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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON MATTERS RELATED TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-FIRST SESSION

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Introductory Note

The Report on Matters to the Work of the International Law Commission prepared by the Secretariat of AALCO contains (1) a brief description of the work and deliberations on the topics under consideration of the Commission in its Session held in the preceding year; (2) a summary of views expressed by the Member States of AALCO on these topics at the Sixth Committee of the United Nations General Assembly and (3) comments and observations of the Secretariat on these topics. The 2018 Report was limited to the topics and deliberations of the Commission at its Sixty-Ninth Annual Session in 2017 for which statements and comments have been incorporated as well as an addendum reporting on the work of the Commission at its Seventieth Session (2018).

This year, the Seventy-First Session (2019) of the Commission was held from 29 April to 9 August 2019 and the corresponding advanced unofficial report[1] to the UN General Assembly was made available from 22 August 2019 on the official website of the Commission. With a view to updating the Member States on the most recent work of the Commission, and to consider deliberations to take place thereupon, the Secretariat considered it appropriate to place the same before the Member States at the Fifty-Eighth Annual Session (2019) of AALCO.

Document AALCO/58/DAR ES SALAAM/2019/SD/S1 reports on the work of the International Law Commission on the following substantive topics that were placed on the agenda[2] for its Seventy-First Session (2019): (1) Peremptory Norms of General International Law (*jus cogens*); (2) Succession of States in respect of State Responsibility; (3) Immunity of State Officials from Foreign Criminal Jurisdiction; (4) Protection of the Environment in Relation to Armed Conflicts; (5) Crimes against humanity (6) General principles of law.

The document also contains statements prepared by Special Rapporteurs on some of the topics that were deliberated at previous session of the Commission as well as those topics which were not on the agenda but are present in the programme of work of the Commission.

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[1] ILC, 'Report of the International Law Commission on the Work of its Seventy-first Session' advance unofficial version (20 August 2019) UN Doc. A/74/10 <http://legal.un.org/docs/?path=../ilc/reports/2019/english/a_74_10_advance.pdf&lang=E> accessed 22 August 2019.

[2] ILC, 'Provisional agenda for the seventy-first session' (14 January 2019) UN Doc. A/CN.4/723 <http://legal.un.org/docs/?symbol=A/CN.4/723> accessed 15 August 2019.

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-FIRST SESSION.

(29 April-7 June and 8 July-9 August 2019)

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Peremptory norms of general international law (*jus cogens*)

1. Introduction

1. Based on the proposal contained in the annex[3] to the report of the International Law Commission on its sixty-sixth session (2014), the topic "*Jus cogens*" was included in the long-term programme of work of the ILC. At the 3257th meeting on 27 May 2015 at its sixty-seventh session (2015) the ILC took the decision of including the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as the Special Rapporteur for the topic. Subsequently, the General Assembly (UNGA) in its resolution 70/236 of 23 December 2015,[4] took note of the decision of the Commission to include the topic in its programme of work.

2. At its sixty-eight (2016) and sixty-ninth (2017) sessions, the Commission had before it the first[5] and second[6] reports of the Special Rapporteur. In accordance with the debates in the Commission on the topic, statements and observations by States in the Sixth Committee of the UNGA the Drafting Committee considered 9 draft conclusions on the topic. Draft conclusions 1 and 2(3) were provisionally adopted by the Drafting Committee at the sixty-eight (2016) session[7] of the Commission whereas draft conclusions 1, 2 [3(2)], 3 [3(1)], 4, 5, 6 and 7 were adopted at the sixty-ninth (2017) session[8] of the Commission. Further, in accordance with a recommendation of the Special Rapporteur[9] at the sixty-ninth (2017) session of the Commission, the name of the topic was changed from '*Jus cogens*' to 'peremptory norms of general international law (*jus cogens*).'

3. At the Seventy-First Session of the Commission, the third report of the Special Rapporteur[10] was presented for consideration of the consequences and legal effects of peremptory norms of general international law. Having already presented the first report on the topic laying down its scope and the nature of *jus cogens* and the second report on the criteria for the identification of *jus cogens* the Special Rapporteur presented the third report which dealt with the consequences of *jus cogens* norms, and proposed 13 draft conclusions numbered as 10 to 23.

4. At its 3425th meeting held on 9 July 2018, the Commission referred these draft conclusions to the Drafting Committee on the understanding that the comments and observations of the members of the Commission would be reflected in the work of the Committee.

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[3] ILC, 'Report of the International Law Commission on the Work of its 66th Session' 274 (5 May- 6 June and 7 July- 8 August 2014) UN Doc A/66/10.

[4] UNGA Res 70/236 (23 December 2015) UN Doc A/RES/70/236

[5] ILC, 'First Report on *jus cogens* by Dire Tladi, Special Rapporteur' (8 March 2016) UN Doc A/CN.4/693.

[6] ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' (16 March 2017) UN Doc A/CN.4/706.

[7] ILC, 'Statement of the Chairman of the Drafting Committee' (9 August 2016) available at: <http://legal.un.org /docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 September 2018)

[8] ILC, 'Statement of the Chairman of the Drafting Committee' (26 July 2017) available at: <http://legal.un.org/ docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 September 2018)

[9] See, ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' para. 90 (16 March 2017) UN Doc A/CN.4/706

[10] ILC, 'Third Report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' (12 February 2019) UN Doc. A/CN.4/714.

Particularly in relation to draft conclusions 22 and 23 relating to the consequences of certain *jus cogens* norms it was decided that they be dealt with by including a single 'without prejudice clause', omitting employing the word immunity which would be clarified in the commentary.

5. Further, draft conclusions 10 to 14 were provisionally adopted by the Drafting Committee and placed before the Commission on 20 July 2018 at is 3434th meeting in the form of an interim report for information purposes only.

6. At its 71st Session, the Commission considered the fourth report on peremptory norms of general international (*jus cogens*) of the Special Rapporteur[11] at its 3459th to 3463rd, and 3465th meetings, from 8 to 10 May, and from 14 to 16 May 2019. The fourth report addressed two key issues, firstly the question of regional *jus cogens* norms and secondly the question of desirability of an illustrative list as well as its contents. While no proposal was made in relation to the question of jus cogens norms, draft conclusion 24 containing an illustrative, non-exhaustive list of eight *jus cogens* norms was proposed by the Special Rapporteur in his fourth report.

7. At its 3465th meeting, held on 16 May 2019 the Commission referred draft conclusion 24 to the drafting committee with comments that the list would be contained in annex to the draft conclusions and shall be based upon those jus cogens norms that have been identified by the Commission in its previous work on other topics.

8. At its 3472nd meeting, held on 31 May 2019 the Chairman of the Drafting Committee presented his statement and report to the Commission recommending the adoption on first reading of the 23 draft conclusions on the topic, as well as the annex containing the illustrative list. Further the commentaries to the draft conclusions were considered by the commission at its 3499th to 3504th meetings, from 5 to 7 August 2019.

2. The Fourth Report of the Special Rapporteur

9. The fourth report as discussed was primarily focussed on two questions, *firstly*, the question of regional jus cogens norms and *secondly*, the question of the illustrative list of jus cogens norms. With respect to the first question the Special Rapporteur did not propose any draft conclusion as in his view it was appropriate to address the question of regional *jus cogens* only in the commentaries. In his report the Special Rapporteur also expressed his view that the concept was not amenable for codification as it was incompatible with the universal scope of the topic.

10. As regards the second question after detailed consideration of the views of the Members of the Commission as well as the Member States expressed in the Sixth Committee of the UNGA, on the long-standing question of an illustrative list of jus cogens the Special Rapporteur supported the view that an illustrative non-exhaustive list would serve the purposes of the Commission. While being cognizant of the opposing views in the Commission and among the Member States, the Special Rapporteur believed that there existed a slight majority in favour of adopting a carefully drafted list.

[11] ILC, 'Fourth Report on the peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapportuer' UN Doc. A/CN.4/727.

11. Therefore, on the basis of the fourth report on peremptory norms in general international law (*jus cogens*) the Special Rapporteur recommended the following draft conclusion 24 to the Commission.

2.1. Draft Conclusions based on the fourth report on peremptory norms in general international law (*jus cogens*).

Draft conclusion 24

Non-exhaustive list of peremptory norms of general international law (*jus cogens*).

Without prejudice to the existence of other peremptory norms of general international law (*jus cogens*), the most widely recognized examples of peremptory norms of general international law (*jus cogens*) are:

a) the prohibition of aggression or aggressive force;
b) the prohibition of genocide;
c) the prohibition of slavery;
d) the prohibition of apartheid and racial discrimination;
e) the prohibition of crimes against humanity;
f) the prohibition of torture;
g) the right to self-determination; and
h) the basic rules of international humanitarian law.

2.2. Introduction by the Special Rapporteur of the fourth report on peremptory norms of general international law (*jus cogens*).

12. At its 3459th Meeting on 3 June 2019, the Special Rapporteur introduced his fourth report on the topic that primarily dealt with the aforesaid two questions namely the question of a regional *jus cogens* norms and the illustrative list.

13. With respect to the first question it was stated that the Special Rapporteur's preliminary view was that the regional peremptory norms of international law would be incompatible with the universal scope of the concept of *jus cogens*, as echoed by States from different regions of the world. It was also stated that practice supporting the concept of regional *jus cogens* norm was also sparse, except for the decision of the Inter-American Commission on Human Rights in the case of *James Terry Roach and Jay Pinkerton v. United States*.

14. Further referring to his fourth report it was stated that the report has reflected upon some literature that supports the notion of a regional *jus cogens* norm and identified three conceptual difficulties with the concept.

15. *Firstly*, it was stated that the Special Rapporteur found it hard to explain theoretically why a State in a particular region, should be bound to the absolute extent to a norm that was not universally peremptory in the absence of that State's consent.

16. *Secondly*, the concept of regional was unclear and did not possess any clear definition that posed the difficulty of a lack of an objective criterion to determine its scope of application specially in the light of the fact that *jus cogens* norms bind States without their consent.

17. *Thirdly*, many of the examples given for the application of regional *jus cogens* were related to treaty regimes. Thus, it appeared that the concept of regional *jus cogens* being advanced was a kind of consensual system of rules in which a group of States agreed to establish a particular legal regime to govern their relations.

18. Although the Special Rapporteur was of the view that international law did not recognize regional *jus cogens*, at least not as defined by the Commission, he considered that the appropriate place to address the question would be the commentary to draft conclusions.

19. As regards the second question it was recognized by the Special Rapporteur that the long-standing questions whether to include a list has been before the Commission since the topic had been placed in the long term programme of work of the Commission and it had raised two main concerns.

20. *Firstly*, whether drawing up the list would be an inordinately difficult task requiring an extremely detailed study of the very large number of norms that could qualify. Unless the Commission was prepared to engage with the topic for decades, it was suggested that it should not embark upon that process.

21. *Secondly*, a concern was raised that no matter how carefully any list was drawn by qualifying it as non-exhaustive or illustrative it could still with the relevant caveats be interpreted by some as being definitive thereby preventing the emergence of other norms.

22. As regards the first concern, the Special Rapporteur sought to avoid the problem by not attempting to be comprehensive in his treatment of the various norms. Rather it was stated that he sought to determine whether there was support for their peremptory character, and concluded that there was on the basis of evidence that reflected the views of States as well as decisions of international courts, and academic writings.

23. With respect to the second concern, it was expressed that it could be addressed by ensuring that its text and the accompanying commentaries were clear enough that any reasonable person acting in good faith could understand them properly.

24. It was also recognized by the Special Rapporteur that the language of the norms might need to be redrafted, and that some norms that were not included in the list might meet the criteria for peremptory status. Norms such as prohibition of enforced disappearance, prohibition of arbitrary deprivation of life and the principle of *non-refoulment* had a strong support in practice and literature and prohibition of gender discrimination and the duty to prevent serious and irreversible harm to the environment had a strong moral claim. These norms were ostensibly not included in the list as they had insufficient practice to satisfy the criteria set out in the draft conclusion 4 as previously adopted by the Drafting Committee.

25. Nevertheless, it appears as though norms were not included in the list because of the pre-decided criteria to only include those norms that had been accepted by the Commission in its previous work on other topics, such as the law of treaties, responsibility for internationally wrongful acts, as well as on fragmentation of international law. The Special Rapporteur states that the approach adopted was based on a search for "a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method as opposed to the content of the peremptory norms."

3. Consideration of the Topic at the Seventy-First Session (2019)

26. The Members of the Commission were generally in consensus on the question of regional *jus cogens* norms, particularly on the point that there a paucity of practice supporting the concept. Only two members disagreed with the assessment, with one member expressing the view that regional jus cogens norms were an integral part of Article 53 of the 1969 Vienna Convention on the Law of Treaties whereas the other member was of the view that Article 53 only codified a part of the customary international law that was applicable.

27. The only other divergence of opinion in the Commission was regarding the manner in which the paucity of practice in this regard may be incorporated in the commentary. Further, most members had also made the point that irrespective of the state of law with regard to the concept of regional *jus cogens* the topic under consideration only warranted enquiry into the general nature.

28. On the long standing question of whether an illustrative list of jus cogens norms should be included, the Special Rapporteur stated that he had attempted to strike a middle ground between two opposing opinions. In furtherance of attempting same and having to choose between having no list at all and having a comprehensive full list, the Special Rapporteur chose to include only those norms that had been recognized in the past practice of the Commission as possessing peremptory character.

29. Concerning, the previous work of the Commission, some members expressed some difficulty with accepting the *jus cogens* norms mentioned in the 1966 Draft Article on the Law of Treaties in light of the fact they were included in the commentary based on some of the examples individual members of the Commission had suggested at the time. It was also brought to the notice of the Commission that one conspicuous absentee in this regard was the right to self-determination which presumably had not achieved peremptory status at that period of time.

30. Other members were of the view that the Commission should consider only those Jus Cogens norms which had been explicitly acknowledged as having that status in the previous work of the Commission. However, the Special Rapporteur was of the view that such a mechanical approach should be avoided and even when certain attributes of the norm in questions such as its intransgressible character or opposability to the consequences of *jus cogens* norms were affirmed the same may be considered as apt for inclusion in the illustrative list.

31. After the conclusion of debate on the proposed draft conclusion, two proposals were accepted by the Special Rapporteur. *Firstly*, in order to reflect the non-exhaustive nature of the

list it was accepted that the list shall be placed in an annex prefaced by a 'without prejudice clause' thus leaving no doubt as to its non-exhaustive illustrative nature. *Secondly*, it was decided that the commentary to the draft conclusion should not address the substance of the norm that might produce an exuberant interpretation of the norm based upon the limited exposition that the commentary may contain.

4. Future Work of the Commission

32. At its 3472nd meeting, held on 31 May 2019 the Commission considered the report of the Drafting Committee and adopted the draft conclusions on peremptory norms of general international law (*jus cogens*) at its first reading. Further, the commentaries to the draft conclusions were considered and adopted at its 3499th to 3504th meetings, from 5 to 7 August 2019.

33. At its 3504th meeting, on 7 August 2019, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.

34. As regards the future work of the Commission that remains on the topic the Commission is to adopt amendments, comments and suggestions that may be transmitted to it by the Member States and incorporate any comments on the draft that may be made in the statements delivered by States at the Sixth Committee of the General Assembly during its consideration of the report of the Commission.

