A/80/10

United Nations

Report of the International Law Commission

Seventy-sixth session
(28 April–30 May 2025)

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

General Assembly
Official Records
Eightieth Session
Supplement No. 10

A/80/10

Report of the International Law Commission

Seventy-sixth session
(28 April–30 May 2025)

United Nations • New York, 2025

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2025*.

ISSN 0251-822X

[5 June 2025]

Summary of contents

Contents

Chapter I
Introduction

1. The International Law Commission held its seventy-sixth session from 28 April to 30 May 2025 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Marcelo Vázquez-Bermúdez, Chair of the seventy-fifth session of the Commission.

A. Membership

2. The Commission consists of the following members:

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

Mr. Carlos J. Argüello Gómez (Nicaragua)

Mr. Masahiko Asada (Japan)

Mr. Yacouba Cissé (Côte d'Ivoire)

Mr. Ahmed Amin Fathalla (Egypt)

Mr. Rolf Einar Fife (Norway)

Mr. Mathias Forteau (France)

Mr. George Rodrigo Bandeira Galindo (Brazil)

Ms. Patrícia Galvão Teles (Portugal)

Mr. Claudio Grossman Guiloff (Chile)

Mr. Charles Chernor Jalloh (Sierra Leone)

Mr. Ahmed Laraba (Algeria)

Mr. Keun-Gwan Lee (Republic of Korea)

Mr. Xinmin Ma (China)

Ms. Vilawan Mangklatanakul (Thailand)

Mr. Andreas D. Mavroyiannis (Cyprus)

Mr. Ivon Mingashang (Democratic Republic of the Congo)

Mr. Giuseppe Nesi (Italy)

Mr. Hong Thao Nguyen (Viet Nam)

Ms. Phoebe Okowa (Kenya)

Ms. Nilüfer Oral (Türkiye)

Ms. Alina Orosan (Romania)

Mr. Hassan Ouazzani Chahdi (Morocco)

Mr. Mario Oyarzábal (Argentina)

Mr. Mārtiņš Paparinskis (Latvia)

Mr. Bimal N. Patel (India)

Mr. August Reinisch (Austria)

Ms. Penelope Ridings (New Zealand)

Mr. Juan José Ruda Santolaria (Peru)

Mr. Alioune Sall (Senegal)

Mr. Louis Savadogo (Burkina Faso)

Mr. Munkh-Orgil Tsend (Mongolia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Evgeny Zagaynov (Russian Federation)

B. Officers and the Enlarged Bureau

3. At its 3702nd meeting, on 28 April 2025, the Commission elected the following officers:

Chair:	Mr. Mārtiņš Paparinskis (Latvia)
First Vice-Chair:	Mr. Masahiko Asada (Japan)
Second Vice-Chair:	Mr. Giuseppe Nesi (Italy)
Chair of the Drafting Committee:	Mr. Mario Oyarzábal (Argentina)
Rapporteur:	Mr. Ahmed Amin Fathalla (Egypt)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the Special Rapporteurs[1] and the Co-Chairs of the Study Group on sea-level rise in relation to international law.[2]

5. On 28 April 2025, the Planning Group was constituted, composed of the following members: Mr. Masahiko Asada (Chair); Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Mr. Hassan Ouazzani Chahdi, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Mr. Ahmed Amin Fathalla (*ex officio*).

C. Drafting Committee

6. At its 3707th, 3712th and 3717th meetings, on 5, 12 and 19 May 2025, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(*a*) *Immunity of State officials from foreign criminal jurisdiction*: Mr. Mario Oyarzábal (Chair), Mr. Claudio Grossman Guiloff (Special Rapporteur), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Ms. Phoebe Okowa, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Hassan Ouazzani Chahdi, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Mr. Ahmed Amin Fathalla (*ex officio*);

(*b*) *General principles of law*: Mr. Mario Oyarzábal (Chair), Mr. Marcelo Vázquez-Bermúdez (Special Rapporteur), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Louis Savadogo, Mr. Evgeny Zagaynov and Mr. Ahmed Amin Fathalla (*ex officio*);

[1] Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. August Reinisch, Mr. Louis Savadogo and Mr. Marcelo Vázquez-Bermúdez.

[2] Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

(*c*) *Subsidiary means for the determination of rules of international law*: Mr. Mario Oyarzábal (Chair), Mr. Charles Chernor Jalloh (Special Rapporteur), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Claudio Grossman Guiloff, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Ivon Mingashang, Ms. Phoebe Okowa, Ms. Alina Orosan, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Ms. Penelope Ridings, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Evgeny Zagaynov and Mr. Ahmed Amin Fathalla (*ex officio*).

7. The Drafting Committee held a total of 14 meetings on the three topics indicated above.

D. Working Groups and Study Group

8. At its 3702nd meeting, on 28 April 2025, the Commission established the following Working Groups of the Whole:

(a) Working Group on "Settlement of disputes to which international organizations are parties", chaired by Mr. August Reinisch;

(b) Working Group on "Non-legally binding international agreements", chaired by Mr. Mathias Forteau;

(c) Working Group on "Prevention and repression of piracy and armed robbery at sea", chaired by Mr. Louis Savadogo; and

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

9. On 1 May 2025, the Planning Group established the following Working Groups:

(a) Working Group on the long-term programme of work: Mr. Marcelo Vázquez-Bermúdez (Chair), Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Ivon Mingashang, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Phoebe Okowa, Ms. Alina Orosan, Mr. Hassan Ouazzani Chahdi, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Evgeny Zagaynov and Mr. Ahmed Amin Fathalla (*ex officio*);

(b) Working Group on methods of work and procedures of the Commission: Mr. Charles Chernor Jalloh (Chair).[3]

10. At its 3702nd meeting, on 28 April 2025, the Commission reconstituted a Study Group on sea-level rise in relation to international law, composed of the following members: Mr. Yacouba Cissé (Co-Chair), Ms. Patrícia Galvão Teles (Co-Chair), Ms. Nilüfer Oral (Co-Chair), Mr. Juan José Ruda Santolaria (Co-Chair), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Phoebe Okowa, Ms. Alina Orosan, Mr. Hassan Ouazzani Chahdi, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Ms. Penelope Ridings, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Marcelo Vázquez-Bermúdez and Mr. Ahmed Amin Fathalla (*ex officio*).

E. Secretariat

11. Ms. Elinor Hammarskjöld, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto,

[3] Owing to time constraints, the Working Group on methods of work and procedures of the Commission did not meet during the present session.

Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Carla Hoe, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Ms. Paola Patarroyo, Mr. Jorge Paoletti and Mr. Douglas Pivnichny, Legal Officers, Mr. Gergő Balázs and Ms. Xiao Mao, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

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

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Succession of States in respect of State responsibility.
4. General principles of law.
5. Sea-level rise in relation to international law.
6. Settlement of disputes to which international organizations are parties.
7. Prevention and repression of piracy and armed robbery at sea.
8. Subsidiary means for the determination of rules of international law.
9. Non-legally binding international agreements.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the seventy-seventh session.
12. Cooperation with other bodies.
13. Other business.

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

13. The Commission's expectation for its seventy-sixth session was to complete its work on sea-level rise in relation to international law, as well as to adopt two second-reading texts, under the topics "Immunity of State officials from foreign criminal jurisdiction" and "General principles of law", as well as to finalize two first-reading texts, for the topics "Subsidiary means for the determination of rules of international law" and "Settlement of disputes to which international organizations are parties". It also expected to conclude its work on the topic "Succession of States in respect of State responsibility", and to advance its work on other topics on its programme of work. However, owing to time constraints arising as a consequence of the reduction of the session, the Commission was only able to adopt a final report on the topic "Sea-level rise in relation to international law". While the Commission was able to advance in the consideration of the draft conclusions on general principles of law and the draft articles on immunity of State officials from foreign criminal jurisdiction, the conclusion of their second reading was not possible at the present session owing to time constraints. The conclusion of the topic on "Succession of States in respect of State responsibility" also had to be postponed to the seventy-seventh session. Such delay will also have a knock-on effect, with the two topics initially planned to be concluded on first reading at the present session no longer being on track for completion on second reading during the present quinquennium.

14. In addition, the Commission was only able to dedicate a single meeting, under the format of a working group, for the consideration of the topics "Settlement of disputes to which international organizations are parties", "Non-legally binding international agreements", "Prevention and repression of piracy and armed robbery at sea" and "Succession of States in respect of State responsibility". The postponement of a significant proportion of the work planned for the present session to the seventy-seventh session will also necessarily constrain the amount of time available for the consideration of topics which were expected to be the primary focus of consideration at the seventy-seventh session, namely "Non-legally binding international agreements" and "Prevention and repression of piracy and armed robbery at sea".

15. With respect to the topic "**Sea-level rise in relation to international law**", the Commission reconstituted the Study Group on sea-level rise in relation to international law. The Study Group had before it the final consolidated report of the Co-Chairs of the Study Group (A/CN.4/783), prepared by the Co-Chairs of the Study Group, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria, which addressed all three subtopics – law of the sea, statehood, and the protection of persons affected by sea-level rise – as well as a draft final report of the Study Group, proposed by the Co-Chairs. The Commission adopted the final report of the Study Group and concluded its consideration of the topic (chap. IV and annex I).

16. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/780), as well as comments and observations received from Governments (A/CN.4/771 and Add.1–3). The second report addressed the comments and observations made by Governments on draft articles 7 to 18 and the draft annex, as adopted on first reading, and included proposals for their consideration on second reading. Following the debate in plenary, the Commission decided to refer draft articles 7 to 18 and the draft annex to the Drafting Committee, taking into account the comments and observations made during the plenary debate. The Commission provisionally adopted draft articles 1, 3, 4 and 5, which it had taken note of at the seventy-fifth session. It also subsequently adopted commentaries to draft articles 1, 3, 4 and 5. The Commission received and took note of the report of the Drafting Committee on draft articles 7, 8 and 9 (A/CN.4/L.1017), as provisionally adopted by the Drafting Committee on second reading at the present session. Owing to the unavailability of time for the preparation, translation and consideration of commentaries, as a consequence of the reduced length of the session, the adoption of draft articles 7, 8 and 9 by the Commission was postponed to the seventy-seventh session (chap. V).