II. Succession of States in respect of State Responsibility

1. Introduction

1. At its sixty-ninth session (2017), the Commission decided to include the topic 'succession of States in respect of State responsibility' in its long-term programme of work on the basis of the proposal contained in the report to the UNGA on the work of the Commission at the sixty-seventh session (2015).[12] At its sixty-ninth session (2017), the Commission decided to include the topic "succession of States in respect of State responsibility; in its programme of work and appoint Mr. Pavel Sturma as Special Rapporteur. The UNGA subsequently vide resolution 72/116 of December 2017,[13] took note of the decision of the Commission to include the topic in its programme of work.

2. At the same Session, the Commission considered the first report of the Special Rapporteur[14] which dealt with the scope and outcome of the topic and provided an overview of the general provisions relating to the topic. Following the debate in the Commission, it was decided to refer draft articles 1 to 4, as proposed in the first report to the Drafting Committee. Subsequently, the Drafting Committee provisionally adopted draft articles 1 and 2 and reported the same to the Commission for information purposes only.[15]

3. At the seventieth session (2018), the Commission had before it the second report of the Special Rapporteur[16] on the topic that looked at certain general rules regarding succession of state responsibility and the transfer of obligation arising from the internationally wrongful act of the predecessor State, that provide for exceptions from the aforesaid general rules. The commission considered the second report at its 3431st to 3435th meetings from 17 to 24 July 2018.

4. At is 3435th meeting on 24 July 2018 the Commission decided to refer the proposed draft articles in the second report i.e. draft articles 5-11 to the Drafting Committee to consider the report taking into account the views of the members in plenary session. At its 3443rd meeting, on 3 August 2018 the Chair of the Drafting Committee presented his interim report which provisionally adopted draft article 1, paragraph 2 and draft articles 5 and 6.[17] The Commission also decided to request the Secretariat to prepare a memorandum on the treaties registered under article 102 of the UN Charter which may be relevant to the future work on the topic. During the

[12] ILC, 'Report of the International Law Commission on the Work of its 68th Session' 274 (2 May- 10 June and 4 July- 12 August 2016) UN Doc A/71/10.
[13] UNGA, 'Report of the International Law Commission on the work of its Sixty-Ninth Session' (7 December 2017) UN Doc. A/RES/72/116.
[14] ILC, 'First Report on succession of States in respect of State Responsibility by Pavel Sturma Special Rapporteur' (31 May 2017) UN Doc. A/CN.4/708.
[15] ILC, 'Statement of the Chairman of the Drafting Commission, Aniruddha Rajput, on the Succession of States in respect of State responsibility' <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf&lang=E> accessed 23 August 2019.
[16] ILC, 'Second Report on succession of States in respect of State Responsibility by Pavel Sturma, Special Rapporteur' (6 April 2018) UN Doc. A/CN.4/719.
[17] ILC, 'Statement of the Chairman of the Drafting Commission, Charles Churnor Jalloh, on the Succession of States in respect of State responsibility' <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sosr.pdf&lang=E> accessed 23 August 2019.

discussion in the Commission the Special Rapporteur indicated that he agreed that the Commission should consider changing the title of the topic to "State responsibility problems in cases of succession of States."

5. At the present Seventy-First Session (2019), the Commission had before it the third report of the Special Rapporteur on the topic[18] as well as the memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[19] Further, the Commission provisionally adopted draft articles 1, 2, and 5 and the commentaries thereto at its 3589th meeting on 24 July 2019 and 3507th meeting on 9 August 2019 respectively.

6. On 31 July 2019, at its 3495th meeting based on the discussion of the draft articles proposed in the second report of the Special Rapporteur three draft articles 7, 8, and 9 were presented to the Commission for information purposes.

The seventy-first session (2019) discussed this topic and considered the third report on succession of States in respect of State responsibility by the Special Rapporteur. The report was comprised of four parts dealing with invocation of responsibility by the successor and predecessor states comprising of certain general consideration (part one), claims for reparation of injuries (part two), technical proposal regarding the scheme of the draft articles (part three) and the future programme of work (part four).

2. The Third Report of the Special Rapporteur

7. As mentioned above, the third report on the topic consists of four parts, dealing with various aspects of the topic. Part one focuses on general considerations and provides a detailed summary of the different views expressed by the States in the Sixth Committee of the General Assembly.

8. Part two of the report deals with reparation for injury resulting from internationally wrongful acts committed against the predecessor State. Part three of the report focuses on the scheme of the draft articles, in furtherance of which certain definitions are proposed and the scope of the draft articles in delineated.

9. Part four of the report addresses the Commission's future programme of work, indicating that the fourth report would focus on forms and invocation of responsibility in the context of succession of State and would also address miscellaneous issues including procedural ones.

2.1. Draft articles based on the second report on the succession of States in respect of State responsibility by Mr. Pavel Sturma.

[18] ILC, 'Third Report on succession of States in respect of State Responsibility by Pavel Sturma, Special Rapporteur' (6 April 2018) UN Doc. A/CN.4/731.
[19] ILC, 'Memorandum by the Secretariat, Information on treaties which may be of relevance to the future work of the Commission on the topic' (20 March 2019) UN Doc. A/CN.4/730.

Part III – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State.

Draft article Y
Scope of the present Part

The draft articles of the present Part apply to reparation for injury resulting from internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation before the date of succession of States.

Draft article 12
Cases of succession of States when the predecessor State continues to exist

1. In the cases of succession of States:

a) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or

b) when a part or parts of the territory of a State separate to form one or more States, while the predecessor State continues to exist; or

c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible; the predecessor State injured by an internationally wrongful act of another State may request from this State reparation even after the date of succession of States.

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and the successor State.

Draft article 13
Uniting of States

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.

2. Paragraph 1 applies unless the States concerned otherwise agree.

Draft article 14
Dissolution of States

When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor State may request reparation from the responsible State.

Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.
The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

Draft article 15
Diplomatic protection

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.

3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

Title for Part I- General provisions

Draft article 2
Use of terms

For the purposes of the present draft articles:…..

(f) "States concerned" means, in respect of a case of succession of States, a State which before the date of succession of States committed an internationally wrongful act, a State injured by such act and a successor State or States of any of these States:…

Title for Part II- Reparation for injury resulting from internationally wrongful acts committed by the predecessor State.

Draft article X
Scope of Part II

The provisions of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States.

2.2. Text of the draft articles provisionally adopted by the Commission at its seventy-first session.

Article 1
Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of State for internationally wrongful acts.

2. The present draft articles apply in the absence of any different solutions agreed upon by the States concerned.

Article 2
Use of terms

For the purposes of the present draft articles:

a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory.

b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

d) "date of the succession of State" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

Article 5
Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and in particular, the principles of international law embodied in the Charter of the United Nations.

2.3. Introduction by the Special Rapporteur of the third report on the succession of States in respect of State responsibility.

10. Regarding Part One of the Report on the general approach it was clarified that all efforts were being made to maintain consistency with the 1978 and 1983 Vienna Convention and that

the rules being formulated subject to an agreement to the contrary and thus took the form of subsidiary rules. It was also emphasized that the diversity, context-specificity and sensitivity of state practice in this area added to the complexity for the formation of general rules, which should not be understood as meaning the existence of the clean slate principle or the principle of non-succession in respect of responsibility.

11. Certain definitional clarifications were also provided for eg. the definition of the word "succession" held to exclude legal succession only dealing with territorial changes to States in conformity with international law. Further, in relation to responsibility it was explained that these draft articles dealt only with situations when the damage was not made good by reparation before the date of succession of the State as indicated in proposed draft articles X and Y.

12. Part two of the report addressed questions of reparation for injury resulting from an internationally wrongful act committed against the predecessor States for which it did not receive full reparation. The general rule was recognized that when the predecessor State continued to exist, succession would affects its right to claim reparation from the wrongdoing State for acts committed before the date of succession. However, it was cautioned that in the case of dissolution as well as separation of a State the legal rights and obligations were determined often based on political consideration, rather than objective criteria.

13. Based on analysis of agreements and decisions of international courts and tribunals draft article 12 to 14 were formulated governing the right of the predecessor state to claim reparations. It was underscored by the Special rapporteur that usage of the term 'may' used in those draft articles aimed at using an enabling provision subject of course to agreement and only implying a claim, not automatic succession. Also considerations of a nexus between the consequences of a wrongful act and territory or nationals of the successor was addressed in draft 14 paragraph 2 as were equitable proportion, unjust enrichment and other relevant factors.

14. The report also addressed the possible succession to the right to reparation in cases where an internationally wrongful act was committed against nationals of the predecessor State, and proposed draft article 15 in this regard. It was argued on the basis of relevant practice in the form of agreement and the practice of the UN Compensation Commission that a claim for reparation by the successor State was not purely theoretical or rare, nor did it concern only inter-State relations. Instead, there were important practical consequences for the effective exercise of diplomatic protection by States in cases of injury suffered before the date of succession by individuals who became their nationals.

15. The Special Rapporteur further observed that, in modern practice and doctrine, a change of nationality resulting from succession of States was largely accepted as an exception to the traditional rule of continuous nationality. Accordingly draft article 15 paragraph 1 recognized the right of the successor State to exercise diplomatic protection in such cases.

3. Consideration of the Topic at the Seventieth Session (2018)

16. The third report on the topic prepared by the Special Rapporteur was welcomed by the members of the Commission who expressed their appreciation for his work. The Members of the

Commission were also appreciative of the efforts made by the Secretariat of the ILC in preparing the detailed Memorandum reflecting wide treaty practice of the States germane to the topic.

17. As regards the special agreements that were relied on by the report that concerned certain *ex-gratia* payments by States that were often a consequence of political or non-legal considerations, a number of MEMBERS doubted evidentiary value of such legal materials.

18. Several members who emphasized on general rule of non-succession with limited exceptions suggested that development of *lex ferenda* in this regard should be indicated expressly in the commentary and that the process of progressive development must be based on solid grounds instead of policy considerations. Some members also made other general comments concerning the need to maintain consistency with the previous work of the Commission on topics such as diplomatic protection and State responsibility as well as the 1978 and 1983 Vienna Convention.

19. With respect to the scheme of the draft articles, there was general support in the Commission regarding the division of the draft articles based on the distinction of the predecessor state being the injured State or the State under an obligation to make reparations. Other proposals were also made such as maintaining the distinction between the draft articles based on the categories of succession, as well as on the basis whether the predecessor state continues to exist or not.

20. Several members also expressed general concern that while the right to reparation was an 'acquired right' transferable from a predecessor State to Successor State, the concept of acquired obligations was not recognized in legal doctrine.

21. In relation to draft article 2(f) some members questioned the need for such a definition and expressed that it may lead to confusion and an explanation of the term "State concerned" would be better placed in the commentary.

22. Regarding, draft article 12 to 14 dealing with the right to claim reparations it was suggested by some members that the expression "may request" was ambiguous, which may conflate between a legal right to claim reparation as opposed to the procedural possibility of claiming responsibility. While some members expressed reservation as to the utility of recognizing procedural possibility without identifying substantive rights and obligations.

23. Members were also of the view that the principles of unjust enrichment could be applied to the context by way of progressive development while others expressed a desire for clarification of the term "special circumstances' and "other relevant factors" employed in draft article 12 and 14 respectively.

24. Further, in relation to draft article 14, clarification regarding the specific requirements of the term 'nexus' were sought to be ascertained and it was noted that the term "national" may be too restrictive and may be replaced with "persons under the jurisdiction of the successor state."

25. Several members expressed support in favor of including draft article 15 as it allowed an exception to the principles of continuous nationality to avoid situations where individuals may be left without protection. Member also referred to the need to maintain consistency with the work of the ILC on diplomatic protection, especially in relation to the concept of 'nationality shopping', which the Special Rapporteur undertook to include in the commentary.

4. Future Work of the Commission

26. As regards the future work of the Commission on the topic, the Special Rapporteur agreed with those members who stated that the Commission should decide at a later stage what outcome or final form the draft articles would take. It was also suggested by the Special Rapporteur that he was open to the proposal of drafting model clauses or compiling an annex of clauses based on existing agreements, but did not wish to change the form of the draft article to draft conclusions, guidelines, principles or an analytical report.

27. As regards, the next report of the Special Rapporteur, it was stated that it would focus on the forms of responsibility (in particular, restitution, compensation and guarantees of non-repitition) and could also address procedural and miscellaneous issues, including those arising in situations of several successor States.

III. Crimes against humanity.

1. Introduction

1. The International Law Commission, at its Sixty-Fifth Session (2013), decided to include the topic "Crimes against humanity" in its long-term programme of work. In 2014, at is Sixty-Sixth Session, the Commission included the topic on its current work programme appointing Mr. Sean D. Murphy as the Special Rapporteur for this purpose. The UN General Assembly following debates within the Sixty-Ninth Session (2014) of the UNGA Sixth Committee noted this development.

2. At its sixty-seventh session (2015), the Commission considered the first report of the Special Rapporteur, which inter alia, contained two draft articles on prevention and punishment of crimes against humanity and the definition of crimes against humanity respectively. The Commission decided to refer the draft articles to the Drafting Committee and subsequently provisionally adopted draft articles 1 to 4, together with commentaries thereto.

3. At its sixty-eighth session, (2016), the Commission had before it the second report of the Special Rapporteur on the topic, as well as a memorandum by the Secretariat. The Second report, addressed, inter alia, criminalization under national law, establishment of national jurisdiction, general investigation and cooperation for identifying alleged offenders, exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare* and fair treatment of an alleged offender, as well as proposed six draft articles corresponding to such issues (draft articles 5 to 10). The Commission referred draft articles 5 to 10 to the Drafting Committee, requesting the Drafting Committee to consider the question of the criminal responsibility of legal persons based on a concept paper to be prepared by the Special Rapporteur. Following presentation and consideration of two reports of the Drafting Committee, the Commission provisionally adopted draft articles 5 to 10, as well as commentaries thereto.

4. At its sixty-ninth session (2017), the Commission considered the third report of the Special Rapporteur. The report addressed, in particular: extradition, non-refoulement, mutual legal assistance, victims, witnesses and other affected persons, relationship to competent international criminal tribunals, federal State obligations, monitoring mechanisms and dispute settlement, remaining issues, the preamble to the draft articles, and final clauses of a convention. Following presentation and consideration of two reports of the Drafting Committee, the Commission adopted on first reading a draft preamble, a set of 15 draft articles and a draft annex, together with commentaries thereto, on crimes against humanity, and decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments, international organizations and others, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.

5. The topic was not discussed in the Seventieth Session of the Commission in 2018.

At the seventy-first session (2019), the Commission had before it the fourth report of the Special Rapporteur, as well as comments and observations received from Governments,

international organizations and others. The fourth report addressed the comments and observations made by Governments, international organizations and others on the draft articles and commentaries adopted on first reading and made recommendations for each draft article. The Commission adopted, on second reading, the entire set of draft articles on prevention and punishment of crimes against humanity, comprising a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto. The Commission decided, in conformity with article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

2. The Fourth Report of the Special Rapporteur

6. The fourth report as discussed addressed the comments and observations made by Governments, international organizations and others on the draft articles and commentaries adopted on first reading, making recommendations for each draft article.

7. Mr. Sean D. Murphy, the Special Rapporteur while introducing the fourth report on crimes against humanity noted that the objective of the exercise was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity. While genocide, crimes against humanity and war crimes have typically featured in international criminal law jurisdiction with specific conventions, crimes against humanity remains the only one without a dedicated convention dealing with its prevention and punishment. This lacuna, according to the Special Rapporteur, had to be addressed, and hence the efforts of the Commission.

8. It was noted by the Special Rapporteur that since the completion of the fourth report, written comments had been received from 38 States and 7 international organizations or offices thereof. Written comments had likewise been received from one United Nations human rights treaty body, one United Nations working group and a large number of United Nations special procedure mandate holders.

The purpose of the present report, according to the Special Rapporteur, was primarily to review the comments and observations made by States, international organizations and others since the adoption, on first reading in 2017, of the complete set of draft articles on crimes against humanity.

2.1. Draft articles on prevention and punishment of crimes against humanity, comprising a draft preamble, 15 draft articles and a draft annex adopted on second reading

Draft Preamble

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

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

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

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

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

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Considering the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court,

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

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

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

Draft article 1
The present draft articles apply to the prevention and punishment of crimes against humanity.

Draft article 2

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

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation or forcible transfer of population;
(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) torture;
(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are

universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
(i) enforced disappearance of persons;
(j) the crime of apartheid;
(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

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

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

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

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

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

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

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

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

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

Draft article 3
General obligations

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

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

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

Draft article 4
Obligation of prevention

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

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

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

Draft article 5
Non-refoulement

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

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

Draft article 6
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
(a) committing a crime against humanity;
(b) attempting to commit such a crime; and
(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

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

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

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

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

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

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

Draft article 7
Establishment of national jurisdiction

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

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

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

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

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

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

Draft article 8
Investigation

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

Draft article 9
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Draft article 10
Aut dedere aut judicare

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

Draft article 11
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and (c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Draft article 12
Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law

or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Draft article 13
Extradition

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.

2. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

4. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

5. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

6. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.

9. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions, or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred. 13. Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.
13. Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Draft article 14
Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. In relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State, mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:
(a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
(b) taking evidence or statements from persons, including by video conference;
(c) effecting service of judicial documents;
(d) executing searches and seizures;
(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;
(g) providing originals or certified copies of relevant documents and records;
(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
(i) facilitating the voluntary appearance of persons in the requesting State; or
(j) any other type of assistance that is not contrary to the national law of the requested State. 4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

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

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

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

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

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

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

Draft article 15
Settlement of disputes

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

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those

States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

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

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

Annex

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

Designation of a central authority

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

Procedures for making a request

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

4. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

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

Response to the request by the requested State

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

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

8. Mutual legal assistance may be refused:

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

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

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

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

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

12. The requested State:

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

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

Use of information by the requesting State

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

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

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her

departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

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

Transfer for testimony of person detained in the requested State

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

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

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

(a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall

not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

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

3. Consideration of the Topic at the Seventy-First Session (2019)

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

10. The Commission considered the report of the Drafting Committee and adopted the entire set of draft articles on crimes against humanity on second reading as well as the commentaries to the aforementioned draft articles and submitted the draft articles to the General Assembly, with recommendations on the future course of action.

11. The members congratulated the Special Rapporteur for his comprehensive fourth report and oral introduction thereto, and the efforts undertaken to accommodate the views of States and other entities in the drafting process. After adopting the draft articles, the Commission expressed its deep gratitude to the Special Rapporteur, Mr. Sean D. Murphy for his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on prevention and punishment of crimes against humanity.

4. Present and Future Status of the topic

12. With the adoption of the entire set of draft articles, ILC has completed its work on the topic "crimes against humanity". The outcome of the topic is a set of draft articles on the prevention and punishment of crimes against humanity, which the ILC recommends should serve as the basis for a new United Nations convention on the subject. The principal focus of the draft articles is to help build up national laws and national jurisdiction relating to this particular crime (similar to existing conventions on genocide or on torture), and to place States in a cooperative relationship on matters such as mutual legal assistance. As such, the draft articles advance the goal of addressing crimes against humanity at the national level in the first instance, rather than before international courts or tribunals.

13. The U.N. General Assembly is expected to seek the adoption of a resolution at the end of 2019 that pursues elaboration of a convention, either within the United Nations or at a diplomatic conference, subject to the support of Member States.

IV. Immunity of State officials from foreign criminal jurisdiction.

1. Introduction

1. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was done so accordingly at its sixtieth session (2008). Mr. Kolodkin submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008), while the second and third reports were considered at the sixty-third session (2011). The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.

2. At the sixty-fourth session (2012), Ms. Concepción Escobar Hernández of Spain was appointed as the Special Rapporteur for the topic replacing Mr. Kolodkin who was no longer a member of the Commission. The Commission received and considered the preliminary report of the Special Rapporteur at the same session. The second, third and fourth reports were received in the sixty-fifth (2013), sixty-sixth (2014), and sixty-seventh (2015) sessions respectively. The fifth report of the Special Rapporteur on limitations and exceptions to immunity, widely believed to be the most contentious aspect of the topic was considered during the sixty-eighth (2016) and sixty-ninth (2017) sessions. Till date, based on the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, seven draft articles have been provisionally adopted along with commentaries thereto. Draft article 2 on the use of the terms is still being developed.

3. At its sixty- ninth session held in 2017, the Commission had before it the Fifth Report of the Special Rapporteur analyzing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, which it had begun to debate at its sixty-eighth session (2016). The report considered the issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction offering an analysis of relevant State practice in addition to addressing some crucial methodological and conceptual questions related to limitations and exceptions. As apparent, the thrust of the debate was on the non-application of the legal regime of immunity in specific cases. In the meeting held on 20 July 2017 after several members addressed the Commission as to their concerns, the Commission provisionally adopted the draft article 7 and annex by a recorded vote of 21-8-1 (with four members absent). Thereafter, the Special Rapporteur proposed commentary for the draft article and annex, which was then revised and adopted by the Commission at its later meetings.

4. The seventieth session held in 2018 discussed the sixth report prepared by the Special Rapporteur addressing certain procedural aspects of the topic and discussion on the same was to continue in the seventy-first session.

At the seventy-first session, the Commission had before it the sixth and the seventh reports of the Special Rapporteur, which were devoted to addressing procedural aspects of immunity from foreign criminal jurisdiction. In particular, the sixth report, on which the debate was not completed at the seventieth session in 2018, provided an analysis of three components of procedural aspects related to the concept of jurisdiction, namely: (a) timing; (b) kinds of acts affected; and (c) the determination of immunity. The seventh report completed the examination of the procedural aspects of immunity in particular as regards the relationship between jurisdiction and such procedural aspects, it also addresses questions concerning the invocation of immunity and the waiver of immunity; examines aspects concerning procedural safeguards related to the State of the forum and the State of the official, considers the procedural rights and safeguards of the official, and proposes nine draft articles (draft articles 8 to 16). Following the debate in the plenary, the Commission decided to refer draft articles 8 to 16 to the Drafting Committee, taking into account the debate and proposals made in the plenary. The Commission received and took note of the interim report of the Chair of the Drafting Committee on draft article 8 ante, which was presented to the Commission for information purpose solely.

2. The sixth and seventh report of the Special Rapporteur

5. The Commission had before it the sixth report, on which debate had not been completed at the seventieth session, and the seventh report of the Special Rapporteur. The sixth report had summarized the debates in the Commission and the Sixth Committee on draft article 7, dealing with crimes under international law in respect of which immunity *ratione materiae* should not apply. It then started to address the procedural aspects of immunity from foreign criminal jurisdiction, focusing in particular on: (a) timing; (b) the kinds of acts affected by immunity; and (c) the determination of immunity. The report did not include any proposals for new draft articles. The seventh report summarized the debates in the Commission at the seventieth session and in the Sixth Committee at the seventy-third session of the General Assembly and completed the examination of the procedural aspects of immunity regarding the relationship between jurisdiction and the procedural aspects of immunity. To that end, two draft articles concerning the consideration of immunity by the forum State and determination of immunity were proposed (**draft articles 8 and 9**).

6. In addition, the seventh report addressed the remaining procedural aspects identified in the sixth report, including questions concerning the invocation of immunity and the waiver of immunity and two draft articles were proposed (**draft articles 10 and 11**).

7. There was also an examination of aspects concerning procedural safeguards related to the forum State and the State of the official, communication between the forum State and the State of the official, including the duty to notify to the official's State the intent to exercise jurisdiction by the forum State; exchange of information between the State of the official and the forum State; and cooperation and international legal assistance between the State of the official and the forum State, in particular the transfer of criminal proceedings from the forum State to the State of the official. In this regard, four draft articles were proposed (**draft articles 12, 13, 14 and 15**).

8. Further, the report considered the procedural rights of the official, focusing on fair treatment and one draft article was proposed (**draft article 16**).

9. The report also addressed the future work plan, anticipating work on first reading to be completed in 2020, at which also an eighth report would be submitted. It would consider remaining issues of a general nature, including: the possible implication on procedural rules of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal jurisdiction; the possibility of establishing some mechanism for the settlement of disputes; and the possible inclusion of recommended good practices.

2.1. Text of the draft articles on the topic proposed by the Special Rapporteur with the Drafting Commission

Draft article 8
Consideration of immunity by the forum State

1. The competent authorities of the forum State shall consider immunity as soon as they are aware that a foreign official may be affected by a criminal proceeding.

2. Immunity shall be considered at an early stage of the proceeding, before the indictment of the official and the commencement of the prosecution phase.

3. The immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official that may affect the performance of his or her functions.

Draft article 9
Determination of immunity

1. It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them.

2. The immunity of the foreign State shall be determined in accordance with the provisions of the present draft articles and through the procedures established by national law.

3. The competent court shall consider whether the State of the official has invoked or waived immunity, as well as the information provided to it by other authorities of the forum State and by the authorities of the State of the official whenever possible.

Draft article 10
Invocation of immunity

1. A State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction.

2. Immunity shall be invoked as soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official.

3. Immunity shall be invoked in writing and clearly, indicating the identity of the official in respect of whom the immunity is being invoked and the type of immunity being invoked.

4. Immunity shall be invoked preferably through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. Immunity may also be invoked through the diplomatic channel.

5. Where immunity is not invoked directly before the courts of the forum State, the authorities that have received the communication relating to the invocation of immunity shall use all means available to them to transmit it to the organs that are competent to determine the application of immunity, which shall decide thereon as soon as they are aware of the invocation of immunity.

6. In any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not.

Draft article 11
Waiver of immunity

1. A State may waive the immunity of its officials from foreign criminal jurisdiction.

2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.

3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.

4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.

5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.

6. Waiver of immunity is irrevocable.

Draft article 12
Notification of the State of the Official

1. Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such notification.

2. The notification shall include the identity of the official, the acts of the official that may be subject to the exercise of criminal jurisdiction and the authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction.

3. The notification shall be provided through any means of communication accepted by both States or through means provided for in international cooperation and mutual legal assistance treaties to which both States are parties. Where no such means exist or are accepted, the notification shall be provided through the diplomatic channel.

Draft article 13
Exchange of Information

1. The forum State may request from the State of the official information that it considers relevant in order to decide on the application of immunity.

2. That information may be requested through the procedures set out in international cooperation and mutual legal assistance treaties to which both States are parties, or through any other procedure that they accept by common agreement. Where no applicable procedure exists, the information may be requested through the diplomatic channel.

3. Where the information is not transmitted directly to the competent judicial organs so that they can rule on immunity, the authorities of the forum State that receive it shall, in accordance with domestic law, transmit it directly to the competent courts. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such communication.

4. The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (ordre public), security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions.

5. The information received shall, where applicable, be subject to conditions of confidentiality stipulated by the State of the official, which shall be fulfilled in accordance with the mutual assistance treaties that provide the basis for the request for and provision of the information or, failing that, to conditions set by the State of the official when it provides the information.

6. Refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply.

Draft article 14
Transfer of proceedings to the State of the Official

1. The authorities of the forum State may consider declining to exercise its jurisdiction in favour of the State of the official, transferring to that State criminal proceedings that have been initiated or that are intended to be initiated against the official.

2. Once a transfer has been requested, the forum State shall suspend the criminal proceedings until the State of the official has made a decision concerning that request.

3. The proceedings shall be transferred to the State of the official in accordance with the national laws of the forum State and the international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties."

Draft article 15
Consultations

The forum State and the State of the official may consult, at the request of either, on matters concerning the determination of the immunity of the foreign official in accordance with the present draft articles.

Draft article 16
Fair and impartial treatment of the official

1. A State official whose immunity from foreign criminal jurisdiction is being examined by the authorities of the forum State shall benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial.

2. These safeguards shall be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction does not apply.

3. The fair and impartial treatment safeguards shall in all cases include the obligation to inform the nearest representative of the State of the official, without delay, of such person's detention or any other measure that might affect his or her personal liberty, so that the official can receive the assistance to which he or she is entitled under international law.

4. The official shall be treated in a fair and impartial manner consistent with applicable international rules and the laws and regulations of the forum State.

3. Consideration of the Topic at the Seventy-First Session (2019)

10. Members commended the Special Rapporteur for her extensive work on the seventh report, which, together with the sixth report, provided a rich and comprehensive review and analysis of State practice, case law and academic literature relevant to procedural aspects on this

highly crucial subject. The relevance of the work of the previous Special Rapporteur, Mr. Roman Kolodkin and the memorandum prepared by the Secretariat was also pointed out by some members.

11. The acknowledgment by the Special Rapporteur regarding the status of the proposals as constituting progressive development of international law was welcomed. Some members nevertheless underlined the importance of taking into account State practice from more diverse regions.

12. Concerning the approach to the procedural aspects of the topic, members underlined the importance of balancing essential legal interests, including respect for the sovereign equality of States, the need to combat impunity for international crimes, as well as the protection of State officials from politically motivated or abusive exercise of criminal jurisdiction. In this context, concerns expressed in the debates of the Commission and the Sixth Committee regarding the overpoliticization or abuse of the exercise of criminal jurisdiction over State officials were reiterated by the members.

13. Members also highlighted the crucial link between the procedural aspects of the topic and the exceptions to immunity in respect of serious crimes under international law set out in draft article 7, which had been provisionally adopted by the Commission. In this connection, several members concurred with the Special Rapporteur, as she had explained in her introduction of the seventh report, that the procedural guarantees and safeguards proposed in draft articles 8 to 16 were applicable to the draft articles as a whole. Other members expressed concerns that draft articles 8 to 16, as presently drafted, did not sufficiently establish a link between the proposed procedural guarantees and safeguards and the application of draft article 7 nor address fully the procedures and guarantees necessary to avoid politically motivated prosecutions. The divergent views expressed by members in respect of the adoption of draft article 7 were reiterated. The *lex lata* versus *lex ferenda* debate on this aspect was also witnessed.

14. Further, some members stressed the need to achieve a balance between the interests of the forum State and those of the State of the official, in line with the principle of reciprocity. According to some members, draft articles 8 to 16 seemed to place more weight on the right to exercise jurisdiction of the forum State over the right to immunity of the State of the official. In this regard, it was suggested that more discretion should be granted to the State of the official in asserting immunity, although the possibility of abuse by the State of the official in blocking the exercise of jurisdiction by the forum State also raised concerns.