17. Concerning the topic "**General principles of law**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/785) with the bibliography thereto (A/CN.4/785/Add.1), as well as comments and observations received from Governments (A/CN.4/779 and Add.1). The fourth report addressed the comments and observations received from Governments on the draft conclusions and commentaries, as adopted on first reading, as well as comments made by States in the Sixth Committee. The fourth report proposed modifications to the draft conclusions where necessary. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 12 to the Drafting Committee, taking into account the comments and observations made during the plenary debate. The Commission received and took note of the report of the Drafting Committee on the consolidated text of draft conclusions 1 to 12 (A/CN.4/L.1018), as provisionally adopted by the Drafting Committee on second reading at the present session. Owing to the unavailability of time for the preparation, translation and consideration of commentaries, as a consequence of the reduced length of the session, the adoption of the draft conclusions on general principles of law on second reading by the Commission was postponed to the seventy-seventh session (chap. VI).

18. Concerning the topic "**Subsidiary means for the determination of rules of international law**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/781) with the bibliography thereto (A/CN.4/781/Add.1). The third report addressed, *inter alia*, teachings, the works of expert bodies, resolutions of international organizations and intergovernmental conferences, the question of unity and coherence of international law, the relationship between "subsidiary means" for determining rules of law and "supplementary means" of interpretation, the structure of the draft conclusions and the future programme of work. Following the debate in plenary, the Commission decided to refer draft conclusions 9, 10, 11, 12 and 13, as presented in the third report, to the Drafting Committee, taking into account the comments and observations made during the plenary debate. The Commission also referred the draft conclusions adopted at previous sessions back to the Drafting Committee for the purpose of finalizing the first reading. The Commission received and took note of the report of the Drafting Committee containing draft conclusions 1 to 13 (A/CN.4/L.1019), as provisionally adopted by the Drafting Committee on first reading at the present session. The adoption of draft conclusions 1 to 13 by the Commission was postponed to the seventy-seventh session, owing to the unavailability of time for the translation and consideration of commentaries, which had been prepared by the Special Rapporteur, as a consequence of the reduced length of the session (chap. VII).

19. Concerning the topic "**Settlement of disputes to which international organizations are parties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/782), with the bibliography thereto (A/CN.4/782/Add.1). In his third report, the Special Rapporteur focused on the discussion of disputes between international organizations and private parties. He also provided an analysis of the practice of settling such disputes, as well as of policy issues relevant to the Commission's work on the topic, outlined his plans for the future work and proposed five draft guidelines. Owing to the reduction of the length of the present session, the Commission was unable to consider the third report of the Special Rapporteur in plenary. The Commission decided to establish a Working Group of the Whole on the topic, chaired by the Special Rapporteur, to allow for a preliminary exchange of views on the third report. The Working Group held one meeting. The Commission took note of the oral report of the Chair of the Working Group on the discussion in the Working Group. The report of the Working Group is reproduced in the present report. The Commission expects to continue with the consideration of the topic and conclude the first reading of the draft guidelines at its seventy-seventh session (chap. VIII).

20. Concerning the topic "**Non-legally binding international agreements**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/784). In his report, the Special Rapporteur addressed general elements of the topic, its purpose, the terminology used, the scope of the project, the form of the outcome and the matters to be addressed through a "without prejudice" clause. The report further analysed the distinction between treaties and non-legally binding international agreements based on jurisprudence, practice and doctrine, and the next steps to be addressed in future work. On the basis of the assessment of the relevant materials, the Special Rapporteur proposed six draft conclusions in his second report. Owing to the reduction of the length of the present session, the

Commission was unable to consider the second report of the Special Rapporteur in the plenary. The Commission decided to establish a Working Group of the Whole on the topic, chaired by the Special Rapporteur, to allow for a preliminary exchange of views on the second report. The Working Group held one meeting. The Commission took note of the oral report of the Chair of the Working Group on the discussion in the Working Group. The report of the Working Group is reproduced in the present report. The Commission expects to continue with the consideration of the topic at its seventy-seventh session (chap. IX).

21. Concerning the topic "**Prevention and repression of piracy and armed robbery at sea**", the Commission had before it a note by the Special Rapporteur (A/CN.4/786). In his note, the Special Rapporteur identified points of law which, in his opinion, could constitute the major themes of the work of the Commission on the topic, outlined general areas of inquiry based on the main features of the topic and provided methodological guidance. The Commission decided to establish a Working Group of the Whole on the topic, chaired by the Special Rapporteur, to consider the note by the Special Rapporteur. Owing to the reduction of the length of the present session, the Working Group held one meeting. The Commission took note of the oral report of the Chair of the Working Group on the discussion in the Working Group. The report of the Working Group is reproduced in the present report. The Commission expects to continue with the consideration of the topic at its seventy-seventh session (chap. X).

22. Concerning the topic "**Succession of States in respect of State responsibility**", and further to the decision taken at its seventy-fifth session, the Commission decided to establish a Working Group of the Whole on the topic, chaired by Mr. Bimal N. Patel. The Working Group had before it a draft report of the Working Group prepared by the Chair (A/CN.4/L.1004). Owing to the reduction of the length of the present session, the Working Group was only able to hold one meeting. The Commission took note of the oral report of the Chair of the Working Group on the discussion in the Working Group. The report of the Working Group is reproduced in the present report. The Commission expects to continue with the consideration of the topic at its seventy-seventh session (chap. XI).

23. Concerning "**Other decisions and conclusions of the Commission**", the Commission decided to include the topics "Compensation for the damage caused by internationally wrongful acts" and "Due diligence in international law" in its programme of work and to appoint Mr. Mārtiņš Paparinskis and Ms. Penelope Ridings, respectively, as Special Rapporteurs (chap. XII, sect. B).

24. The Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to establish the Working Group on the long-term programme of work, chaired by Mr. Marcelo Vázquez-Bermúdez, and the Working Group on methods of work and procedures of the Commission, chaired by Mr. Charles Chernor Jalloh. The Commission decided to include in its long-term programme of work the topics "The principle of non-intervention in international law", "Identification and legal consequences of obligations *erga omnes* in international law" and "Legal aspects of accountability for crimes committed against United Nations personnel serving in peacekeeping operations" (chap. XII, sect. C, and annexes II, III and IV respectively).

25. Judge Iwasawa Yuji, President of the International Court of Justice, addressed the Commission on 8 May 2025. Members of the Commission held an informal exchange of views with the International Committee of the Red Cross on 20 May 2025 (chap. XII, sect. D).

26. The Commission decided that its seventy-seventh session would be held in New York, from 20 April to 29 May 2026, and in Geneva, from 29 June to 7 August 2026. In the event that insufficient resources are made available to hold the first part of the seventy-seventh session in New York, then the first part would be held in Geneva from 27 April to 5 June 2026 (chap. XII, sect. C).

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

A. Settlement of disputes to which international organizations are parties

27. The Commission would appreciate receiving information from States, international organizations and others, on additional materials, in all official languages of the United Nations, for inclusion in a future revised version of the bibliography and table of cases prepared by the Special Rapporteur on the settlement of disputes to which international organizations are parties for the seventy-sixth session.[4] The Commission would particularly appreciate receiving relevant information on decisions of national and international courts and arbitral tribunals, as well as publications, on the topic, by 1 December 2025.

B. Non-legally binding international agreements

28. The Commission considers as still relevant the request for information on the topic "Non-legally binding international agreements" contained in chapter III of the report of its seventy-fifth session (2024), and it would appreciate receiving the following information, or any updates to information already submitted pursuant to that request, by 1 December 2025, concerning examples, in particular, of:

(*a*) the practice of competent ministries and decisions of national courts, as appropriate, concerning non-legally binding international agreements; and

(*b*) any guidelines adopted at the national level on non-legally binding international agreements that States could publicly share with the Special Rapporteur and the Commission.

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

29. Having regard to the list of documents contained in the annex to the note by the Special Rapporteur,[5] the Commission would appreciate receiving from States and competent international organizations additional or updated information, by 1 December 2025, concerning legislation, decisions of national courts and tribunals and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea. The Commission would also appreciate receiving from States information concerning legislation and practice related to the use of uncrewed vessels and aircrafts in the context of prevention and repression of piracy and armed robbery at sea.

[4] A/CN.4/782/Add.1.
[5] A/CN.4/786.

Chapter IV
Sea-level rise in relation to international law

A. Introduction

30. At its seventy-first session (2019), the International Law Commission decided to include the topic "Sea-level rise in relation to international law" in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu,[6] Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.[7] The Study Group decided to examine the three subtopics identified in the syllabus for the topic prepared in 2018,[8] namely: (a) issues related to the law of the sea (to be co-chaired by Mr. Aurescu and Ms. Oral); (b) issues related to statehood (Mr. Ruda Santolaria); and (c) issues related to the protection of persons affected by sea-level rise (Ms. Galvão Teles).

31. At each session from the seventy-second (2021) to the seventy-fifth (2024) sessions, the Commission reconstituted the Study Group. Over that period, the Study Group considered the first issues paper on the topic, on issues related to the law of the sea,[9] the second issues paper, on issues related to statehood and to the protection of persons affected by sea-level rise,[10] and an additional paper to each issues paper.[11] Each paper was issued together with a selected bibliography.[12] The Commission considered and adopted the reports of the Study Group on its work at each session over that period.[13]

B. Consideration of the topic at the present session

32. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by three of the Co-Chairs, namely Ms. Galvão Teles, Ms. Oral and Mr. Ruda Santolaria.