15. Several members remarked that draft articles 8 and 9 should provide for a more flexible approach concerning the relevant organs of the forum State in the consideration and determination of immunity. Some members considered it sufficient to refer to the competent authorities of the forum State, while others preferred to simply refer to the forum State. At the same time, some members welcomed the acknowledgment that the courts of the forum State usually had the primary authority to determine immunity, as reflected in draft article 9. The concern was expressed that the courts of the forum State should be independent from, not subordinated to, the executive branch. In this regard, clarification was sought regarding the obligation by the courts of the forum State to consider information provided by other authorities.

16. A number of members supported the requirement in draft article 8 for consideration of immunity at an early stage of the proceedings, even though there was need for precision as to the moment when such determination had to be made, such as "without delay".

17. A number of members agreed in substance with draft article 10 (Invocation of immunity), whereas there were differing opinions regarding a differentiated approach between immunity *ratione personae* and immunity *ratione materiae*. In particular, it appeared from draft article 10, paragraph 6, that the forum State shall decide *proprio motu* in a case concerning immunity *ratione personae*, whereas the State of the official was expected to invoke immunity *ratione materiae* before consideration by the forum State. Not all members supported such a distinction.

18. A proposal was made to indicate that, in a case where immunity *ratione materiae* was not invoked, the forum State should likewise consider or decide *proprio motu* as soon as it was aware of the status of the foreign State official or of the acts involved. Another proposal was that, for the purposes of immunity *ratione materiae*, the acts of the foreign State official should be considered separable, with the effect that invocation or waiver of immunity may be applicable to some acts but not others.

19. It was acknowledged that the right to invoke or waive immunity belonged to the State of the official, not to the official. However, some members noted that, as a practical matter, it was often the official who would be first to claim the immunity in practice. In this regard, it was suggested that States might be advised to stipulate the competent organ to invoke immunity in their domestic law. The obligations of the forum State should also be clarified in the event that immunity was claimed by the official but denied by the State, such as when for example a crime was committed by the official on the orders of the State.

20. In relation to draft article 11 (waiver of immunity), several members agreed that waiver of immunity must be express as a general rule. Some considered that waiver must be express in all cases. Reference was also made to the view of the former Special Rapporteur, Mr. Kolodkin, who concluded that waiver of immunity should be express for the troika, but waiver could be either express or implied for other officials enjoying immunity *ratione personae* or immunity *ratione materiae*.

21. As to the form of communication between the forum State and the State of the official, it was mentioned by some members that the requirement of invocation of immunity in writing did not necessarily reflect the international practice. Moreover, several members highlighted the central role of the diplomatic channel in communications between the forum State and the State of the official. The conduct of diplomacy through third-parties, such as intermediaries, was also mentioned. Support was generally expressed for a drafting proposal to emphasize the use of the diplomatic channel in a broader sense, in the context of invocation and waiver of immunity under draft articles 10 and 11, as well as the processes of notification, exchange of information and consultations under draft articles 12, 13 and 15 respectively. It was further noted that the States concerned should be free to decide on the most appropriate channel for communication.

22. Various positions were expressed on the irrevocability of waiver of immunity. Members generally supported the wording of draft article 11, paragraph 6, expressing the view that waiver should be presumed to be irrevocable, unless otherwise indicated by the State of the official. The need for consideration of such a provision was also highlighted, since revocation might be justified on other grounds such as concerning vital national interests.

23. Several members placed emphasis on the relevance of domestic law and the use of the diplomatic channel in the application of draft articles 12 to 15. Regarding draft article 12, members generally recognised the crucial relevance of notification into the general framework of procedural safeguards.

24. In respect of draft article 13 (Exchange of information), it was suggested that the scope of information that may be requested from the State of the official should be limited to the information necessary for the forum State to decide upon the application of immunity. Further, some members observed in respect of draft article 13, paragraph 4, that the grounds for refusal of a request for information were not necessarily limited to situations affecting sovereignty, public order, security or essential public interests, but might include other reasons, such as cases involving the political crime exception, violations of human rights, harassment or discrimination. Alternatively, it was proposed that the State of the official should have the sovereign right to refuse a request for information for any reasons without providing an explanation to the forum State.

25. As regards draft article 14 (Transfer of criminal proceedings), a number of members agreed with the Special Rapporteur that the transfer of proceedings to the State of the official was an important provision in ensuring individual criminal responsibility of State officials while achieving a balance between sovereign equality of the State of the official and the right of the forum State to exercise criminal jurisdiction. The principles of complementarity and subsidiarity of the jurisdiction of the forum State, in relation to the primacy of the jurisdiction of the State of the official, were reiterated by the Members. In this regard, reference was made to State practice illustrating the transfer of proceedings from the forum State to the State of the official, conditioned upon the effective exercise of jurisdiction by the latter. In addition, how the principle of subsidiarity would operate in the context of the exercise of jurisdiction based particularly on the passive nationality principle was raised, and highlighted.

26. A number of proposals were also made with the aim of preventing the potential abuse of the transfer of proceedings. It was suggested that restrictions could be placed where the State of the official was unwilling or unable genuinely to investigate or prosecute its official, based on article 17 of the Rome Statute of the International Criminal Court. Likewise, the State of the official could be required to provide assurances in this regard as a condition for the transfer of proceedings.

27. While some members questioned whether the inclusion of draft article 16 was necessary, others found it useful for its emphasis on the procedural rights and safeguards pertaining to the foreign State official, particularly in the context of protecting the official from politically motivated proceedings.

28. Several members agreed with the Special Rapporteur that procedural rights and safeguards relating to fair treatment before an impartial tribunal were well-recognized in international law, including international human rights law, international criminal law and international humanitarian law. At the same time, it was suggested that it would be helpful to clarify the content of the procedural rights and safeguards proposed.

29. Concerning draft article 16, paragraph 3, it was observed that the Vienna Convention on Consular Relations, which codified customary international law, only required consular notification upon the request of the detained individual. While it was noted by one member that a general right to consular assistance was not established under customary international law, the view was expressed by several members that more emphasis should be placed on consular assistance, particularly if the forum State intended to exercise criminal jurisdiction against an individual who has ceased to be a State official and the situation would be brought to the attention of the State of the official through consular assistance.

30. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and substantive discussion of the sixth and seventh reports in 2018 (16 statements) and in 2019 (28 statements). The debate was rich and constructive both in 2018 and at the present session. She noted that the debate confirmed the importance of consideration of provisions on procedural guarantees and safeguards in the context of the topic, whose inclusion in the draft articles is an innovative proposal that could significantly help States. She noted the broad support offered by the members of the Commission with respect to draft articles 8 to 16. She also acknowledged the comments, suggestions, and criticisms made, and additional proposals on the substance, some of which could be addressed in the Drafting Committee. Regarding the suggestion made by the members of the Commission related with the reordering of the draft articles, she proposed to follow this sequence: draft articles 8, 12, 10, 11, 13, 9, 14, 15 and 16.

31. With regard to the terminology employed in draft article 8 (Consideration of immunity) and draft article 9 (Determination of immunity), the Special Rapporteur said that the use of separate terms was deliberate, as each draft article referred to a different issue. The expression "consideration of immunity" was used to refer to the obligation of the forum authorities to initiate examination of the question of immunity as soon as they established that a foreign official was involved. The expression "determination of immunity" was used to refer to the act of deciding whether or not immunity applied in a specific case. Thus, while draft article 8 was principally temporal in scope, draft article 9 focused on which authority was competent to take a decision on whether immunity applied, the normative elements that the authority concerned must take into account in reaching that decision, and whether certain circumstances pertained, such as whether immunity had been invoked, which could be essential to deciding whether immunity applied or not. Accordingly, she said that she did not consider it appropriate to use the same term in both articles, although she was open to considering different terminology in each case, such as for example "examination of the issue of immunity" (draft article 8) or "ruling on the applicability of immunity" (draft article 9). In any case, she was opposed to merging draft articles 8 and 9 into a single draft article.

32. In relation to draft article 8, she said that the majority of members of the Commission had supported the flexible approach it reflected, under which immunity should always be examined before the indictment of the official and/or the commencement of oral proceedings (i.e. in the judicial phase), or even earlier if the authorities of the forum State intended to take any coercive measure against the foreign official that might affect the performance of his or her functions. However, she took note of the comments of some members that the issue of considering immunity in relation to purely executive activities and in relation to any investigative activity should be examined in more detail, along with the need to consider the issue of the inviolability of the foreign official.

33. On the above issue, she said that many of the aspects raised could be dealt with in the context of defining the concept of "criminal jurisdiction", to which end she had already made a proposal in 2013 that was with the Drafting Committee pending consideration. And she expressed satisfaction because the preparation of that definition had received wide support from members of the Commission. Similarly, she expressed her willingness to consider using the expression "without delay" instead of "at an early stage". Lastly, the Special Rapporteur said that she was also open to considering using the alternative expressions "competent authorities", "authorities of the forum State" or simply "forum State".

34. With regard to draft article 9, the Special Rapporteur reiterated, first and foremost, her conviction that it was for the courts of the forum State to determine immunity, although she took note of the comments of a certain number of members of the Commission on variations in national legal regimes and the fact that in some States such determinations were made by authorities other than the courts, even in some cases the executive authorities. She was therefore open to the Drafting Committee considering broader wording that would cover all the possible situations that might arise in national law. However, she emphasized that the internal judicial effects of a decision on the applicability of immunity would not permit such a decision to be classed as a mere "political act" or "act of government" that could be excluded from judicial review.

35. On the applicable law for determining immunity, the Special Rapporteur highlighted that the decision should necessarily take into account the law of the forum State, the rules incorporated into the Commission's draft articles defining the normative elements of immunity ratione personae and immunity ratione materiae, and other norms of international law that applied to the case in question.

36. The Special Rapporteur said that draft article 9 was the appropriate framework within which to consider the proposal on strengthening procedural guarantees in respect of draft article 7 that had been made by a member of the Commission in his statement to plenary, as the aim of that proposal was to establish certain additional safeguards for determining whether immunity applied or not in the event that any of the crimes under international law listed in that draft article were alleged. In respect of those safeguards, the Special Rapporteur expressed agreement with the requirement that immunity should be decided by the competent authorities of the forum State at the highest level. She said that it would also be desirable for the determination of immunity to be undertaken only if there was sufficient evidence that the foreign official could have committed the crimes imputed to him or her, but said that the use of the phrase "the alleged

offence is fully conclusive" was not suitable, particularly because it implied that proceedings would be too far advanced to be compatible with the requirement that immunity must be considered at an early stage. Lastly, the Special Rapporteur said that she could also consider the question of the transfer of proceedings to the State of the official, which could be examined either in relation to draft article 9 or in the context of draft article 14, which already provided for a transfer mechanism.

37. With regard to draft article 11, the Special Rapporteur reiterated her position with regard to the separate procedures that should apply to invocation in the cases of immunity ratione personae and immunity ratione materiae, recalling that the same position had also been adopted by the previous Special Rapporteur, Mr. Kolodkin. However, she said that she was open to considering wording that would enable the distinction to be made more flexible for cases in which the authorities of the forum State were directly aware that the individual over whom they intended to exercise jurisdiction was a foreign official, for which purpose wording from the Vienna Convention on Consular Relations could be used. With regard to the time at which immunity should be invoked, she accepted the suggestion made by various members of the Commission to amend the wording of paragraph 2 of the draft article so as to take into consideration the different situations in which a State might find itself at the point of deciding whether to invoke the immunity of one of its officials. In any case, she reiterated that not invoking immunity could not automatically be understood as a waiver of immunity.

38. With respect to draft article 11, she reiterated that waiver of immunity was a right of the State of the official, which could not produce retroactive effects and which must be express and clear, while indicating her willingness for the Drafting Committee to explore the most appropriate way to refer to the manner in which a treaty could give rise to a waiver of immunity. She also stated that it would be useful for the Drafting Committee to examine the proposal put forward by a member of the Commission to the effect that the State of the official should waive immunity or offer to itself prosecute if it was alleged that the official concerned had committed serious crimes under international law.

39. With regard to draft articles 12 to 15, the Special Rapporteur noted that in general they had received broad support. Regarding draft article 12 (notification), she reiterated its essential role in the proper functioning of the system of procedural guarantees, although she stated that the definition of the limits of the obligation of notification should be examined by the Drafting Committee.

40. With respect to draft article 13, the Special Rapporteur recalled that the exchange of information constituted an essential element for considering and determining immunity, in particular immunity ratione materiae. Regarding the refusal of the State of the Official to transmit the requested information, she reiterated that it would be useful to enumerate the grounds for such a refusal, or at least establish that the State of the Official "must consider the request in good faith". In any event, she insisted that refusing to transmit the requested information cannot be the reason to declare that immunity does not apply. Moreover, she affirmed that draft article 13 could be supplemented by an explicit reference stating that the provision of information may in no case be interpreted as waiver of immunity or of recognition of the criminal jurisdiction of the forum State. The Special Rapporteur reiterated her opinion that

the exchange of information provided for in draft article 13 can function in a bidirectional manner.

41. Regarding draft article 14, the Special Rapporteur emphasized the broad support it had received, with members of the Commission considering that the transfer of criminal proceedings to the State of the official was a useful instrument and an important element in the system of procedural safeguards. With regard to that mechanism, the Special Rapporteur clarified that the transfer of proceedings could take place both in situations where immunity did not apply and in those where it did.

42. With respect to draft article 15, the Special Rapporteur emphasized the broad support that the institution of consultations had received from Commission members, who had considered it a wide-ranging instrument that could even be useful in the context of the settlement of disputes. Accordingly, she said that consultations should receive separate treatment in the draft articles and that she was opposed to merging draft article 15 with any other procedural provision.

43. Regarding draft article 16, the Special Rapporteur affirmed its importance and its essential character, since it ensured that the foreign official would receive fair and impartial treatment from the forum authorities, both in the process of considering and determining immunity and also subsequently, if the authorities of the forum State considered that immunity did not apply. With regard to the content of the draft article and its relationship with other similar provisions recently adopted by the Commission within the framework of other topics, the Special Rapporteur indicated that those aspects could be dealt with by the Drafting Committee, taking into account the specificities of each topic.

44. At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 ante provisionally adopted by the Drafting Committee at the seventy-first session. The Commission took note of the interim report of the Drafting Committee on draft article 8 ante, which was presented to the Commission for information only.

"**Draft article 8 ante**
Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles."

4. Future Work of the Commission

45. Members generally supported the plan to complete the first reading of the draft articles in 2020, although sufficient time was needed for substantial consideration of the draft articles by the Commission.

46. Concerning future work, the Special Rapporteur reiterated her wish to provide a brief analysis, in general terms, on the relationship of the present topic with international criminal jurisdiction, bearing in mind the possibility of transfer the proceeding to an international tribunal. She confirmed that she will address the question of dispute settlement mechanisms, as well as best practices focusing on operational rather than normative aspects. She noted that questions concerning ultra vires acts and other remaining issues would be addressed in the commentaries.

47. In relation to the final form of the project, the Special Rapporteur noted that it was premature for the Commission to decide on whether or not a treaty was being elaborated; the current form of draft articles sufficed.

48. As to the possible inclusion of recommended best practices on the topic, several members noted that it could be useful to States, particularly in reducing the risk of any abusive or politically motivated exercise of jurisdiction over State officials. At the same time, a number of members pointed out that this would need to be decided by the Commission depending on the final form envisaged by the Special Rapporteur.