33. In accordance with the agreed programme of work and methods of work, the Study Group had before it the final consolidated report of the Co-Chairs of the Study Group on the topic (A/CN.4/783), prepared by Ms. Galvão Teles, Ms. Oral and Mr. Ruda Santolaria. In the final consolidated report, to the Co-Chairs provided a summary of the preliminary observations in the issues papers and the additional papers to the issues papers regarding the three subtopics; a summary of the statements made by States during the most recent debates in the Sixth Committee and of the submissions by States to the Commission; and an overview of recent relevant developments at the international level. The Co-Chairs then presented the following cross-cutting issues and interlinkages between the three subtopics: stability, predictability and certainty; preservation of existing rights; self-determination; permanent sovereignty over natural resources; equity and solidarity; international cooperation; and international law as adaptation. In the conclusion, the Co-Chairs presented reflections and final observations and outlined possible ways forward. A draft final report of the Study Group was contained in an annex to the final consolidated report of the Co-Chairs, and was

[6] Mr. Aurescu resigned from the Commission in 2024, following his election to the International Court of Justice.

[7] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 265.

[8] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), annex B.

[9] A/CN.4/740 and Corr.1.

[10] A/CN.4/752.

[11] A/CN.4/761 and A/CN.4/774.

[12] A/CN.4/740/Add.1, A/CN.4/752/Add.1, A/CN.4/761/Add.1 and A/CN.4/774/Add.1.

[13] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296; *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 153–237; *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 131–230; and *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 335–417.

submitted for the consideration of the Study Group. A summary of the deliberations on the final consolidated report of the Co-Chairs is given below.

34. The Study Group, which at the present session comprised 28 members, held six meetings, from 28 April to 5 May 2025.

35. At its 3719th meeting, on 26 May 2025, the Commission took note of the oral report of the Study Group, in which, *inter alia*, the Study Group recommended that the Commission: (a) adopt the draft final report of the Study Group on the topic, which provided useful guidance for States; and (b) conclude its consideration of the topic "Sea-level rise in relation to international law".

36. At its 3720th meeting, on 26 May 2025, the Commission adopted the final report of the Study Group on the topic "Sea-level rise in relation to international law" and concluded its consideration of the topic. The final report of the Study Group is contained in annex I to the present report.

1. Introduction of the final consolidated report of the Co-Chairs (A/CN.4/783)

(a) Procedure followed by the Study Group

37. At the first meeting of the Study Group, held on 28 April 2025, the Co-Chair (Ms. Galvão Teles) indicated that the purpose of the six meetings scheduled in the session was to allow for an exchange of views on the final consolidated report of the Co-Chairs, and on the draft final report of the Study Group, as contained in the annex thereto.

(b) Presentation of the final consolidated report of the Co-Chairs

38. At the first meeting of the Study Group, the Co-Chairs (Ms. Galvão Teles, Ms. Oral and Mr. Ruda Santolaria) gave a general presentation of their final consolidated report. The Co-Chairs recalled the mandate of the Study Group and emphasized that since 2018, when the Commission had recommended the inclusion of the topic in its long-term programme of work, the importance of the topic had grown for the international community. Attention was drawn to the work of various United Nations organs addressing the topic of sea-level rise, including the high-level plenary meeting of the General Assembly on "Addressing the existential threats posed by sea-level rise", on 25 September 2024. The Co-Chairs then proceeded, in turn, to introduce the sections of the final consolidated report dealing with each of the three subtopics: issues related to the law of the sea, issues related to statehood and issues related to the protection of persons affected by sea-level rise.

39. The Co-Chair on issues related to the law of the sea (Ms. Oral) reiterated that since the Study Group had begun its consideration of the topic, there had been wide engagement and support on the part of States in the Sixth Committee, with more than 100 States having expressed views on the topic. She noted that a convergence of views had emerged among States across the various regions regarding key issues concerning the law of the sea in relation to sea-level rise.

40. The Co-Chair noted that among such views were the following: that the United Nations Convention on the Law of the Sea[14] did not address sea-level rise as it was not an issue that had been discussed at the time of its negotiation; that the Convention did not prohibit the preservation of baselines and maritime zones; that there was no obligation for States to update baselines on nautical charts to account for changes as a result of sea-level rise; and that the principle of fundamental change of circumstances (*rebus sic stantibus*), as provided for in article 62 of the Vienna Convention on the Law of Treaties,[15] did not apply to maritime boundaries. Furthermore, she recalled recent advisory proceedings on climate

[14] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[15] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), *ibid.*, vol. 1155, No. 18232, p. 331.

change before the International Tribunal for the Law of the Sea and the International Court of Justice,[16] during which a number of States had referred to sea-level rise in their statements.

41. The Co-Chair noted that the three subtopics were interconnected, and recalled that several States had requested the Study Group to examine cross-cutting issues and interlinkages, such as legal stability, predictability and certainty, the preservation of existing rights, and international law as adaptation. On the basis of the statements and comments from States, legal stability, predictability and certainty had emerged as foundational principles for all three subtopics. The favoured approach was to seek to ensure the preservation of the legitimate rights of affected States. In addressing the effects of sea-level rise, existing international law should be interpreted and applied in such a way as to meet the needs of States and populations that might be affected by the possible adverse consequences of climate change and sea-level rise, in order to ensure legal stability, predictability and certainty, equity and the preservation of existing rights. Such an approach could entail evolutive or adaptive interpretation and consideration of subsequent agreements and subsequent practice.

42. The Co-Chair on issues related to statehood (Mr. Ruda Santolaria) recalled the multidimensional global impact of sea-level rise, which was an existential question for specially affected States, given, *inter alia*, the impact on peoples' lives and livelihoods and on the functioning of States. Regarding the debates in the Sixth Committee, he noted that the majority of States that had taken the floor had considered that article 1 of the 1933 Convention on the Rights and Duties of States[17] dealt only with the creation of States and not with the continuity or extinction of existing States. He also recalled the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, issued by the leaders of the Pacific Islands Forum on 9 November 2023.[18]

43. The Co-Chair noted that a number of States had linked statehood to self-determination, in that the States most affected by sea-level rise could express their right to self-determination by preserving statehood or by opting for another form of organization. Other States had been more cautious in invoking the principle of self-determination, which they considered applicable principally in the context of decolonization. States had referred to a number of fundamental principles of international law that had not been originally conceived of in relation to sea-level rise, but were nonetheless relevant when analysing the phenomenon. He recalled that at the high-level plenary meeting of the General Assembly, held on 25 September 2024, States had recognized the work of the Commission and expressed their support for the continuity of statehood of the most affected States.

44. The Co-Chair highlighted developments in relation to regional and bilateral declarations and initiatives, including the following: the Declaration of the Heads of State and Government of the Alliance of Small Island States on Sea-level Rise and Statehood, adopted on 23 September 2024,[19] in which the continuity of statehood was recognized as a principle of international law; the Australia-Tuvalu Falepili Union Treaty, concluded in Rarotonga on 9 November 2023;[20] the joint communiqué on the reaffirmation of diplomatic relations between Latvia and Tuvalu, signed by the Ministers for Foreign Affairs of the two States in New York on 24 September 2024;[21] and the launch by the Inter-American Juridical Committee, of the Organization of American States, of a topic entitled "Legal implications of sea-level rise in the inter-American regional context".[22] He also referred to the advisory

[16] See https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/ and https://www.icj-cij.org/case/187.

[17] Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.

[18] Available at https://forumsec.org/publications/reports-communique-52nd-pacific-islands-leaders-forum-2023.

[19] Available at https://aosis-website.azurewebsites.net/aosis-leaders-declaration-on-sea-level-rise-and-statehood.

[20] Available at https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty.

[21] Available at https://www.mfa.gov.lv/en/media/15961/download?attachment.

[22] See https://www.oas.org/en/sla/iajc/docs/CJI-RES_283_CIII-O-23_ENG_rev1.pdf and https://www.oas.org/en/sla/iajc/docs/Legal_Implications_of_Sea-Level_Rise_in_the_Inter-American_Regional_Context.pdf.

proceedings on climate change before the International Court of Justice, during which several States had expressed support for the above-mentioned declarations. Regarding cross-cutting issues, he highlighted the importance of self-determination, including consultation of the affected populations on the measures to be applied, and the relevance of permanent sovereignty over natural resources, which had been linked by several States to statehood, self-determination and the preservation of the territorial integrity of States.

45. The Co-Chair on issues related to the protection of persons affected by sea-level rise (Ms. Galvão Teles) reiterated that existing legal frameworks for such protection were fragmented and non-specific to sea-level rise, and that relevant State practice was sparse at the global level, but more developed in States already affected by the phenomenon. In the debate in the Sixth Committee in 2024, States had discussed the need to examine the adequacy of existing legal frameworks, the principle of human dignity as a guiding principle, and the requirement for a combination of needs-based and rights-based approaches to address the issue effectively. States recognized that there was no binding international legal instrument that specifically addressed climate change-related displacement. Several States called for new bilateral or multilateral legal instruments to strengthen protection for climate-displaced individuals.

46. The Co-Chair further recalled that at the high-level plenary meeting of the General Assembly, held on 25 September 2024, States had reiterated the importance of equity, solidarity and international cooperation as essential principles to address sea-level rise. In relation to the recent advisory proceedings before international courts and tribunals, she noted that issues related to the protection of persons affected by climate change had been raised by several participants in the proceedings before the International Court of Justice, and that the duty to cooperate, non-discrimination and the rights of vulnerable groups affected by climate change had been discussed during the hearings for the proceedings before the Inter-American Court of Human Rights.[23]

47. The Co-Chair recalled the cases *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[24] and *Duarte Agostinho and Others v. Portugal and 32 Others*,[25] in which the European Court of Human Rights had emphasized the need for effective State action on climate change while clarifying the limitations of individual claims. The final report of the Committee on International Law and Sea-Level Rise, adopted at the Eighty-First Conference of the International Law Association, in June 2024, contained a comprehensive review of key legal issues related to statehood, human rights and international cooperation. On cross-cutting issues, she emphasized the role of equity, solidarity and international cooperation. Lastly, she made several observations reflecting a convergence of views in the Study Group and of States, including the need to develop legal and practical solutions to better protect persons affected by sea-level rise and the need for international cooperation. She also emphasized the role of human dignity as a guiding principle for any action to be taken in the context of sea-level rise, and the importance of consultation with the persons concerned in respect of decisions affecting them.