49. It was also suggested that the Commission should adopt a clear position on the outcome of work on the topic, noting in particular that a recommendation to elaborate a treaty would assist in overcoming some of the differences that relate to procedures and that some of the proposals made sense in relation to a treaty as an outcome.

V. Protection of the environment in relation to armed conflicts

1. Introduction

1. The significance of the topic "Protection of the environment in relation to armed conflicts" was accentuated in the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* wherein it was noted, citing the General Assembly resolution 47/37 of 25 November 1992 on the "Protection of the Environment in Times of Armed Conflict",[20] that environmental considerations ought to be taken into account "when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[21] Thereafter, at its sixty-fifth session in 2013, the Commission decided to include the topic in its programme of work, and Ms. Marie G. Jacobsson was appointed as Special Rapporteur. Three reports were received and considered by the Commission from its sixty-sixth session (2014) to its sixty-eighth session (2016).

2. At the sixty-eighth session (2016), the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, whilst considering the third report of the Special Rapporteur, and took note of draft principles 4, 6 to 8, and 14 to 18 which were provisionally adopted by the Drafting Committee. At its sixty-ninth session (2017), the Commission established a Working Group chaired by Mr. Vázquez-Bermúdez to consider the way forward in relation to the topic as Ms. Jacobsson was no longer with the Commission, and the appointment of a new Special Rapporteur was recommended. Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.

3. At its seventieth session (2018), the Commission established a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18. The Commission adopted draft principles 4, 6 to 8, and 14 to 18; considered the first report of the Special Rapporteur;[22] and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.

At the seventy-first session (2019), at its 3455th meeting on 1 May 2019, the Commission provisionally adopted draft principles 19, 20 and 21. At its 3464th to 3471st meetings, from 15-27 May 2019, the Commission considered the second report of the Special Rapporteur.[23] At its 3471st meeting, the Commission referred draft principles 6 *bis*, 8 *bis*, 13 *bis*, 13 *ter*, 13 *quater*, 13 *quinquies*, and 14 *bis*, as contained in the second report of the Special Rapporteur, to the Drafting Committee. At its 3475th meeting, on 8 July 2019, the Chair of the Drafting Committee

[20] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, 242.
[21] Ibid.
[22] Document A/CN.4/720.
[23] Document A/CN.4/728.

presented the report of the Drafting Committee on the topic;[24] and the Commission provisionally adopted the entire set of the draft principles on the topic on first reading.[25] At its 3504th to 3506th meetings, on 7 and 8 August 2019, the Commission adopted the commentaries to the draft principles.

2. The Second Report of the Special Rapporteur

4. Several new areas, from among those identified by the Working Group for the topic in 2017 as being able to usefully complement the Commission's work, have been delved into in the second report of the Special Rapporteur. Certain questions of the protection of the environment in non-international armed conflicts (NIACs), with a focus on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts have been addressed. As regards the ambit, the questions, claimed to be representative of problems that have been prevalent in current NIACs and have caused severe stress to the environment, pertaining to illegal exploitation of natural resources and unintended environmental effects of human displacement, have been considered in a manner not exclusive to NIACs. Nor have they provided a basis for a comprehensive consideration of environmental issues relating to NIACs.

5. Research based on the post-conflict environmental assessments conducted since the 1990s by the United Nations Environment Programme (UNEP), the International Organization for Migration, the United Nations Development Programme (UNDP) and the World Bank, which has identified the use of extractive industries to fuel conflict, and human displacement as being among the six principal pathways for direct environmental damage in conflict[26] has been cited in the report. The other major causes of environmental harm are noted to include toxic hazards from the bombardment of industrial sites and urban infrastructure, weapons, landmines, unexploded ordnance and depleted uranium, and direct targeting of natural resources, particularly scorched earth tactics. Acknowledging that some of these causes of environmental harm had to a certain extent been addressed in the existing draft principles related to conduct of hostilities and remnants of war, the second report has proceeded to address the issue of protection of natural resources in relation to armed conflict in continuum with the work already done, in a manner complementary to the previous strides taken.

6. In line with the priorities endorsed by the Commission and the Sixth Committee, the report in Chapters III and IV deals with certain questions related to responsibility and liability. The responsibility and liability for environmental damage and depletion of natural resources in conflict caused by non-State actors have been discussed in Chapter III. Such responsibility may be of a civil or a criminal nature. While in section A, dealing with non-State armed groups, the main focus is on individual criminal responsibility, section B, on multinational enterprises, as

[24] A/CN.4/L.937
[25] A/CN.4/L.937
[26] D. Jensen and S. Lonergan, "Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues", in Jensen and Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2012), pp. 411–450, p. 414, cited in the Report at p. 8.

well as private military companies as a specific category of private companies present in conflict zones, looks at a number of accountability mechanisms, including civil liability suits.

7. Chapter IV addresses certain questions of State responsibility and liability. The general rules of State responsibility for wartime damage are discussed in section A, with a particular focus on challenges arising from the presence or involvement of multiple States and other actors in current conflicts. Section B addresses certain questions specific to the valuation and reparation of environmental damage, while section C adds a few examples related to remediation without the establishment of responsibility (*ex gratia* payments and victims assistance).

8. In a quest to consolidate the set of draft principles by gap-filling, the proposal made during the Commission's seventieth session to include in the set of draft principles a principle modelled on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976 has been considered in the report. Thereafter, the Martens clause, which has been referred to several times in the context of the present topic, has been discussed and invoked whilst drafting a principle on protection of the environment. The different approaches to the definition of the environment have been discussed, and a proposal has been made to harmonize the references to the environment in the draft principles.

2.1. Draft principles proposed in the second report and provisionally adopted, along with commentaries, in the seventy-first session.

Part One
Draft principle 6 *bis*
Corporate due diligence

States should take necessary legislative and other measures to ensure that corporations registered or with seat or centre of activity in their jurisdiction exercise due diligence and precaution with respect to the protection of human health and the environment when operating in areas of armed conflict or in post-conflict situations. This includes ensuring that natural resources are purchased and obtained in an equitable and environmentally sustainable manner.

Draft principle 8 *bis*
Martens Clause

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience in the interest of present and future generations.

Part Two
Draft principle 13 *bis*
Environmental modification techniques

Military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State is prohibited.

Draft principle 13 *ter*
Pillage

Pillage of natural resources is prohibited.

Part Three

Draft principle 13 *quater*
Responsibility and liability

1. These draft principles are without prejudice to the existing rules of international law on responsibility and liability of States.

2. When the source of environmental damage in armed conflict is unidentified, or reparation from the liable party unavailable, States should take appropriate measures to ensure that the damage does not remain unrepaired or uncompensated, and may consider the establishment of special compensation funds or other mechanisms of collective reparation for that purpose.

3. Damage to the environment for the purposes of reparation shall include damage to ecosystem services, if established, irrespective of whether the damaged goods and services were traded in the market or placed in economic use.

Draft principle 13 *quinques*
Corporate responsibility

1. States should take the necessary legislative and other measures to ensure that corporations registered or with seat or centre of activity in their jurisdiction can be held responsible for harm caused to human health and the environment in areas of armed conflict or in post-conflict situations. To this effect, States should provide adequate and effective procedures and remedies, which are also available for the victims of the corporate actions.

2. States should take the necessary legislative and other measures to ensure that, in cases of harm caused to human health and the environment in areas of armed conflict or in post-conflict situations, responsibility can be attributed to the corporate entities with *de facto* control of the operations. Parent companies are to be held responsible for ascertaining that their subsidiaries exercise due diligence and precaution.

Draft principle 14 *bis*
Human displacement

States and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by conflict are located, while providing relief for such persons and local communities.

3. Consideration of the Topic at the Seventy-first Session (2019)

9. With respect to the topic "Protection of the environment in relation to armed conflicts", the Commission had before it the second report of the Special Rapporteur, the scope of which has been discussed above. The complementary nature of the work was pointed out by the Special Rapporteur whilst enumerating the objectives of the report; *viz.*; first, addressing the remaining broad issues that the 2017 Working Group had identified as being in need of elaboration; and second, dealing with certain gaps and with two questions that had been left pending in 2016.[27]

10. The nature of the draft text and the final form of the Commission's output on the topic was discussed, and clarification adduced by the Special Rapporteur on the draft principles being of policy nature with the issues addressed in those draft principles constituting standards of practice and conduct.

11. Questions were raised about the use of the words "shall", "should" and "should ensure" in the draft principles, and in particular whether "should ensure" would appear to impose an obligation of result. It was sought to be clarified that the proper formulation would depend on the context, and decisions on the final wording would be taken by the Drafting Committee. Further discussions ensued on the matter of whether the topic as a whole constituted progressive development or whether some provisions reflected customary international law.

12. In response to the concern that inadequate attention had been paid to part two of the text, which dealt with the period of armed conflict, and to the suggestion that new draft principles should be added on the legitimate rights of belligerents, the status of neutral States, collateral damage and the meaning of the terms "widespread", "long-term" and "severe", the Special Rapporteur recalled that the working group established by the Commission in 2017 to identify outstanding issues within the context of the topic had not proposed any new draft principles on the conduct of hostilities or on the law of neutrality, and that indulging in the same might lead to duplication of the undertaking that the International Committee of the Red Cross (ICRC) has been involved in.

13. As regards the proposed draft principles, draft principle 6 *bis* on corporate due diligence had been supported by ten members, although a number of comments had been made with regard to its wording. It was clarified that the proposed draft principle was not intended to stigmatize corporations; rather, it reflected the extensive existing practice and commitments of States and corporations. Proposed draft principle 8 *bis* regarding extension of the Martens clause to cover environmental protection had received extensive support; only three members had expressed reservations about it. The inclusion of the expression "principles of humanity" in that clause faced some opposition, on the grounds that such principles specifically served human beings, not animals, plants or the environment.

[27] ILC, 71st Session (first part), Provisional summary record of the 3464th meeting, 15 May 2019, at 3 p.m., A/CN.4/SR.3464.

14. Proposed draft principle 13 *bis* on environmental modification techniques was also broadly supported by the Commission members, with three members expressing a preference for the alternative drafting that she was presented by the Special Rapporteur in her introductory statement. It was proposed by her that the Drafting Committee should use the alternative formulation as the basis for its work. Proposed draft principle 13 *ter* on pillage had been supported by almost all the Commission members who had commented on the topic, with certain questions raised on the scope and relevance of the terms "pillage", "spoliation" and "exploitation". On the question of whether that prohibition applied to situations of occupation in the context of the draft principles, the applicability *mutatis mutandis* of the draft principles contained in parts two and three of the text to situations of occupation was recalled.

15. With regard to proposed draft principle 13 *quater*, seven Commission members had expressed general support for the proposed formulation, while seven other members had said that they saw a need for a "without prejudice" clause. Paragraph 3 of proposed draft principle 13 *quater* had been supported by six Commission members and had been opposed by three.

16. Comments had been made on proposed draft principle 13 *quinquies* by almost all Commission members who had made statements on the topic. Eleven Commission members had said that they saw merit in its inclusion in the set of draft principles, while five had expressed the opposite view. Several comments had been made with regard to its drafting, for the purposes of making it less prescriptive, making it clearer, ensuring that it did not unnecessarily narrow the liability of parent companies or mitigating the effects of extraterritorial jurisdiction. Three members had proposed that draft principle 6 *bis* should be merged with draft principle 13 *quinquies*. Proposed draft principle 14 *bis* on human displacement had been broadly supported; however, one member had said that it concerned an issue of policy rather than law and another had questioned its legal basis.

17. On the proposal to use the term "environment" throughout the draft principles, views among Commission members had been more divided. Eight Commission members had supported the proposal, while five had said that there was no need to harmonize the use of terms. Two members had said that they would prefer to use the term "natural environment" throughout the set of draft principles.

18. Following the plenary debate, the Commission decided to refer the seven draft principles, as proposed by the Special Rapporteur in her second report, to the Drafting Committee.
As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, 28 draft principles, together with commentaries thereto, on protection of the environment in relation to armed conflicts. Gratitude was expressed to both the Special Rapporteurs for their work on the topic.

4. Present status of the topic and future work

19. Significant leaps were attained in the work of the Commission on this topic during the Seventy-first session. It would be pertinent to note that the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-

General, to Governments, international organizations, including from the United Nations and its Environment Programme, and others, including the ICRC and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020. Therefore, the time is now ripe for AALCO Member States and AALCO, as a representative forum of the Member States if mandated, to convey suggestions and proffer recommendations on this topic, as deemed fit.

20. Certain issues and some draft principles may require further elucidation in the general commentary, as also suggested by the Special Rapporteur. Further explanations may be adduced vis-à-vis the nature of the draft principles with regard to their differing normative value; the legal support that exists for each provision so as to determine its contribution to progressive development or as reflecting customary international law or otherwise; and the connection between the issue of human displacement and the draft articles on the protection of persons in the event of disasters.

21. The second report undeniably lays the basis for finalizing the Commission's work on the topic, and a complete set of draft principles together with the accompanying commentaries call for commendation. However, that must not preclude the Commission from reconsidering the general shape and object of the draft principles, including their overall structure, at or even prior to the second-reading stage. The relevance of the alleged need for a new draft principle addressing the responsibility of non-State armed groups- concerning reparations by non-State armed groups and individual criminal responsibility- may be further assessed by the Special Rapporteur.

V. General principles of law

1. Introduction

1. On the basis of the recommendation of the Working Group on the long-term programme of work the Commission in 2017,[28] at its seventieth session in 2018, decided to include the topic "General principles of law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.

During the seventy-first session in 2019, the Commission had before it the first report of the Special Rapporteur.[29] The report was considered at its 3488th to 3494th meetings, from 23 to 30 July 2019. At its 3494th meeting, on 30 July 2019, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary. At its 3503rd meeting, on 7 August 2019, the Chair of the Drafting Committee presented an interim oral report of the Drafting Committee on draft conclusion 1, provisionally adopted by the Drafting Committee.

2. The first report of the Special Rapporteur

2. In the first report, the Special Rapporteur addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also addressed previous work of the Commission related to general principles of law and provided an overview of the development of general principles of law over time, as well as an initial assessment of certain basic aspects of the topic. Three draft conclusions were proposed in the report and certain suggestions made for the future programme of work on the topic.

3. The pertinence of the general principles of law as an important component of the international legal system was accentuated by the Special Rapporteur whilst noting that this source of international law could be usefully clarified by the Commission almost a century after its inclusion in Article 38 of the Statute of the Permanent Court of International Justice.
The first report, preliminary and introductory in nature, seeks to lay the foundation of the Commission's work on the topic and to obtain the views of members of the Commission and States in this regard.

[28] A/72/10.
[29] A/CN.4/732.

4. Part One of the report sets forth the scope of the topic and raises four interrelated issues to be considered by the Commission: *firstly,* the legal nature of general principles of law as a source of international law and the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; *secondly,* the origins of general principles of law; *thirdly,* the functions of general principles of law and their relationship with other sources of international law; and *fourthly,* the identification of general principles of law. Certain aspects pertaining to methodology were also highlighted, *viz.*, method of selection of relevant materials for the study of the topic in light of the imprecise terminology employed in the literature and in practice, and a non-exhaustive list of factors to be considered to determine the relevance of materials. It was further noted that, as in the case of the topic "Identification of customary international law", the examples of general principles of law that may be referred to in the work of the Commission must be illustrative only and contained in the commentaries to the draft conclusions, and that the Commission should not delve into their substance.