2. Summary of the exchange of views

(a) General comments on the topic and the final consolidated report of the Co-Chairs

48. Members of the Study Group thanked the Co-Chairs for their work on the topic and congratulated them for producing their final consolidated report, which included a detailed synthesis of the comments from States. Members also thanked the Co-Chairs for their efforts to produce a draft report of the Study Group. Members underscored the relevance of the topic and welcomed the fact that the Commission was working on an issue of paramount importance for States, paving the way for further developments in international law. The

[23] See https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634.

[24] European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Judgment, 9 April 2024.

[25] European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20, Decision, 9 April 2024.

work of the Commission on the topic was timely, and provided evidence of the value of its role and continued commitment to justice, equality, equity, stability and human dignity.

49. Members noted that the work of the Commission on the topic had catalysed the practice of States and had created space for the development of such practice. There had been significant developments in relation to the legal regulation of the effects of sea-level rise since the Commission had first adopted its programme of work on the topic in 2019, including a growing convergence of views among States. The efforts of the Co-Chairs and their engagement with States were welcomed, and such interactions were considered to be a possible model for the Commission in future topics.

50. Members stressed that the Study Group's focus on the legal aspects of the topic had enabled the identification of legal issues and certain general principles, which could be helpful to guide the practice of States and policy decisions. The Commission had been able to record the developments and changes in State practice, in relation to important issues such as the law of the sea, during the period over which the Study Group had been considering the topic. The position of certain States had evolved as the topic was considered, and the work of the Commission could be perceived as having been useful in contributing to the development of international law.

51. However, the view was expressed that the format of a study group as a method of work had imposed certain constraints on the scope of the study of the topic. First, the final work of the Commission consisted of a synthesis of issues and possibilities, whereas the preparation of a concrete instrument could have allowed the Commission to identify in more detail the legal issues arising from sea-level rise. Second, the consideration of the topic within the Study Group did not follow the Commission's traditional methods of work: while the views of the Co-Chairs were detailed in the issues papers and the final consolidated report, the views and nuances provided by other members of the Commission were only summarized briefly in the annual reports, and the final consolidated report of the Co-Chairs had few references to the debates held in the Study Group in previous years.

52. In relation to the final outcome of the Commission's work on the topic, different views were expressed as to whether the Commission should have focused on producing a draft interpretive declaration on the United Nations Convention on the Law of the Sea. According to one view, such a draft interpretive declaration could have been of assistance to States in continuing their work on the topic. Another view was that such an interpretive declaration could hinder further developments in the field and was beyond the mandate of the Study Group. A different view was that it would not have been possible to amend the Convention in time to address the impact of sea-level rise, given the immediacy of the phenomenon and the complexity of the amendment procedure. A further view was that the final work of the Study Group could have also addressed the issue of the modalities that a State could choose to preserve its existence, and the role that international cooperation could play in that regard.

53. It was suggested that the final report of the Study Group should deduce principles and considerations that States could use to continue developing or adapting legal frameworks with regard to the occurrence of sea-level rise. The final report of the Study Group should evidence the developments in the Commission's analysis of the topic and should be presented to States in a practical manner, reflecting the consensus achieved around certain key aspects. Members also considered that the final report of the Study Group should be read in the context of the debates held by the Study Group over the years, separately from the views of the Co-Chairs as reflected in their final consolidated report. The final report of the Study Group should not only focus on actions before other entities, including advisory proceedings and interpretive statements, but also offer solutions to States on the basis of existing frameworks.

(b) Law of the sea

54. Members generally considered that the existing legal framework remained applicable in the context of sea-level rise, and added that the scope of application of such rules could be made clearer.

55. In relation to the question of baselines, it was noted that States had largely considered the notion of fixed baselines. The view was expressed that the United Nations Convention on the Law of the Sea did not require the modification or updating of charts to reflect changes in baselines. It was stressed that, as noted by the Co-Chair in her introduction on issues related to the law of the sea, many States considered that there was no obligation for them to update nautical charts. However, the view was expressed that the absence of such an obligation did not necessarily imply consensus as to whether baselines were fixed. Some members expressed a preference for referring to fixed or final baselines, rather than to the immutability of boundaries. According to another view, the notion of fixed baselines was a consequence of, and not a basis for, legal stability.

56. Furthermore, members of the Study Group emphasized the need to preserve legal stability, which was one of the underlying arguments for the preservation of the maritime entitlements of States affected by sea-level rise. It was suggested that the final report of the Study Group should refer expressly to that connection. Also in relation to the preservation of legal stability, a suggestion was made to refer to the effects of article 76 of the United Nations Convention on the Law of the Sea, according to which the outer limits of the continental shelf established by a coastal State on the basis of a recommendation by the Commission on the Limits of the Continental Shelf were final and binding, and were independent of the question of baselines, even if they had been considered as the basis for initial claims to such areas.

57. Members noted that, as had been observed by the Co-Chair and many States, the principle of fundamental change of circumstances (*rebus sic stantibus*) was not applicable to the provisions of the United Nations Convention on the Law of the Sea in the context of sea-level rise, because, as indicated in article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, the principle did not apply to treaties establishing territorial boundaries. Members also noted that defending such a proposition would run against the importance of legal stability.

58. Some members considered it desirable to clarify some expressions referred to as international legal principles. For example, it was considered crucial to indicate that the principle that "the land dominates the sea" was not absolute and that it should be evaluated in the light of equitable considerations and the stability of boundaries, since it was the coastline, not the land mass itself, that determined the baselines and corresponding maritime entitlements. Some concern was voiced that a reference to that principle might give the impression that loss of land would extinguish entitlements, and it was also welcomed that the draft final report of the Study Group did not include such a reference.

59. Members suggested a cautious approach regarding an adaptive interpretation of the United Nations Convention on the Law of the Sea. By reference to the case law of the International Court of Justice,[26] the view was expressed that an evolutive interpretation had a limited application to terms intended to evolve over time, and would not allow for the introduction of entirely new concepts.

60. Members suggested that the proposal of the Co-Chairs to view international law as adaptation could be simplified and brought closer to more established approaches of interpretation. That included subsequent agreements and subsequent practice, as provided for in the Vienna Convention on the Law of Treaties, in addition to the original meaning of the terms of the treaty and taking into account its object and purpose. It was noted that there could be challenges in establishing the existence of a subsequent agreement, as practice was often diverse and contradictory.

(c) Statehood

61. As in previous years, general support was expressed in the Study Group for the continuity of statehood. Members emphasized that, in the context of the preservation of statehood, the principle of cooperation implied a duty for all States. It was noted that non-continuity could have multiple implications, including for international peace and security, existing treaty regimes, the right of peoples to self-determination and the rights of

[26] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213.

persons affected by sea-level rise, and for the permanent sovereignty over natural resources enjoyed by the low-lying coastal States and small island developing States affected by the phenomenon.

62. Regarding the legal characterization of the continuity of statehood, it was noted that during the debates on the topic in the Sixth Committee, and in the comments submitted directly to the Commission, some States had referred to continuity as a principle, while others had referred to it as a presumption. It was emphasized that the characterization of continuity of statehood as a presumption could place the burden of proof on the State affected by sea-level rise to demonstrate such continuity, which could be opposed by other States and might give rise to a discussion as to the possible existence of rebuttable and irrebuttable presumptions. Instead, the characterization of continuity as a principle captured a more complex concept that could encompass nuances to adapt to the specific situation of States affected by sea-level rise without creating the challenges and complexities of referring to a presumption.

63. Concerns were expressed about the practical challenges of the total or partial submersion of the land surface of States. Some of the difficulties mentioned included the potential absence of enforcement jurisdiction over a physical area, and challenges for other States as to how to respect the sovereignty of another State in the absence of territory, which could potentially lead to a differentiation between States with and States without a clearly defined territory. Another example of possible practical challenges pertained to the construction of artificial structures within the current limits of areas under the jurisdiction of the State to support the continuity of statehood, and the consequent applicability of special regulations on artificial islands under the United Nations Convention on the Law of the Sea.

(d) Protection of persons affected by sea-level rise

64. As in previous sessions, members agreed that respect for human dignity should constitute a guiding principle in the protection of persons affected by sea-level rise. Members particularly noted that a balanced endorsement of complementary needs-based and rights-based approaches should be favoured and had received support from States in the Sixth Committee. The protection of vulnerable people and their dignity was not merely a moral imperative: positive measures were needed to ensure the enjoyment of human rights. It was suggested that, for the sake of consistency of interpretation and legal certainty, the Commission should recognize dignity as a functional legal principle that allowed for the interpretation of existing obligations in fragmented regimes. It was further suggested that needs-based approaches should be understood as mechanisms for implementing rights-based obligations, in order to ensure that legal legitimacy and operational flexibility operated in conformity with the principle of accountability.

65. Members reaffirmed the significant challenges posed by sea-level rise for the protection of persons, particularly those in vulnerable coastal communities, and considered that such challenges would be more pronounced for developing States and States whose coastlines were more vulnerable to rising sea levels, even if they had contributed the least to the creation of the problem.

66. The view was expressed that the principle of *non-refoulement* was well established in international law, and that it could be relevant to the protection of persons affected by sea-level rise as a guarantee that such persons would not be put at risk. The importance of the consideration of regional practice was also highlighted, and reference was made, *inter alia*, to the Cartagena Declaration on Refugees and its broad definition of refugees.[27]

67. The view was expressed that in the light of the fragmented and inadequate nature of existing legal frameworks, further development of the international legal framework in a more specific, coherent and complete manner was most needed. Members of the Study Group agreed that there was a need for more specific and widespread State practice on the matter,

[27] Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984. Available at www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf.

as it remained sparse at the international level and mostly not specific to sea-level rise. It was noted that some States considered that the Commission's draft articles on the protection of persons in the event of disasters[28] were a potential basis for addressing sea-level rise. Some members considered that further examination was required before adopting such route. Specifically, questions would arise as to the legal characterization of sea-level rise as a disaster within the scope of those draft articles, and its possible definition as a slow-onset disaster or as a consequence of human-made climate change.

68. Noting broad agreement on the matter, members acknowledged that the continuity of statehood was crucial in facilitating the protection of affected populations, especially in relation to nationality and institutional continuity. A more nuanced formulation was recommended, however, to avoid insinuating that loss of statehood could potentially entail loss of human rights protection. The view was expressed that, even in the absence of territorial continuity, recognition that human rights obligations continued to be binding and applicable extraterritorially was essential to avoid the exclusion of vulnerable people from the reach of the law.

69. Members reiterated that all States had a legal duty to cooperate with affected States to protect persons affected by sea-level rise. However, the view was expressed that the Study Group should elaborate on the specific obligations that would arise with regard to international cooperation, and on how States could be supported to develop tools to avoid the statelessness of persons affected by sea-level rise. Analysis of the scope of cooperation with regard to persons affected by sea-level rise should focus on the duty bearers of those obligations, with a view to incorporating the principle of cooperation into a more concrete legal framework, which could be implemented and monitored. Certain members affirmed that due consideration should be given to the capacities and resources of both the affected and the assisting States, particularly in the case of developing States.

70. It was noted that risk reduction was central to addressing matters such as the effects of statelessness and internal displacement, and that a preventive approach could be followed. Regarding the protection of Indigenous Peoples as specifically affected persons, it was suggested not to limit the discussion to mechanisms for prior consultation, but also to examine whether the current framework sufficiently protected their rights and identify the potential gaps.

(e) Cross-cutting issues and interlinkages between the subtopics

71. Members exchanged views in relation to various notions that were relevant across all three subtopics. As in past sessions, several members recalled the importance of international cooperation in addressing the effects of sea-level rise. The duty to cooperate appeared in a number of legal instruments, including the United Nations Convention on the Law of the Sea, and in the past work of the Commission on the draft articles on the protection of persons in the event of disasters. Some other members considered that the Commission should not categorize cooperation as a general principle of law, as such categorization should only be done in conformity with the methodology proposed by the Commission in its ongoing work on that type of source of international law.

72. It was noted that one of the aspects of the duty to cooperate pertained to whether there was a duty to assist States affected by sea-level rise. Some members considered that the duty to cooperate did not entail a duty to assist affected States, recalling that the Commission had not made such an assertion in draft article 7, on the duty to cooperate, of the draft articles on the protection of persons in the event of disasters. The view was expressed that the scope of the duty to cooperate should take into consideration the respective capabilities of States.

73. Members stressed the importance of respect for the right of peoples in those States affected by sea-level rise to self-determination. Some members considered that the concept of self-determination could be overly broad and did not necessarily reflect the views of States from all regions. Some members expressed the view that the principle of self-determination was primarily applicable in the context of decolonization, and questioned the extent to which it could be applicable in situations arising from sea-level rise. Other members considered that

[28] *Yearbook … 2016*, vol. II (Part Two), para. 48.

the exercise of self-determination was linked to other concepts, such as the permanent sovereignty of the affected State over natural resources, and that it was applicable to situations beyond decolonization.

74. In relation to equity, members stressed its relevance in the consideration of options to address the effects of sea-level rise, and debated whether it should be qualified as a general principle of law. The view was expressed that equitable considerations needed to be taken into account at all times, in particular in relation to the evolution of statehood and alternatives to the continuity of statehood under international law. Given the various views of both members and States in relation to the precise content and scope of equity, it was suggested that it could be considered as a guiding principle, but not as a customary norm or a general principle of law. It was stated that equity might be addressed in practice only when other legal notions did not provide a specific course of action. It was noted that equitable considerations were referred to in instruments such as the United Nations Convention on the Law of the Sea.

75. Several members referred to the importance of the concept of solidarity in relation to challenges posed by sea-level rise. Some members supported the view that solidarity should be characterized as a principle, as found in various regional instruments, including the Charter of the Organization of American States[29] and the African Charter on Human and Peoples' Rights.[30] They noted that the concept also played an important role in the context of the law of the European Union. It was recalled that there was ongoing work on the matter within the United Nations context, including the appointment of the Independent Expert on human rights and international solidarity, who had called for a declaration on the right to international solidarity. However, others held the view that categorizing solidarity as a general principle would not be in conformity with the criteria that the Commission had been studying in its ongoing work on general principles of law, as there was insufficient practice of States or judicial decisions that qualified it as a principle.

76. References were also made to the principle of common but differentiated responsibilities and respective capacities, which had been mentioned by the International Tribunal for the Law of the Sea in its advisory opinion on climate change,[31] and which was at the core of the climate change regime. That principle was also crucial in the context of sea-level rise, as the States that had contributed the least to climate change would suffer the adverse consequences most severely.

C. Tribute to the Study Group and its Co-Chairs

77. At its 3720th meeting, held on 26 May 2025, the Commission, after adopting the final report of the Study Group on sea-level rise in relation to international law, which is contained in annex I to the present report, adopted the following resolution by acclamation:

"*The International Law Commission*,

Having adopted the final report of the Study Group on sea-level rise in relation to international law,

[29] Charter of the Organization of American States (Bogotá, 30 April 1948), United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.

[30] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217.

[31] International Tribunal for the Law of the Sea, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, Case No. 31.

Expresses to the Study Group and its Co-Chairs, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria, as well as to the former Co-Chair, Mr. Bogdan Aurescu,[1] its deep appreciation and warm congratulations for the outstanding contribution that they have made in the preparation of the issues papers, the additional papers thereto and the final consolidated report of the Co-Chairs of the Study Group on sea-level rise in relation to international law through their tireless efforts and devoted work, and for the results achieved in the elaboration of the final report of the Study Group on sea-level rise in relation to international law.

--

[1] Mr. Aurescu resigned from the Commission in 2024, following his election to the International Court of Justice."

Chapter V
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

78. 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.[32] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[33]

79. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[34] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[35]

80. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[36] The Special Rapporteur submitted eight reports. The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, her seventh report during the seventy-first session (2019), and her eighth report during the seventy-second session (2021).[37]

81. At its seventy-third session (2022), the Commission adopted, on first reading, the entire set of draft articles on immunity of State officials from foreign criminal jurisdiction which comprised 18 draft articles and a draft annex, together with commentaries thereto.[38] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.[39]

82. The Commission, at its seventy-fourth session (2023), appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission.[40]

83. At its seventy-fifth session (2024), the Commission had before it the first report of the Special Rapporteur (A/CN.4/775), as well as comments and observations received from Governments (A/CN.4/771 and Add.1 and 2). Following the debate in plenary, the Commission decided to refer draft articles 1 to 6, as contained in the Special Rapporteur's

[32] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[33] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[34] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[35] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[36] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

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

[38] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 64–65.

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

[40] *Ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 250.

first report, to the Drafting Committee.[41] The Commission subsequently took note of draft articles 1, 3, 4 and 5,[42] as contained in the report of the Drafting Committee (see A/CN.4/L.1001) and provisionally adopted by the Committee at that session.[43]

B. Consideration of the topic at the present session

84. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/780), as well as comments and observations received from Governments (A/CN.4/771 and Add.1–Add.3). The Special Rapporteur, in his second report, examined the comments and observations received from Governments on draft articles 7 to 18 and the draft annex, as adopted on first reading. He made proposals for consideration on second reading in relation to draft articles 7 to 18 and the draft annex, in light of the comments and observations made by States in both written comments and in the Sixth Committee.

85. At its 3702nd to 3707th meetings, from 28 April to 5 May 2025, the Commission considered the second report of the Special Rapporteur. At its 3707th meeting, on 5 May 2025, the Commission decided to refer draft articles 7 to 18 and the draft annex to the Drafting Committee, taking into account the comments and observations made during the plenary debate. The summary of the plenary debate can be found in paragraphs 107 to 162 below.

86. At its 3704th meeting, on 30 April 2025, the Commission provisionally adopted draft articles 1, 3, 4 and 5, which had been provisionally adopted by the Drafting Committee at the seventy-fifth session (see sect C.1 below).

87. At its 3718th meeting, on 23 May 2025, the Chair of the Drafting Committee introduced the report of the Drafting Committee on the topic (see A/CN.4/L.1017).[44] At the same meeting, the Commission took note of the report of the Drafting Committee, containing draft articles 7, 8 and 9, provisionally adopted by the Committee on second reading at the present session. The adoption of draft articles 7, 8 and 9 by the Commission was postponed to the seventy-seventh session, owing to the unavailability of time for the preparation, translation and consideration of corresponding commentaries, as a consequence of the reduced length of the present session.

88. At its 3722nd to 3724th meetings, on 27 and 28 May 2025, the Commission adopted the commentaries to draft articles 1, 3, 4 and 5, provisionally adopted at the present session on second reading (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the second report

89. The Special Rapporteur recalled that the objective of the second reading was to streamline the text adopted on first reading and modify it only where there were compelling reasons to do so, whether owing to new developments in international law or to the need for clarification. He emphasized that his second report was based on a careful review of the extensive written and oral comments provided by States, as well as significant developments in national jurisprudence and legislation since 2022, particularly regarding the most serious international crimes. He further recalled that broad opportunities had been afforded to States to submit comments, including additional written observations, with respect to draft articles 7 to 18 and the draft annex. The report reflected a commitment both to achieving consensus and to remaining faithful to the evolution of international law.

90. The Special Rapporteur expressed appreciation for the Commission's work at its seventy-fifth session, when the Commission took note of draft articles 1, 3, 4 and 5, while

[41] *Ibid.*, *Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 144.

[42] *Ibid.*, para. 145.

[43] Statement of the Chair of the Drafting Committee at the seventy-fifth session (2024) available on the website of the Commission at https://legal.un.org/ilc/guide/4_2.shtml.