5. Part Two of the report addresses the Commission's previous work related to the topic, i.e., the previously undertaken codification of general principles of law in the context of some topics, such as the law of treaties and responsibility of States for internationally wrongful acts; and the brief discussion on certain aspects of the present topic by the Commission, such as in the topics on fragmentation of international law, and identification of customary international law.

6. Part Three of the report, which deals with the development of general principles of law over time, seeks to provide context to the topic and relevant materials for the study of general principles of law by members of the Commission by focusing on references to general principles of law in international instruments and case law of international courts and tribunals.

7. Part Four of the report provides first an initial assessment of Article 38, paragraph 1(c), of the Statute of the International Court of Justice, which refers to "the general principles of law recognized by civilized nations." Three interrelated elements were identified, namely "general principles of law", "recognized" and "civilized nations". Part Four also addressed the question of the origins of general principles of law. The Special Rapporteur observed that this fundamental issue would determine the work of the Commission in the future. The report preliminarily concludes that, while general principles of law may have a more "general" and "fundamental" character, it cannot be excluded, having regard to existing practice, that there may exist general principles of law which do not have these characteristics. Another issue addressed in Part Four of the report is the relationship between general principles of law and "general international law". That recognition would constitute an objective basis that would address the drafters' concern not to afford to a judge excessive discretion in the determination of the law was pointed out; and the anachronistic nature of the term "civilized nations" highlighted.

8. In view of existing practice and literature, the report addresses two categories of general principles of law: those derived from national legal systems and those formed within the international legal system.

2.1. The first report on the topic proposed the following draft conclusions.

Draft conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

Draft conclusion 2
Requirement of recognition

For a general principle of law to exist, it must be generally recognized by States.

Draft conclusion 3
Categories of general principles of law

General principles of law comprise those:
(a) derived from national legal systems;
(b) formed within the international legal system.

3. Consideration of the Topic at the Seventy-first Session (2019)

9. The Commission had before it the first report of the Special Rapporteur, which was hailed with appreciation vis-à-vis its structure and quality of research. It was agreed that a number of issues would need to be further addressed and nuanced in the course of future work on the topic, in particular regarding the scope of the topic, as well as the elements and origins of general principles of law, and their identification. It was noted that this topic was relevant not only because general principles of law were essential in the judicial context, but also because they were generally applicable between States.

10. Members generally agreed with the issues set forth for consideration by the Commission in the first report. It was agreed by a number of members that the Commission should not delve into the substance of general principles of law, although it could provide illustrative examples. Some members proposed that an illustrative list of general principles of law be prepared and provided as an annex, while others stressed that this would be an incomplete exercise and could become a distraction from the core issues. Several members considered that illustrative examples of general principles of law could be included in the commentaries together with all relevant materials. The legal nature of general principles of law as a source of international law was pondered upon in some detail in the discussions. The majority of members supported, at least on a preliminary basis, that general principles of law were supplementary in nature, and that their main function was to fill gaps or lacunae in international law or to avoid *non liquet*.

11. With respect to the functions of general principles of law and their relationship with other sources of international law, members agreed with the Special Rapporteur that this issue would require careful consideration. It was generally agreed that draft conclusions would be an appropriate form with respect to the outcome of the topic. The view was expressed, however, that draft guidelines or draft articles would be a more appropriate outcome. A view was also expressed that the Commission ought to make such determination at a later stage of its work.

12. As regards the methodology, a general agreement was reached with the methodology proposed in the first report, and the analysis of the historical background was appreciated. It was, however, pointed out that the Commission should avoid settling theoretical debates and should aim at providing practical solutions.

13. Vis-à-vis the elements of general principles of law, the possibility of addressing "regional" or "bilateral" general principles of law was welcomed by some members, while others expressed doubts as to whether it would be appropriate, and some suggested that it was premature for the Commission to examine this issue at this early stage of its work. Suggestions were adduced to replace the outdated and inappropriate term "civilized nations" with "States" or "community of nations."

14. A number of drafting proposals were made concerning draft conclusions 1, 2 and 3. Several members suggested that draft conclusions 2 and 3 be held in the Drafting Committee until the Commission has had the opportunity to consider further relevant issues that may have an impact on their formulation.

15. It would be pertinent to note that at its 3507th meeting, on 9 August 2019, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

IV. Present status of the topic and future work

16. It is undeniable that by adopting a cautious and rigorous approach, the Commission could, vide its work on this topic, provide guidance to States, international organizations, courts and tribunals, and all those called upon to use general principles of law as a source of international law. The recommended preparation of the memorandum, as noted above, is especially conducive to this objective. Moreover, the stated plan of the Special Rapporteur to circulate a questionnaire to States requesting information about their practice on general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, shall further aid cogent work on this topic.

17. With respect to the future work of the Commission, it has been proposed by the Special Rapporteur, and seconded by most of the Members, that the second report address the functions of general principles of law and their relationship to other sources of international law, and that the third report be dedicated to the identification of general principles of law, including the question of the requirement of recognition. That report may also address the possibility of general principles of law with a regional or bilateral scope of application. The Special Rapporteur, however, indicated his flexibility on the order in which these aspects of the topic should be addressed.

VII. Statements and recommendations of the Special Rapporteurs.

(A) Peremptory norms of general international law (*jus cogens*) - statement of the Special Rapporteur, Professor Dire Tladi.

"For jus cogens, here is a brief summary and recommendations on which AALCO members might wish to focus:

During the current session, the ILC adopted a full set of draft conclusions on PNGIL with commentaries. This was the first time that the Commission had adopted any draft conclusions since the topic was placed on the agenda because the Commission had decided to keep the draft conclusions in the Drafting Committee until the completion of the topic.

Of course it would be good to comment on all the draft conclusions. However, special issues on which the Special Rapporteur would value the views of members include the following:

1. DC 3, whether the resort to fundamental values and universal applicability is appropriate.

2. DC 16, whether the UNSC should fall within the scope of the draft conclusions and, in particular whether decisions of the Council that conflict with jus cogens should be regarded as invalid.

3. Whether the consequences flowing from breaches of jus cogens (non-recognition and non-assistances) should be limited to serious breaches.

4. DC 21, whether the procedural rights established in the Draft conclusions are appropriate.

5. DC 22, whether the Commission ought to address immunities and exercise of jurisdiction more explicitly.

6. Whether the norms in the illustrative list are sufficient?"

(B) Crimes against humanity- statement of the Special Rapporteur, Professor Sean D. Murphy

“As the ILC's Special Rapporteur for crimes against humanity, I suggest the following short statement:

In August 2019, the ILC completed its work on the topic "crimes against humanity". The outcome of the topic is a set of draft articles on the prevention and punishment of crimes against humanity, which the ILC recommends should serve as the basis for a new United Nations convention on the subject. The principal focus of the draft articles is to help build up national laws and national jurisdiction relating to this particular crime (similar to existing conventions on genocide or on torture), and to place States in a cooperative relationship on matters such as mutual legal assistance. As such, the draft articles advance the goal of addressing crimes against humanity at the national level in the first instance, rather than before international courts or tribunals.

Now is an appropriate time for AALCO States to consider whether they would support the U.N. General Assembly adopting a resolution at the end of 2019 that pursues elaboration of a convention, either within the United Nations or at a diplomatic conference.”

(C) Protection of the environment in relation to armed conflict- statement of the Special Rapporteur, Ambassador Dr. Marja Lehto.

“1. The Commission concluded this year the first reading of the draft principles on protection of the environment in relation to armed conflicts. Altogether 28 draft principles with commentaries were adopted, among them the three draft principles relative to situations of occupation that were provisionally adopted by the drafting committee in 2018 (DPs 20, 21 and 22), and eight new draft principles.

2. The new draft principles concern Human displacement (DP8), State responsibility (DP 9), Corporate due diligence (DP 10), Corporate liability (DP 11), Martens Clause with respect to the protection of the environment in relation to armed conflicts (DP 12), Prohibition of pillage (DP 18), Environmental modification techniques (DP 19) and Relief and Assistance (DP 26).

3. The Commission also made a few changes to the structure of the set of draft principles, which now comprises five parts. Part One contains two introductory draft principles. Part Two contains draft principles that either relate to pre-conflict phase or are of general application. Part Three contains draft principles applicable during an armed conflict. Part Four contains draft principles applicable in situations of occupation, and Part Five contains draft principles applicable in post- armed conflict phase.

4. AALCO member States are encouraged to focus their comments on the eight new draft principles. Attention is also drawn to the request for written comments and observations concerning the set of draft principles. Such comments and observations should be submitted to the UN Secretary-General by 1 December 2020.”

(D) Sea level rise in relation to international law- statements of Professor Nilüfer Oral and Ambassador Dr. Bogdan Lucian Aureseu

"Please see the formal request issued by the Secretariat which is on the Commission website:

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

At the seventy-second session (2020), the Study Group will focus on the subject of sea-level rise in relation to the law of the sea. In this connection, the Commission appreciated receiving, by 31 December 2019 [informally by 31 October 2019], examples from States of their practice that could be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature.

Such practice could, for example, relate to baselines and where applicable archipelagic baselines, closing lines, low-tide elevations, islands, artificial islands, land reclamation and other coastal fortification measures, limits of maritime zones, delimitation of maritime boundaries, and any other issues relevant to the subject.

Relevant materials could include:

- bilateral or multilateral treaties, in particular maritime boundary delimitation treaties;

- national legislation or regulations, in particular any provisions related to the effects of sea-level rise on baselines and/or more generally on maritime zones;

- declarations, statements or other communications in relation to treaties or State practice;

- jurisprudence of national or international courts or tribunals and outcomes of other relevant processes for the settlement of disputes related to the law of the sea;

- any observations in relation to sea-level rise in the context of the obligation of States parties under the United Nations Convention on the Law of the Sea to deposit charts and/or lists of geographical coordinates of points; and

- any other relevant information, for example, statements made at international forums, as well as legal opinions, and studies.

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

(E) Provisional application of treaties- statement of the Special Rapporteur, Ambassador Mr. Juan Manuel Gómez-Robledo

(i) "Oral report of the Special Rapporteur

Informal consultations on the draft model clauses

26 July 2019

Mr. Chairperson

I thank you for giving me the opportunity to provide a brief report on the informal consultations on the draft model clauses on the provisional application of treaties, held at the current session.

As Members will recall, the Commission concluded the first reading of the draft Guide to the provisional application of treaties at its seventieth session, held last year. In addition the Commission took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, "based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee."

The possibility of including draft model clauses to the Guide to Provisional Application of Treaties was mentioned at paragraph 7 of the General Commentary, in which it is explained that in preparing a set of draft model clauses, to be annexed to the Guide, the Commission would seek to reflect the best practice with regard to the provisional application of both bilateral and multilateral treaties. It is also clarified that in no way would they be intended to limit the flexible and voluntary nature of provisional application of treaties. Nor would they pretend to address the whole range of situations that may arise.

The Commission further indicated, in its report from last year, its intention to resume the consideration of such draft model clauses at its seventy-first session, "to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during the seventy-second session."

Following the discussions held last year, I prepared an informal paper containing, *inter alia*, a revised set of five draft model clauses, for the consideration of the Commission in the context of informal consultations. Two meetings of informal consultations on the informal paper were held on 10 and 18 July this year. The consultations were open to all members and were announced in advance. I circulated a revised version of my informal paper, which took into account some of the comments made at the first meeting, at the second meeting. Copies of that revised informal paper have now been made available to you.

I am grateful to the Bureau of the Commission for allocating the time for the informal consultations. I also wish to thank those members who participated in the informal consultations. As I said at the beginning, the purpose of my statement today is to provide the Plenary with a report of the discussions held in the informal consultations, and to make a recommendation to the Commission on how to proceed.

Before doing so, permit me to recall some of the context to the consideration of the draft model clauses, and which is recorded in the introductory paragraphs of my informal paper. First, I wish to recall that forty-one delegations, including the European Union who spoke on behalf of its 28 member States and other States, expressed views in the debate on the topic in the Sixth Committee, during the seventy-third session of the General Assembly.

Many delegations acknowledged with appreciation the proposal of the Special Rapporteur of including draft model clauses as an annex to the Guide and several delegations observed that draft model clauses would provide practical assistance and guidance to States when drafting provisions of treaties. At the same time, some delegations regretted that the Commission had not been able to complete its consideration during the first reading of the Guide and expressed their hope that they could be in a position to consider the draft model clauses before the second reading takes place.

Turning to my revised proposal for the draft model clauses, I wish to recall the understandings recorded in my informal paper, namely that:

1. The Draft model clauses should be aimed at addressing the most common issues faced by States and international organizations who are willing to resort to provisional application;

2. Thus, the draft model clauses should not pretend to address the whole range of situations that may arise;

3. Special care should be taken so as to avoid the draft model clauses overlapping with the guidelines contained in the Guide to Provisional Application of Treaties; and

4. The draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

In addition, I wish to reiterate that the draft model clauses should at least cover the following situations:

1. They should provide for the provisional application of a treaty or a part of a treaty in the treaty itself or in a separate agreement;

2. They should provide for the most common situations of termination of the provisional application of a treaty or a part of a treaty; and

3. They should provide for the possibility of opting for the provisional application of a treaty or a part of a treaty, or for opting not to have the treaty or a part of a treaty being provisionally applied for that State or international organization, whenever the decision to resort to provisional application is made by:

    i) a resolution adopted by an international organization or at an intergovernmental conference in which the State or international

organization concerned has not participated or is not in agreement with such resolution; or,

ii) a declaration by a State or international organization that is not a negotiating party to the treaty; and

4. They should provide for limitations deriving from internal law of States or rules of international organizations.

It was with these considerations in mind that I prepared the revised set of draft model clauses. I should also recall that, as I mentioned in my fifth report, the draft model clauses are intended only to draw attention to some of the most common legal issues that arise in the event of an agreement to apply a treaty provisionally. They thus contain elements that reflect the most clearly established practice of States and international organizations, while avoiding other elements that are not reflected in practice or are unclear or legally imprecise. While none of the proposed wording is taken verbatim from any existing treaty, the draft model clauses include footnotes giving examples of provisional application clauses found in treaties that refer to the same issue covered in the draft model clause in question, although such examples are by no means exhaustive.

Discussion in the informal consultations

With these explanations in mind, an exchange of views on the proposed draft model clauses was held during the informal consultations. Members were generally supportive of the proposal to include a set of draft model clauses, as an annex to the Guide to Provisional Application of Treaties, to be adopted on second reading next year. A number of points were made concerning the approach to be taken to the model clauses, as well as on some of the drafting. While in the interests of time I will mention here only the more general comments, I have taken copious notes of all the remarks made.

For example, it was stated that the Commission should carefully explain the nature of the draft model clauses as not necessarily being the definitive version, but rather that they merely provide a basis for States to negotiate such clauses in their treaties. It was also suggested that a clearer distinction be drawn, in the text of the draft model clauses, between bilateral and multilateral treaties. Support was also expressed for the inclusion of draft model clauses 4 and 5, dealing with the question of opting out of provisional application arising from a resolution of an international organization, and limitations deriving from internal law of States or rules of international organizations, respectively; even if the accompanying commentary will need to provide clear explanations.