[44] Statement of the Chair of the Drafting Committee at the seventy-sixth session (2025), available on the website of the Commission at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2025_dc_chair_statement_iso.pdf&lang=ES. Statements made at the 3718th meeting are reflected in document A/CN.4/SR.3718.

noting that draft article 2 would be adopted at the conclusion of the topic for methodological reasons.

91. Turning to draft article 7, on crimes under international law in respect of which immunity *ratione materiae* shall not apply, the Special Rapporteur recalled that there was general support by States for the proposition that there should be responsibility for the most serious crimes under international law. Some States considered it essential and valuable to list those crimes, while others favoured the adoption of a set of criteria rather than a list. Among the latter group, certain States expressed reservations about establishing a list, fearing that it might hinder the progressive development of the law by being interpreted as exhaustive. Conversely, those supporting a list invoked such arguments as the need for legal certainty. Taking into account the principles of international criminal law and the requirement of typification of crimes, the Special Rapporteur considered the arguments in favour of a list to be persuasive. On the question of the non-exhaustive nature of the list, he underlined that the draft articles did not exclude the possibility that additional international crimes could be incorporated in the future through the evolution of international law. He also noted that all non-governmental organizations that had commented on draft article 7, and whose comments he had requested the Secretariat to distribute to the Commission, had emphasized that the non-exhaustive nature of the list should be addressed either in the draft article itself or in the commentary.

92. The Special Rapporteur proposed the addition of the crimes of aggression, slavery, and the slave trade to the list of crimes. With respect to the crime of aggression, he outlined the grounds justifying its inclusion, for example: several States had requested it; aggression had long been recognized as one of the most serious crimes under international law, characterized as the "supreme international crime" by the Nuremberg Tribunal; omitting aggression could undermine efforts to prosecute it and risked creating an artificial hierarchy among serious international crimes; and its inclusion would align with the Commission's earlier work, including the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[45] the 1954 draft Code of Offences against the Peace and Security of Mankind[46] and the 1996 draft Code of Crimes against the Peace and Security of Mankind.[47] The Special Rapporteur also recalled that since 2017, when draft article 7 was provisionally adopted, jurisdiction over the crime of aggression had been activated by the International Criminal Court through the entry into force of the Kampala Amendments.[48] Those arguments had also been raised by States in their comments.

93. With regard to slavery and the slave trade, the Special Rapporteur indicated reasons supporting their inclusion. Those crimes were generally placed among the most serious international crimes, and broad consensus existed on their definition. Slavery and the slave trade, similarly to apartheid, torture and enforced disappearance, which were already included in the draft article, had been the subject of treaties aimed at their prevention, suppression and punishment. He noted the recent development whereby Sierra Leone had, on 16 April 2025, deposited a proposal to amend articles 7 and 8 of the Rome Statute of the International Criminal Court to classify slavery as a war crime and the slave trade as both a crime against humanity and a war crime. The Special Rapporteur further emphasized the long-standing international practice prohibiting slavery and the slave trade, with prohibitions dating back to the early nineteenth century. He observed that the prohibition of those crimes constituted a peremptory norm of general international law (*jus cogens*), as recognized in the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[49] The Special Rapporteur indicated that proposed changes

[45] *Yearbook … 1950*, vol. II, document A/1316, pp. 374 *ff*., paras. 98–127.

[46] *Yearbook … 1954*, vol. II, document A/2693, pp. 150 *ff*, para. 50–54.

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

[48] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3. For the Amendment to Article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010), see *ibid*., vol. 2868, No. 38544, p. 197. For the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Kampala, 11 June 2010), see *ibid*., vol. 2922, No. 38544, p. 199.

[49] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44. See also General Assembly resolution 78/109 of 7 December 2023.

would also be reflected in the annex, including references to article 8 *bis* of the Rome Statute and article 1 of the 1926 Slavery Convention.[50]

94. Concerning the procedural safeguards contained in Part Four of the draft articles, the Special Rapporteur observed that States had regarded the safeguards as a crucial component of the work on the topic, given their role in balancing the rights of the forum State and the State of the official. He emphasized that the safeguards protected key principles of international and human rights law, particularly the assurance of due process for those accused of criminal offences. According to the Special Rapporteur, most States that had provided comments had welcomed the Commission's proposal to combine provisions on limitations or exceptions to immunity for international crimes with a coherent set of procedural safeguards. The Special Rapporteur noted that Part Four was widely seen by States as necessary to balance sovereign equality of States and peaceful relations between States with the imperative to combat impunity, while avoiding the risk of politicization. The Special Rapporteur concurred with the observation by States that some proposals reflected progressive development of international law, whereas others, notably the provisions on fair treatment and due process, constituted codification of customary international law.

95. With respect to draft article 8, on the application of Part Four, the Special Rapporteur recalled that it affirmed that procedural safeguards applied to both immunity *ratione personae* and immunity *ratione materiae*. Several States supported this holistic approach, citing the need for consistency and due process. However, some States called for further clarification, particularly regarding whether the safeguards applied at the investigation stage or only after formal charges had been brought. The Special Rapporteur recommended that the commentary clarify that procedural safeguards applied to all stages, thereby ensuring the rule of law and preventing arbitrary or politicized proceedings. Notwithstanding the usefulness of draft article 8, the Special Rapporteur nonetheless agreed with concerns regarding the phrases "shall be applicable in relation to any exercise of criminal jurisdiction" and "over an official of another State, current or former", which created confusion. He thus proposed changes to the provision to clarify them and avoid confusion concerning acts performed in a private capacity. For greater clarity, he also recommended dividing draft article 8 into two paragraphs. He stated that additional issues, including the relationship between draft article 7 and Part Four, could be developed further in the commentary.

96. Regarding draft article 9, on examination of immunity by the forum State, the Special Rapporteur recalled that it had been among the most debated provisions. It provided that the forum State must examine whether immunity was applicable before proceeding with the exercise of criminal jurisdiction. Some States had expressed concern that such a requirement might confer excessive discretion to national authorities and undermine the institution of immunity, while others emphasized the importance of early scrutiny to prevent wrongful arrests or proceedings. The Special Rapporteur recommended stressing in the commentary that said examination by the forum State must occur prior to any coercive act and must be guided by principles of good faith, proportionality and consultation with the State of the official. He also proposed inserting the phrase "as far as practicable" into the text to address concerns regarding urgent situations requiring prompt action by the forum State.

97. With regard to draft article 10, on notification to the State of the official, the Special Rapporteur noted that the obligation to notify the State of the official had been broadly welcomed as a vital procedural safeguard. Some States nevertheless had raised concerns regarding the timing and content of notification, particularly its potential impact on ongoing investigations and confidentiality. The Special Rapporteur proposed changes to paragraph 1 to address concerns by States. Concerning paragraph 3, he agreed with the suggestion of a State to delete the final phrase, as the first phrase of the paragraph already encompassed all accepted means of communication. He proposed similar amendments to draft articles 11, 12 and 13.

98. With regard to draft article 11, on invocation of immunity, the Special Rapporteur noted concerns raised by States as to whether invocation of immunity was necessary or

[50] Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253.

whether immunity applied automatically. The Special Rapporteur proposed clarifying in the commentary that although immunity did not depend on formal invocation, invocation facilitated procedural clarity and inter-State dialogue. He further suggested that the commentary address concerns regarding potential abuse and recommend the principles of good faith and cooperation as guiding norms.

99. Regarding draft article 12, on waiver of immunity, the Special Rapporteur noted that most States had supported the requirement of express waiver as a reflection of existing international law, while other States proposed recognizing the possibility of implicit waiver. He recommended maintaining the requirement of express waiver to ensure respect for diplomatic relations and legal certainty. Nevertheless, he proposed that the commentary acknowledge that, in certain domestic legal systems, waiver might be inferred from unambiguous conduct; however, he emphasized that such interpretations should be approached with caution and respect for sovereign equality of States.

100. With regard to draft article 13, which permitted the forum State to request information from the State of the official, the Special Rapporteur observed that some States had sought clarification regarding the timing and the non-binding nature of such requests, and how they interact with notification and invocation obligations. He proposed that the commentary make clear that the draft article complemented, but did not replace, the mechanisms established under draft articles 10 and 11.

101. Regarding draft article 14, on determination of immunity, the Special Rapporteur noted concerns raised by some States that it could enable unilateral and potentially politicized decisions. He proposed emphasizing in the commentary that determinations on the applicability of immunity must be based on law, not on political considerations, and should strive for objectivity. He also underscored the importance of the mechanism of consultations and dispute resolution, where disputes persisted.

102. The Special Rapporteur observed that some States had expressed reservations regarding the enforceability and consistency of the mechanism envisaged in draft article 15, related to the transfer of criminal proceedings to the State of the official. He stressed that the provision was rooted in the principle of complementarity and mutual legal assistance. He proposed clarifying in the commentary that the forum State must consider whether the transfer served the interests of justice and was consistent with the gravity of the alleged crime.

103. With regard to draft article 16, on fair treatment of the State official, the Special Rapporteur noted that the provision had been widely welcomed by States. He recommended that the commentary elaborate on the concept of “fair treatment”, making reference to guarantees enshrined in international human rights instruments, such as the presumption of innocence, access to counsel, prompt notification of charges, and protection against arbitrary detention.

104. With respect to draft article 17, which encouraged States to engage in consultations to resolve disputes concerning immunity, the Special Rapporteur stated that most States endorsed the provision as a means of de-escalating tensions and seeking diplomatic solutions. He suggested clarifying that consultations were not a substitute for legal determinations, but rather a mechanism to avoid conflict and promote mutual respect among States.

105. On draft article 18, which provided for the peaceful settlement of disputes, the Special Rapporteur noted that several States supported the provision, while others urged caution in formalizing dispute settlement mechanisms. He proposed retaining the provision, while clarifying in the commentary that States were free to choose means of dispute resolution. He noted that the provision mirrored Article 33 of the Charter of the United Nations and reaffirmed the commitment of States to a peaceful legal order.

106. The Special Rapporteur concluded by stating that the arguments presented by States in favour of recommending that the draft articles serve as the basis for a convention had been particularly persuasive. He observed that a convention would provide a framework for negotiations, enabling States to refine provisions as necessary. He further stressed that certain draft articles, such as draft article 18, reflected a presupposition that they would form part of a treaty and would have limited effect outside such a context.

2. Summary of the debate

(a) General comments

107. Members expressed appreciation for the Special Rapporteur's second report, highlighting its clear structure and in-depth engagement with the comments of States. Several members also expressed gratitude for the work of the previous Special Rapporteurs, Mr. Kolodkin and Ms. Escobar Hernández. Some members expressed regret that the reduced length of the seventy-sixth session had limited their ability to fully present their views and led to an incomplete debate.

108. With respect to the objective and working methods of the second reading, some members supported the approach adopted by the Special Rapporteur, affirming that changes to the draft articles should be made only where compelling reasons existed. It was suggested that while the text should largely remain unchanged, substantial revisions to the commentaries could be considered where appropriate.

109. Other members advocated for a more ambitious approach, emphasizing that the second reading provided an opportunity to address shortcomings in the first-reading text and to meet the diverse expectations of States. A concern was raised that certain issues, such as the applicable regime for crimes committed in the territory of the forum State, had been insufficiently examined during the first reading. It was recalled that previous second readings conducted by the Commission, such as that of the articles on responsibility of States for internationally wrongful acts, had not rigidly adhered to a minimalist approach. It was emphasized that many members had not previously had the opportunity to express their views on certain issues under the topic.

110. Some members appreciated the Special Rapporteur's comprehensive compilation of recent judicial decisions, national legislation and comments of States. However, several members expressed the concern that the practice cited lacked geographical balance and relied too heavily on decisions from developed countries, with limited inclusion of perspectives from other countries. Calls were also made to consider regional instruments like the Malabo Protocol,[51] to proactively solicit input from underrepresented regions and to learn from consultation methods used by other international bodies, such as human rights treaty bodies.

111. Some members stressed that the Commission should look beyond written State comments and consider judicial decisions, academic writings and other evolving practice to better understand the law. It was stressed that both executive and judicial perspectives should be taken into account, given their distinct roles in shaping State practice and legal interpretation. It was emphasized that State silence, namely, when a State refrains from exercising criminal jurisdiction, could also be relevant in identifying customary international law. A more nuanced analysis of judicial decisions was called for, particularly with a view to assessing whether immunity was clearly invoked in the cases cited.

112. Regarding the nature of the draft articles, several members emphasized that the draft articles, or parts thereof, should be viewed as progressive development of international law rather than as codifying existing customary international law. It was stated that draft articles should offer added value beyond restating established law. However, a concern was raised that the draft articles contained *de lege ferenda* provisions that, if misunderstood, could cause serious harm to international relations on a highly sensitive matter.

113. Several members emphasized the need to strike a careful balance between sovereign equality of States and accountability for serious international crimes. A view was expressed that the draft articles should reflect the practical challenges faced by national prosecutorial authorities and that immunity should not impede investigations or preservation of evidence. It was also suggested that not all policy issues needed to be resolved within the Commission and could be appropriately left for States to address through negotiation.

114. A proposal was made to include a new draft article based on the judgment by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance*

[51] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), available on the website of the African Union: https://au.int.

in Criminal Matters.[52] It was noted that such a proposal was supported by the principle of *aut dedere aut judicare*. Hope was expressed that the second reading would address and clarify certain concerns left unresolved in earlier sessions of the Commission, such as the conflation of civil and criminal immunity and the existence of inconsistencies and gaps in the draft articles.

(b) Draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and draft annex

115. Several members reiterated that immunity was not a bar for accountability, while recalling the principle of sovereign equality of States, the importance of stability of State relations and the exceptional nature of draft article 7. The diverging views of States and of members of the Commission regarding draft article 7 were recalled. According to some members, the Commission should strive for a more consensus-based or unified approach to draft article 7 on second reading. The view was expressed that consensus among members was fundamental to enhancing the Commission's credibility and authority. The importance of reflecting in the commentary the various views of members and of States on the provision was stressed, particularly if the outcome of the topic was in the format of draft articles with a recommendation for the General Assembly to negotiate a treaty. A number of members voiced support for retaining draft article 7 in the text, while some members reiterated their objections and reservations to the draft article as a whole. The view was expressed that the link between draft article 7 and the principle of universal jurisdiction ought to be examined.

116. A number of members raised concerns regarding the fact that the majority of the case law in relation to draft article 7 referred to in the Special Rapporteur's reports and in the commentaries adopted on first reading focused on a particular group of States and was not representative enough. It was considered important to research and analyse the case law of States from all regions of the world. Concerns were also raised with respect to the silence of several States on the issue of exceptions to immunity and the lack of general State practice. It was noted that decisions of courts and tribunals were not a source of international law and some of the decisions analysed by the Special Rapporteur in his second report were still subject to adjudication by higher courts. In that connection, it was pointed out that particular weight should be given to statements delivered by States in the Sixth Committee and elsewhere. The work of the Commission on the topic "Identification of customary international law" was recalled, specifically the definition of relevant practice contained in conclusion 8 and its commentary.[53]

117. Differing views were expressed as to whether draft article 7 reflected customary international law. Some members emphasized that draft article 7 reflected customary international law, as there was sufficient and longstanding practice to support that conclusion, while noting that, in the case of some international crimes, exception to immunity was also reflected in widely ratified treaties. Nevertheless, other members emphasized that the draft article did not reflect a rule of customary international law, as a "general trend" was not enough to establish State practice and *opinio juris*. The view was expressed that draft article 7 was a proposal for progressive development. Another view was expressed that the analysis in the second report did not contain convincing evidence of a "general trend" on the issue; regret was expressed that some examples found in the second report were irrelevant because, for example, they did not pertain to crimes under international law. It was deemed necessary to include more appropriate case law in the commentary. The importance of considering *in concreto* whether immunity could result in impunity in the case of international crimes

[52] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at para. 196.

[53] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 66. See also General Assembly resolution 73/203 of 20 December 2018, annex.

was stressed and the jurisprudence of the International Court of Justice,[54] the African Court on Human and Peoples' Rights[55] and the European Court of Human Rights[56] was recalled.

118. It was stated that the Commission should exercise caution and should not focus its debate on the nature of draft article 7, but rather on its mandate to promote progressive development of international law and its codification. Some members considered that the Commission did not need to make a differentiation as both codification and progressive development were within the Commission's mandate.

119. Members debated the question of territorial exception and whether it was appropriate to elaborate in the commentary the issue of crimes committed by foreign officials in the territory of the forum State, as proposed in paragraph 81 of the second report.

120. Several members favoured retaining a list of crimes in paragraph 1 of draft article 7, but stressed that the list should not be exhaustive and should allow for the future inclusion of crimes. Other members deemed that stating expressly that the list was not exhaustive could result in abuse and the arbitrary inclusion of a wide range of crimes. A concern was raised that an open-ended list would undermine legal certainty. Further discussion was called for on the methodology for selecting the crimes listed in the provision. A view was expressed that inclusion of crimes under international law should be based on express recognition by States. According to several members, the establishment of clear and practical criteria, or clear legal grounds, for identifying crimes that might be listed in paragraph 1 of draft article 7 was essential; it was suggested that the criteria could be developed in the commentary to the provision. It was recalled that a more general formulation that would exclude the application of immunity for the most serious crimes under international law had been proposed in the previous quinquennium and by some States in their comments, thereby allowing for the draft articles to keep apace with developments in international law. The use of the term "crimes under international law" in paragraph 1 of draft article 7 was questioned; it was stated that it was necessary to distinguish between crimes under treaties and those under customary international law, with the former being limited to contracting parties to the relevant treaty and the latter being universally accepted by States as crimes and as applicable to all. Some members expressed differing views on whether certain international crimes could be considered official acts and clarity in that regard was considered important. The view was expressed that certain crimes listed in the Malabo Protocol could be considered for inclusion in paragraph 1.

121. A number of members expressed support for the proposal by the Special Rapporteur to add the crimes of aggression, slavery and the slave trade to draft article 7, while others questioned the proposal. It was observed, *inter alia*, that those crimes were among the oldest examples of crimes under both customary international law and international treaty law, which in its separate work, the Commission had qualified as bearing a *jus cogens* character. Concerns were raised about, *inter alia*, the lack of general and representative State practice to support the proposal and issues related to the crime of aggression, in particular the complexity and practical challenges for national authorities, such as the determination by a national court of a State as to whether a foreign State had committed aggression. The explanation offered by the Commission not to include the crime of aggression in the commentary adopted on first reading was recalled; a suggestion was made to add a qualifier to the provision, should the Commission decide to include the crime of aggression. The view was expressed that the second report did not contain examples of criminal proceedings for the proposed three additional crimes and did not contain compelling reasons to add those three crimes. It was noted that some crimes, such as slavery, torture and enforced disappearance, already fell within the scope of crimes against humanity. Concerns about the exclusion of terrorism or acts of terrorism were reiterated and the argument was made that

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above); *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[55] *Ligue ivoirienne des droits de l'homme (LIDHO) and Others v. Côte d'Ivoire*, Application No. 041/2016, judgment, 5 September 2023.

[56] *Sassi and Benchellali v. France*, Nos. 35884/21 and 35886/21, Decision, 15 October 2024.

they needed to be included in the list, because of their impact on the international community as a whole. Other members, while rejecting terrorism and considering it a grave crime, were of the view that it should not be included in the list, for, *inter alia*, the reasons expressed in the commentary adopted on first reading on the lack of an agreed definition.