The concern was also expressed that the inclusion of a set of draft model clauses could be interpreted as the Commission encouraging States to resort to provisional application. My view, which I expressed during the informal consultations, is that this concern has existed from the very beginning of our work on this topic. The very fact of clarifying the applicable rules can be understood as facilitating the provisional application of treaties. However, I don’t think this is necessarily the case. The fact is that there already exists a significant body of practice of States

resorting to provisional application from even before the 1969 Vienna Convention, but especially so since the adoption of article 25 of that Convention. The Commission decided to undertake this topic in order to provide a service to the member States by seeking to clarify the necessary procedures for the resort to provisional application as well some of the legal consequences arising therefrom. At all times, the optional and voluntary nature of provisional application has been emphasised. The draft model clauses would simply be provided to facilitate drafting in those situations where negotiating parties decide to resort to the mechanism of provisional application.

Recommendation on how to proceed

Mr. Chairman,

I turn now to the question of how to proceed. Several members expressed the preference to have had the model draft clauses considered by the Drafting Committee. Given the lack of time, it would not be possible to do so this year. Nonetheless, I would like to propose that the Commission record the substance of this oral report in, and annex the draft model clauses to, its annual report to the General Assembly this year. This would be accompanied by a request, contained in Chapter III, that member Governments also submit comments on the draft model clauses contained in the annex to this year's report. In this manner, I could benefit from both the views expressed by members of the Commission during the informal consultations held this year; as well as the comments of Governments, either in writing or made orally in the Sixth Committee. It would be on the basis of all of those comments that I would prepare a further revised version of the draft model clauses to be included in my final report to be submitted next year. If the Plenary agrees, it would be those proposals that would be referred to the Drafting Committee, at next year's session, for its consideration.

I hope that the Commission could be in a position now to take note of my oral report and to decide to proceed on the basis of my recommendation.

I thank you, Mr. Chairperson."

(ii) "Provisional Application of Treaties

Informal consultations

Revised draft model clauses

Introduction

As Members will recall, the ILC, in its Report on the seventieth session, took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, "based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee."

The possibility of including draft model clauses to the Guide to Provisional Application of Treaties is thus mentioned at paragraph 7 of the General Commentary . Furthermore, at foot note 1008 of its Report, the ILC expressed its intention to resume the consideration of such draft model clauses at its seventy-first session, "to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during the seventy-second session."

The Bureau of the Commission has kindly agreed to allow that informal consultations be convened for that purpose and has included them in the programme of work for the second part of this year's session.

Summary of the debate in the Sixth Committee

Forty one delegations, including the European Union who spoke on behalf of its 28 member States and other States, expressed themselves in the debate on the topic during the seventy-third session of the General Assembly.

Many delegations acknowledged with appreciation the proposal of the Special Rapporteur of including draft model clauses as an annex to the Guide and several delegations observed that draft model clauses would provide practical assistance and guidance to States when drafting provisions of treaties. Some delegations regretted that the Commission was not able to complete their consideration during the first reading of the Guide and expressed their hope that they could be in a position to consider them before the second reading takes place.
The draft model clauses

The text of eight draft model clauses as proposed by the Special Rapporteur, in his fifth report (A/CN.4/718), are to be found at foot note 996 of the ILC Report of its seventieth session and were sent to the Drafting Committee. However, the Special Rapporteur submitted to the Drafting Committee a revised version of such draft model clauses on the basis of comments made during the debate in the plenary on his fifth report consisting in seven draft model clauses which are contained in ILC (LXX)/DC/PAT/WP.1.

Since the Drafting Committee lacked time to consider any proposal on such draft model clauses, the Special Rapporteur assessed once again comments and suggestions made to him during the seventieth session of the Commission as well as during the present session.
On that basis, the Special Rapporteur considers that:

1. Draft model clauses should be aimed at addressing the most common issues faced by States and international organizations who are willing to resort to provisional application.

2. Thus, draft model clauses should not pretend to address the whole range of situations that may arise.

3. Special care has to be taken as to avoid that the draft model clauses overlap with the guidelines contained in the Guide to Provisional Application of Treaties.

4. Draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

Therefore, the Special Rapporteur believes that draft model clauses should at least cover the following situations:

a) To provide for the provisional application of a treaty or a part of a treaty in the treaty itself or in a separate agreement;

b) To provide for the most common situations of termination of the provisional application of a treaty or a part of a treaty;

c) To provide for the possibility of opting for the provisional application of a treaty or a part of a treaty, or for opting not to have the treaty or a part of a treaty being provisionally applied for that State or international organization, whenever the decision to resort to provisional application is made by:

i) a resolution adopted by an international organization or at an intergovernmental conference in which the State or international organization concerned has not participated or is not in agreement with such resolution; or,

ii) a declaration by a State or international organization that is not a negotiating party to the treaty.

d) To provide for limitations deriving from internal law of States or rules of international organizations;

Revised draft model clauses

As mentioned by the Special Rapporteur in his Fifth report on the provisional application of treaties, the model clauses are intended only to draw attention to some of the most common legal issues that arise in the event of an agreement to apply a treaty provisionally.

The draft model clauses thus contain elements that reflect the most clearly established practice of States and international organizations, while avoiding other elements that are not reflected in practice or are unclear or legally imprecise.

While none of the proposed wording of this set of model clauses is taken verbatim from any existing treaty, the draft model clauses include footnotes giving examples of provisional application clauses found in treaties that refer to the same issue covered in the draft model clause in question, although these examples are by no means exhaustive.

Commencement and termination

Draft model clause 1

1. This Treaty [article (s)…] shall apply provisionally[30] from the date of signature[31] [or from X date[32]], unless[33] a State [an international organization] notifies the other State [international organization] [Depository] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application.[34]

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[30] Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other, to take account of the accession of the Republic of Croatia to the European Union, *Official Journal of the European Union*, No. L 373, p. 3,art. 4 ("This Protocol shall apply provisionally…"); Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services, *Ibid.*, No. L 179, p. 20, art. 9 ("…the Parties agree to provisionally apply this Agreement…"); Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO2 and the reimbursement of the tax on CO2 to enterprises under Liechtenstein's law on the exchanges of rights, United Nations, *Treaty Series*, vol. 2763, p. 274, at 262, art. 12 ("…this Agreement shall apply provisionally…"); Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC), *Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1, art. 2 ("The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force…"); ECOWAS Protocol A/P.1/12/99 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, art. 57 ("This Protocol shall enter into force provisionally upon signature…"); Supplementary Protocol A/SP.1/01/06 Amending Articles VI-C, VI-I, IX- 8, XI – 2 AND XII of Protocol A/P2/7/87 on the Establishment of the Western African Health Organization (WAHO), art. 2 ("This Protocol shall enter into force provisionally upon signature…"); Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, art. 4 ("The present Supplementary Protocol shall enter into force provisionally upon signature…"); ECOWAS Supplementary Protocol A/SP.2/06/06 amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7,Paragraph 3 of the Protocol on the Community Court of Justice, art. 8 ("This Supplementary Protocol shall come into force provisionally upon its signature…").

[31] Treaty between the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Kyrgyz Republic on the deepening of integration in economic and humanitarian fields (Moscow, 29 March 1996), United Nations, *Treaty Series*, vol. 2014, No. 34547, p. 15, art. 26; Statutes of the Community of Portuguese-Speaking Countries (Lisbon, 17 July 1996), *Ibid.*, vol. 2233, No. 39756, p. 207; Agreement concerning permission for the transit of Yugoslav nationals who are obliged to leave the country (Berlin, 21 March 2000), *Ibid.*, vol. 2307, No. 41137, p. 3, art.7, para.3; Agreement establishing the "Karanta" Foundation for support of non-formal education policies and including in annex the Statutes of the Foundation (Dakar, 15 December 2000), *ibid.*, vol. 2341, No. 41941, p. 3, art. 8; 1972 International Cocoa Agreement (Geneva, 21 October 1972), *ibid.*, vol. 882, No. 12652, p. 67, art. 66; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu August 13, 2004), *ibid.*, [vol. not yet published], No. 51490, art. 17, para. 2.

[32] 1994 International Coffee Agreement, United Nations, Treaty Series, vol. 1827, No. 31252, p. 3, art. 40; 1994 International Tropical Timber Agreement, Ibid., vol. 1955, No. 33484, p. 81, art. 41, para.2; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), Official Journal of the European Union, L 161, p. 3; 1968 International Coffee Agreement (open for signature at New York from 18 to 31 March 1968), United Nations, Treaty Series, vol. 647, No. 9262, p. 3, art. 62, para. 2 ; 1976 International Coffee Agreement (London, 3 December 1975), ibid., vol. 1024, No. 15034, p. 3, art. 61, para. 2; International Coffee Agreement, 1983 (London, 16 September 1982), ibid., vol. 1333, No. 22376, p. 119, art. 61, para. 2. Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO2 and the reimbursement of the tax on CO2 to enterprises under Liechtenstein's law on the exchanges of rights, United Nations, Treaty Series, vol. 2763, p. 274, at 262, No. 48680, art. 12 ("Like the Treaty, this Agreement shall apply provisionally as of…").

[33] Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *Official Journal of the European Union*, No. L 29, 4 February 2016, p. 3, art. 281, para. 5 ("unless otherwise specified therein, shall apply provisionally").

[34] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46, art. 7;

2. The provisional application of this Treaty [or article (s)…] shall terminate upon its entry into force[35] for a State [an international organization] that is applying it provisionally or if that State [an international organization] notifies the other State [international organization] [Depositary] of its intention not to become a party to the Treaty.[36]

Exchange of notes of 17 June 1979 constituting an agreement for the provisional application of the Convention on International Land Transport and the annexes thereto (Mar del Plata on 10 November 1977) (available on the website of the Ministry of Foreign Affairs of Peru, Directorate-General for Treaties: https://apps.rree.gob.pe /portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=E0F2.); Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002), United Nations, *Treaty Series*, [vol. not yet published], No. 51181 (text available at: https://treaties.un.org); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (Nassau, 5 July 2001), *ibid.*, vol. 2259, No. 40269, p. 440; Agreement on the provisional application of certain provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention] pending its entry into force (Agreement of Madrid) (Madrid, 12 May 2009), *Council of Europe Treaty Series*, No. 194; available at: https://rm.coe.int/1680083718.

[35] Agreement of Madrid; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the annex to the agreement, on costs to States parties and institutional arrangements; International Cocoa Agreement, 1986 (Geneva, 25 July 1986) United Nations, *Treaty Series*, vol. 1446, No. 24604, p. 104, art. 69 ("It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession."); Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force. Council of Europe, *Treaty Series*, No. 194, para. e ("the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree.").

[36] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331; Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), *ibid.*, vol. 2389, No. 43165, p. 117; Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000), *ibid*., vol. 2161, No. 37756, p. 45; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004), *ibid*., vol. [not yet published], No. 51490 (text available at: https://treaties.un.org); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *ibid.*, vol. 2167, p. 3, at p. 126.; Energy Charter Treaty (Lisbon, 17 December 1994), *ibid.*, vol. 2080, No. 36116, p. 95; Final Act of the European Energy Charter Conference, Art. 45 (text available at: https://www.italaw.com/sites/default/files/laws/italaw 6101%2833%29.pdf) ("Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty"); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 7 ("Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement."); Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, *ibid.*, No. L 143, 31 May 2011, p. 2, art. 2, para. 10 ("Either party may terminate this Agreement upon six month's written notice to the other Party."); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3, art. 281, para. 10 ("Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels."; ECOWS Energy Protocol A/P4/1/03, art. 40 ("Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol."); Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal of the European Union*, No. L 127, 14 May 2011, p. 6, art. 15.10. para. c ("A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification"); Treaty between the Federal Republic of Germany and the Kingdom

Form of agreement

Draft model clause 2

This Treaty [or article (s)…] can be provisionally applied in accordance with the provisions of a separate agreement to that effect.[37]

Opt in/Opt out[38]

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of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, art. 16 ("Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party."); Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea, *Ibid.*, [vol. not yet published], No. 51490, art. 17, para. 3 ("This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification"); ECOWAS Energy Protocol A/P4/1/03, art. 40 ("Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol.").

[37] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46.; Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force; International Wheat Agreement 1986 (London, 14 March 1986), *ibid.*, vol. 1429, No. 24237, p. 85, art. 28 (Referencing a separate "mutual consent"); Havana Charter for an International Trade Organization (1947) (E/CONF.2/78) (text available at: https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf ("Any Member which before July 1, 1948 has signed the Protocol of Provisional Application…")

[38] Draft Guideline 3 (General Rule) chose not to restrict the possibility of resorting to provisional application to the 'negotiating States' (and IOs), thereby leaving open that possibility to 'States (IOs) concerned'. In order not to create a presumption that non-negotiating States and IOs are generally permitted to be bound by the provisional application of a treaty or a part of a treaty, negotiating States should accept it as established in Draft Guideline 4 (Form of agreement), paragraph (b). This is what draft model clause 3 intends to address.

Draft Guideline 4 allows also for a resolution adopted by an international organization or at an intergovernmental conference, as a means to agree on the provisional application of a treaty or a part of a treaty. Some examples are the following: Article 3, Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU) (Official Journal of the European Union, No. L 346, 15 December 2012, p. 1); Article 2, Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC) (Official Journal of the European Union, No. L 352, 30 December 2002, p. 1); Article 4, Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) (Official Journal of the European Union, No. L 278, 20 September 2014, p. 1); Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU) (Official Journal of the European Union, No. L 261, 30 August 2014, p. 1); Article 2, Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU) (Official Journal of the

Draft model clause 3

A State [an international organization] that is not a negotiating State [international organization] of this treaty may declare that it will provisionally apply it [or article (s)…], provided that the negotiating States [international organizations] accept such declaration

Draft model clause 4

A State [an international organization] may declare that it will not provisionally apply a treaty [or article (s)…] when the decision to its provisional application results from a resolution of [X international organization or X intergovernmental conference] to which that State [international organizations] does not agree.

Limitations deriving from internal law of States or rules of international organizations[39]

Draft model clause 5

A State [an international organization] may at the time of expressing its agreement to the provisional application of this Treaty [article (s)…] [or any other time agreed upon] notify the other State [international organization] [Depository] of any limitations deriving from its internal law[40] [rules of the international organization] that would affect compliance by that State [international organization] of such provisional application.

European Union, No. L 20, 23 January 2013, p. 1). Without prejudice to the rules of decision-making applicable to an IO or intergovernmental conference in a concrete situation and to the question of whether a resolution has binding character, the voluntary nature of provisional application may call for an opt-out clause in case a State or IO does not agree with such resolution. Draft model clause 4 addresses that situation.

[39] A number of multilateral treaties refer to the internal law of concerned States. Some examples are the following: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, article 7, paragraph 2; Agreement on collective forces of rapid response of the Collective Security Treaty Organization, art. 17; Trans-Pacific Strategic Economic Partnership Agreement, article 20.5, paragraph 3; Article 26 of the 1995 Grains Trade Convention; Article XXII (c) (signature and ratification) and article XXIII (c) (accession) of the 1999 Food Aid Convention; Article 40 (entry into force), paragraphs 2 and 3, of the 1994 International Coffee Agreement; Article 38 of the 2006 International Tropical Timber Agreement (notification of provisional application); and Article 45 (entry into force), paragraph 2, of the 2001 International Coffee Agreement.

[40] Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95, art. 45 ("to the extent that such provisional application is not inconsistent with its constitution, laws or regulations"); Protocol Of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947), *ibid.,* vol. 55, No. 814, p. 308, art. 1 ("Undertake… to apply provisionally…to the fullest extent not inconsistent with existing legislation."); International Natural Rubber Agreement (Geneva, 6 October 1979), *ibid.,* vol. 120, No. 19184, p. 191, art. 59 ("a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures."); Sixth International Tin Agreement (Geneva, 26 June 1981), *ibid*., vol. 1282, No. 21139 pg. 205, art. 53 ("will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally…"); Agreement on Air Transport between Canada and the European Community and its Member States (available at: https://www.icao.int/sustainability/Documents/Compendium_FairCompetition/Practices/EU-canada-OSA_final_text_agreement.pdf) ("in accordance with the provisions of domestic law of the Parties…"); Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part (2010) (" in accordance with their internal procedures and/or domestic legislation as applicable"); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the

(F) Protection of the atmosphere- statement of the Special Rapporteur, Professor Shinya Murase.

"Towards a Successful Completion of the ILC Topic on the Protection of the Atmosphere

Shinya Murase, Special Rapporteur, 28 July 2019

The first reading of the topic Protection of the Atmosphere was completed in 2018, with the Commission adopting the Preamble (8 preambular paragraphs) and 12 Draft guidelines,[41] as well as the commentaries attached thereto (see the ILC Report 2018).[42] Governments and international organizations are requested to submit their comments before 15 December 2019. The second reading to be held in 2020 can be conducted only on the basis of these comments, and therefore, it is crucial for the Commission to receive these written comments. The following is some of the points that Governments and international organizations may wish to consider in preparing their comments.

I. The 2013 Understanding

With regard to the so-called 2013 Understanding,[43] we note that the Commission and the Special Rapporteur have faithfully complied with its conditions. There is therefore no need to reiterate the Understanding in the Draft guidelines. These conditions were imposed ***not*** by the Sixth Committee (it took note of this topic in 2011 without any conditions) but by the Commission itself. As some members of both the Sixth Committee and the Commission noted, imposing conditions on the Special Rapporteur had never been done before and was "disgraceful" for the Commission, not to mention "humiliating" to the Special Rapporteur, who nonetheless complied with them faithfully. We would therefore like to propose that references to the Understanding in the Preamble as well as in the Draft guidelines be deleted in the Second reading of the topic in 2020.

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other part, *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 3 (" in accordance with their respective internal procedures and legislation as applicable."); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3 (" may apply this Agreement…in accordance with their respective internal procedures and legislation, as applicable"); Euro Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part, *ibid.*, No. L 386, 29 December 2006, p. 57, art. 30 ("in accordance with the national laws of the Contracting Parties, from the date of signature."); ECOWAS Energy Protocol A/P4/1/03, art. 40 (" to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *Official Journal of the European Union*, No. L 260, 30 August 2014, p. 4, art. 464 ("in accordance with their respective internal procedures and legislation, as applicable".) Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46, art. 7, para. 2 ("All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations...").

[41] Please see the Annex at the end of the present memorandum.

[42] ILC Report 2018, A/73/10, Chapter VI.<http://legal.un.org/docs/?path=../ilc/reports/2018/english/chp6.pdf&lang=EFSRAC>

[43] ILC Report 2013, A/68/10, para. 168.

Thus, we would like to propose the deletion of the 8th preambular paragraph, as well as paragraphs 2 and 3 of Draft guideline 2 on Scope. The 8th preambular paragraph might have had some meaning at the outset of the work on this topic, but it is meaningless now that the project has been completed in full compliance with the restrictions. Paragraph 2 of Draft guideline 2 does not make sense. It says that Draft guidelines "do not deal with, *but without prejudice to*", which is a "double negative" formula. This was a point raised by some delegates of the Sixth Committee in the past. Further, the Draft guidelines have not touched on the principles enumerated in this paragraph. Thus, this paragraph should be deleted. Likewise, paragraph 3 should also be deleted because the Draft guidelines have not dealt with "specific substances". We hope that other delegations will support our proposals.

II. Common Concern of Humankind

There are some other points that we would like to raise: The phrase in the fourth preambular paragraph, "a pressing concern of the international community as a whole", should be changed to "a common concern of humankind". The latter phrase was not accepted because of an opinion expressed in the Commission, in May 2015, that the international community had abandoned "common concern" for more than 20 years. In December 2015, however, the concept of "common concern" was adopted in the Preamble of the Paris Agreement on climate change. Therefore, the Preamble on this topic should adopt the language "common concern" in line with the Paris Agreement.

III. Substances and Energy

Draft guideline 1 (b): The term "substances" should be changed to "substances ***or energy***" in line with the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP, Article 1(a)), and the 1982 United Nations Convention on the Law of the Sea (UNCLOS, Article 1(1)(4)). The omission of the term "energy" in the definition of the atmospheric pollution should be rectified.

IV. Large-scale Modification of the Atmosphere

There were certain discussions in the Commission on Draft guideline 7, concerned with "the large-scale modification of the atmosphere", or "Geo-engineering", the term more commonly used. It is important to retain this provision, because geo-engineering activities will be conducted widely in the future. The approach that the ILC took was a well-balanced one: it neither encouraged nor discouraged these activities. It merely suggested "caution and prudence" in conducting such activities, which is an important reminder to the international community."

Annex

"Text of the draft guidelines on the protection of the atmosphere, together with preamble, adopted by the Commission on first reading in 2018.

Preamble

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

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

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Aware of the special situation and needs of developing countries,

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

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

Recalling that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long- range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

Guideline 1 Use of terms

For the purposes of the present draft guidelines,

1. (a) "Atmosphere" means the envelope of gases surrounding the Earth;
2. (b) "Atmospheric pollution" means the introduction or release by humans,

directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2 Scope of the guidelines

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Guideline 3 Obligation to protect the atmosphere

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

Guideline 4 Environmental impact assessment

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

Guideline 5 Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6 Equitable and reasonable utilization of the atmosphere

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

Guideline 7 Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8 International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9 Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

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

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

Guideline 10 Implementation

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

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

Guideline 11 Compliance

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

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

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

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

Guideline 12 Dispute settlement

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

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

(G) General principles of law- statement by the Special Rapporteur, Ambassador Marcelo Vázquez-Bermúdez

"Note by the Special Rapporteur, 3 September 2019

At its seventieth session, the International Law Commission (ILC) decided to include the topic "General principles of law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. The first report of the Special Rapporteur was discussed at the seventy-first session of the Commission. This note briefly highlights certain issues arising in the topic and with respect to which comments of AALCO's Member States would be particularly welcome at present. The Special Rapporteur would also welcome Member States' comments on any other issue that they may find relevant.

General principles of law are an important component of the international legal system that deserves attention. Nearly a century has passed since their inclusion in Article 38 of the Statute of the Permanent Court of International Justice ("PCIJ"), and the clarification by the Commission of various aspects of this source of international law would represent a useful and valuable contribution.

In 2017 and 2018, States in the Sixth Committee widely welcomed the ILC's decision to address the topic, noting that this would complement existing work on the sources of international law. Various delegations considered that the Commission could provide an authoritative clarification on the nature, scope and functions of general principles of law, as well as on the criteria and methods for their identification.

The first report on general principles of law is preliminary and introductory in nature. Its main purpose is to lay the foundation for the future work of the ILC and to obtain the views of its

members and of States in that regard. It addresses certain basic aspects of the topic in some depth, but account was taken of its complexities. It proposes three draft conclusions (see below) that reflect an initial approach to the topic.

The first report is divided into five parts. Part One addresses the scope of the topic, the form that the final outcome of the Commission's work should take, and certain issues of methodology. Part Two addresses the previous work of the Commission related to general principles of law. Part Three provides an overview of the development of general principles of law over time. Part Four contains an initial analysis of the elements of Article 38, paragraph 1 *c*), of the Statute of the International Court of Justice ("ICJ") and the origins and corresponding categories of general principles of law. Part Five proposes a future programme of work.

As regards the **scope of the topic**, members of the Commission agreed with the Special Rapporteur that it should include four main aspects: (1) the legal nature of general principles of law as a source of international law; (2) the origins and corresponding categories of general principles of law; (3) the functions of general principles of law and their relationship with other sources of international law; and (4) the identification of general principles of law.

Another issue that might be useful to consider is the possibility of general principles of law with a regional scope of application. In the first debate, members of the Commission expressed divided views as to whether general principles applied at the regional level should be included in the scope of this topic. The Special Rapporteur would welcome comments by States in this regard.

One of the main **methodological issues** in the topic is how to select the relevant materials for its study, as the terminology found in practice and in the literature tends to be unclear. Terms such as "principle", "general principle", "general principle of law", "principle of international law", "general principle of international law" and "fundamental principle of international law" are used frequently without a clear indication as to the source of such principles. The use of the word "principle" may, but does not necessarily, indicate a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute. Depending on the context, that term might refer to a general principle of law or to a conventional or customary rule, and a degree of caution is thus needed. During the first debate, members of the Commission generally agreed that this is an important methodological question to keep in mind.

As regards the final outcome of the topic, there was general consensus that the Commission's work should take the form of conclusions accompanied by commentaries. Specific examples of general principles of law should be included in the commentaries.

Part Four of the report is the most substantial one. It addresses, first, the elements of the term "the general principles of law recognized by civilized nations" in Article 38(1)(c) of the ICJ Statute; and second, the origins and corresponding categories of general principles of law.

As regards **the elements of Article 38(1)(c) of the ICJ Statute**, the first report addresses in the first place whether the term "general principles of law" reveals anything about the possible characteristics, origins, functions or otherwise of this source of international law. One of the questions that arise is whether the latter shares any characteristics with the 'general principles'

that exist in national legal systems. While at first glance it may seem that they do (for example, in the sense that both may serve to fill gaps), general principles of law in the sense of Article 38(1)(*c*) of the ICJ Statute are a source of international law and are therefore likely to have their own unique features owing to the structural differences between the international legal system and national legal systems.

Another question that arises is whether a "principle" is qualitatively different from a "norm" or "rule" of international law. If so, could it be said that all general principles of law in the sense of Article 38(1)(c) of the ICJ Statute have certain characteristics of "principles" that distinguish them from conventional and customary rules? Article 38 of the ICJ Statute seems to treat "rules" and "principles" as synonyms. The ICJ and the ILC have expressed the view that while "rules" and "principles" could be used to convey the same idea, the term "principle" may refer to a rule with a more "general" and "fundamental" character. In practice, while several general principles of law that have been invoked by States or applied by international courts and tribunals could be considered "general" and/or "fundamental", some others do not have these characteristics.

With respect to the term "recognized" in Article 38(1)(c) of the ICJ Statute, members of the Commission generally agreed with the Special Rapporteur that it reflects the essential condition for the existence of a general principle of law as a source of international law. This follows from the text of Article 38(1)(c) and the *travaux* of the PCIJ Statute. The drafters agreed that the formal validity of general principles of law depended on their recognition by 'civilized nations'; in other words, their existence had to have an objective basis. One of the drafters' concerns was to avoid granting judges overly broad discretion in determining the law or even the power to legislate. That could only be achieved by means of a condition that did not depend on the subjective view of the judge, or any particular State, but which could be determined by observing the recognition accorded by States in general.
The essential condition of recognition must be distinguished from the essential conditions for the existence of customary rules, namely general practice and its acceptance as law (*opinio juris*). The possible forms that recognition may take and the degree of recognition required are addressed only briefly in the first report and will be further studied in a future report.

As regards the term "civilized nations", there is broad consensus, both in practice and in the literature, that it is anachronistic and should be avoided, considering existing practice and the principle of sovereign equality of States. The main question remained as to the appropriate alternative to be used. The choice among different alternatives, namely, 'States', 'nations', 'international community', etc, touches upon the question of whose 'recognition' is needed. In particular, during the first debate within the Commission, the question has arisen whether international organizations and other actors could also contribute to the formation of general principles of law. This will be subject to study in a future report. On the choice of term, the suggestion was made in the first debate that possibly the best formulation could be the term "community of nations", contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights: "general principles of law recognized by the community of nations".

The issue of the **origins and corresponding categories of general principles of law** is central to the topic and attracted considerable attention during the first debate.

The first report addresses what may be considered the two most outstanding categories of general principles of law in practice and in the literature: general principles of law derived from national legal systems and general principles of law formed within the international legal system. Other categories of general principles of law, such as those "of legal logic" or "intrinsic to the idea of law", are sometimes proposed in the literature. However, such categories tend to be rather vague, might provide excessive discretion to those applying them and do not seem to have enough support in practice.

The category of general principles of law derived from national legal systems finds support in practice prior to the adoption of the PCIJ Statute and the *travaux* of the latter, in the contemporary practice of States, and in international jurisprudence. Examples of general principles of this category invoked or applied in practice include the principle of separate corporate legal personality, *res judicata,* estoppel, unjust enrichment, and unclean hands. This category of general principles is widely acknowledged in the literature on the topic, and it was also generally supported by members of the Commission during the debate.

It is also generally agreed that, in order to identify general principles of law derived from national legal systems, a two-step analysis might be required: first, identifying a principle common to national legal systems; second, determining whether that principle is applicable in the international legal system, a process that some term "transposability" or "transposition". This two step-analysis is connected to the question of which forms recognition may take, and thus the criteria of the identification of this type of general principles of law.

The second category of general principles of law discussed in the first report consists of those formed within the international legal system. The existence of this category is based on the following: There is nothing in the *travaux* of Article 38(1)(c) of the ICJ Statute, or in the text of that provision, that suggests that general principles of law are limited to those derived from national legal systems. Although the drafters had by and large agreed that general principles of law could derive from national legal systems, they did not exclude the possibility that they might have other origins. This category of general principles of law also finds support in State practice, in international jurisprudence and in the literature. Examples of general principles of this category include the Nürnberg principles, *uti possidetis,* general principle of respect for human dignity, and principles of humanity. States have also expressly invoked general principles of law formed at the international level in judicial or non-judicial settings. During the first debate, several members of the Commission supported this category of general principles of law, considering that it is based on sufficient practice, while it was questioned by some other members. The latter considered that practice was insufficient and that the forms of recognition of this second category may be too flexible. These members were nonetheless not entirely excluding the possible existence of this second category. In any case, the key to addressing the concerns related to this category is to ensure that these general principles must be evidenced by the attitude of States. This matter will be subject to careful study in a future report.

As revealed in practice and in the literature, the forms of 'recognition' required for, or the criteria for, the identification of general principles of law of these two categories seem to differ from each other. It appears that while a two-step analysis is needed for the first category, it is not

necessary for the second. This view was endorsed by members of the Commission agreeing with the two categories.

The following draft conclusions were presented by the Special Rapporteur (due to the lack of time, only the first one was discussed and provisionally adopted by the Drafting Committee in 2019):

"*Draft conclusion 1*
Scope

The present draft conclusions concern general principles of law as a source of international law.

Draft conclusion 2
Requirement of recognition

For a general principle of law to exist, it must be generally recognized by States.

Draft conclusion 3
Categories of general principles of law

General principles of law comprise those:
(a) derived from national legal systems;
(b) formed within the international legal system."

The following question was addressed to States in the 2019 ILC report:

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

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

and

(d) treaty practice".

Members of the Commission encouraged the Special Rapporteur to continue his work by addressing the requirement of recognition and the identification of general principles of law. Comments by AALCO's Member States on these issues would be particularly welcome."