122. Various proposals were made, such as: (*a*) reordering the crimes listed in paragraph 1; (*b*) enumerating the crimes with a detailed explanation of the rationale for including each crime; (*c*) adding an explanation of the legal basis of inapplicability of immunity regarding each crime, separately indicating in the commentary whether the Commission considered it to be codification, progressive development or a combination of both; (*d*) shortening the list of crimes according to pre-agreed clear criteria; (*e*) replacing the text with a general one referring to the most serious crimes under international law or those of concern to the international community; (*f*) adding a new paragraph with a general reference to other crimes under international law for which it was established under international law that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction should not apply; (*g*) moving the list of crimes to the commentary; (*h*) adding a new paragraph clarifying the definitions in the annex; and (*i*) making a distinction in paragraph 1 between international crimes qualified as such under treaties and those under customary international law. Some members did not favour adopting a general textual formulation for the provision, as a replacement of draft article 7 as adopted on first reading, because States would not have the opportunity to comment on it since the topic was at the second reading stage.

123. A suggestion was made to align the draft article and the draft annex with the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) of 2022 and, in particular, draft conclusion 23 and the annex.[57] Others suggested adding the Geneva Conventions and Additional Protocol I[58] to the draft annex with respect to war crimes. Some members raised concerns regarding the reliance on the Rome Statute of the International Criminal Court in the draft annex, and the inclusion of crimes that were set out in treaties that were not universally ratified. Other members supported the reference to the Rome Statute and its definitions, as well as to the other treaties referred to in the draft annex which were considered as part of customary international law. Others stressed the fact that the pertinent definitions included in the Rome Statute and other treaties were the last definitions of the crimes listed in draft article 7. It was pointed out that criminalization of the offences listed in paragraph 1 had to be done in accordance with customary international law. The view was expressed that paragraph 2 and the annex should be deleted, as the proper place to mention relevant instruments in support of paragraph 1 would be the commentary.

(c) General comments to Part Four (Procedural provisions and safeguards)

124. Several members emphasized that Part Four aimed at ensuring fair trial safeguards for foreign State officials in the context of exercise of criminal jurisdiction. Some members highlighted that the procedural safeguards served to prevent the abuse or politicization of criminal jurisdiction, uphold sovereign equality of States and maintain peaceful relationships among States. The provisions were also seen as offering practical guidance to national authorities and helping to navigate complex and sensitive matters, and as able to reconcile divergent positions among States.

125. Some members considered that the current draft articles might unduly favour protecting immunity and should be rebalanced to protect the exercise of criminal jurisdiction by the forum State and the fight against impunity. The view was expressed that the procedural safeguards must not be diluted, and that any modifications, particularly those concerning notification of the State of the official, should be precisely formulated to avoid legal uncertainty or weakening the protections of State officials.

---

[57] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44.

[58] Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, Treaty Series, vol. 75, Nos. 970–973, p. 31, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

126. It was asserted that certain provisions in Part Four reflected elements of progressive development rather than being firmly grounded in existing State practice. It was recalled that some draft articles, particularly those addressing notification and waiver, had been adopted by drawing analogy from existing treaties without a detailed analysis of State practice.

127. The view was expressed that, given their progressive nature, the procedural provisions should be understood as guidelines rather than binding obligations. Several members opposed the suggestion to divide up the draft articles and to transform Part Four into non-binding guidelines or conclusions. It was recalled that including the procedural safeguards within the draft articles, even when they were based on limited State practice, was consistent with the approach adopted in other parts of the project and could prevent future abuses. It was also cautioned that splitting the outcome could complicate future treaty negotiations and create uncertainty.

128. Several members expressed general support for the proposed changes to the text of Part Four proposed by the Special Rapporteur in the second report and considered that many concerns raised by States could be addressed in the commentary. Some members noted that certain issues on the scope of "criminal jurisdiction" should be addressed in draft article 2. It was suggested that the procedural rules in Part Four should distinguish more clearly between their application to immunity *ratione personae* and immunity *ratione materiae.* In that connection, attention was drawn to specific provisions where different procedural treatment could be warranted, such as draft articles 10, 14, 15 and 16.

(d) Draft article 8 (Application of Part Four)

129. Some members expressed support for the Special Rapporteur's proposed changes to draft article 8. Several members emphasized that the rewording of paragraph 1 offered a more coherent and logical delineation of the scope of application of the procedural safeguards, avoiding giving the wrong impression that Part Four could apply to acts committed by officials in their private capacity. Other members supported affirming the early-stage applicability of the safeguards under Part Four. Some members welcomed the division of the draft article into two distinct paragraphs to enhance clarity.

130. At the same time, several members noted that the phrase "that may affect the immunity of an official of another State" in paragraph 1 could introduce ambiguity. The change was also considered to risk weakening the link between draft article 7 and the procedural guarantees established in Part Four. According to another view, a determination as to whether someone enjoyed immunity should be made under draft article 14, rather than procedural safeguards being excluded from the outset on the basis that the acts in question were private.

131. Concern was expressed over the deletion of the phrase "current or former" in paragraph 1, as its removal might obscure the continuing relevance of immunity rules after the end of official positions. Proposals were made to amend the provision, including: use the term "in any stage" instead of "in any instance" in paragraph 1; and adding the phrase "at an early stage of" before "any instance that may involve the exercise of criminal jurisdiction". It was suggested that the relationship between procedural safeguards and immunity *ratione personae* required more careful treatment, and that the wording of paragraph 2 might cast doubt on the absoluteness of such immunity. The view was expressed that paragraph 2 might be redundant, given that the scope of application had already been established in paragraph1.

132. Calls were made for clarification of several issues in the commentary, including further explanation of the meaning and scope of the jurisdictional acts covered in paragraph 1. Some members considered that the commentary could distinguish between the procedural implications for immunity *ratione personae* and immunity *ratione materiae*. It was also proposed that the relationship between draft article 7 and Part Four be further clarified.

(e) Draft article 9 (Examination of immunity by the forum State)

133. Some members supported the addition of the phrase "as far as practicable" proposed by the Special Rapporteur in paragraph 1, viewing it as a useful way to introduce flexibility in urgent circumstances, such as where coercive measures were needed to prevent imminent harm. However, other members expressed concerns that the inclusion of the phrase might

lead to uncertainty and that a more precise formulation would be preferable. The use of the term "practicable" was questioned.

134. While some members supported the proposal to add "the immunity of" before "an official of another State" in paragraph 1, others questioned the need for such an addition.

135. The separation of the examination and determination of immunity in draft article 9 and draft article 14 was welcomed by several members, but a proposal was made to consider merging the two draft articles. A suggestion was made for the commentary to clearly articulate the distinct scopes of the two provisions.

136. Further clarification of the nature of the obligation to examine immunity, the thresholds for triggering the obligation and the consequence of examination was called for. Several members proposed to further explain whether the examination was an obligation of means or result and what acts fell within the concept. It was proposed that the notion of "awareness" in paragraph 1 should be understood to include "constructive knowledge", that is, when a person should have known. Suggestions were made to clarify what constituted an "instance" involving the exercise of criminal jurisdiction and to include a temporal element that immunity should be decided "expeditiously" and "*in limine litis*".[59]

137. A concern was raised that the reference to "inviolability" in paragraph 2, subparagraph (*b*), lacked conceptual clarity. It was suggested that the reference be removed from the text and addressed instead in the commentary. Some members questioned whether inviolability applied only to officials enjoying immunity *ratione personae*. A proposal was made to include a clear definition of "inviolability" in draft article 2, as follows: "the protection of a State official in the territory of the forum State that the official may enjoy under international law, including physical protection against measures that would amount to direct coercion such as arrest and detention".

(f) Draft article 10 (Notification to the State of the official)

138. Several members expressed support for the change to paragraph 1 allowing exceptions to the obligation to notify where "such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings". The change was deemed a pragmatic response to concerns raised by States regarding the potential adverse impact of notification on criminal justice processes. It was emphasized that the commentary should provide concrete examples of situations in which such exceptions might apply to ensure clarity and prevent potential abuse.

139. At the same time, some members raised concerns that introducing such exceptions might significantly weaken the safeguard of prior notification and shift discretion entirely to the forum State. A suggestion was made to clarify the scope of the proposed exception.

140. It was suggested that the triggering conditions for the obligation to notify should be clarified to include cases where the official claimed immunity, where the State of the official raised concerns or where the forum State initiated coercive measures. It was also suggested that the opening clause of paragraph 1 be revised to better align it with other provisions of Part Four.

141. Differing views were expressed as to whether paragraph 2 should be deleted. Several members proposed revising the paragraph to allow for greater flexibility.

142. With respect to paragraph 3, several members voiced support for removing the reference to mutual legal assistance treaties, noting that the reference was redundant and could be elaborated in the commentary. It was suggested that the commentary clarify the permissible channels for notification and whether diplomatic channels alone suffice for both sending and receiving such communications.

143. Some members called for the deletion or a more fundamental reconsideration of draft article 10 as a whole. Concerns were raised that the notification obligation lacked support in

[59] See International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at para. 63.

existing State practice and could seriously hinder efforts to combat impunity. Some members opposed the deletion of draft article 10 and reaffirmed the importance of the notification requirement as a procedural safeguard. It was observed that existing international instruments tended to require notification only after coercive measures had been taken.

(g) Draft article 11 (Invocation of immunity)

144. Concerning draft article 11, several members suggested clarifying in the commentary that invocation was not a prerequisite for the application of immunity. They emphasized that immunity must be considered *proprio motu* by the forum State, irrespective of whether it had been formally invoked. It was suggested that the issue should be clearly stated in the text itself rather than in the commentary. The view was expressed that invocation should be a prerequisite for the application of immunity, particularly in light of the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[60]

145. Clarification was sought on the grounds for invoking immunity and on the legal value and procedural consequences of invocation, including whether it gave rise to additional obligations for the forum State and the impact of delayed invocation. It was also proposed that the link between invocation and determination be clarified and that it be stated that invocation did not create a presumption of immunity before the forum State.

146. With regard to the form of invocation specified in paragraph 2, support was voiced for requiring invocation to be express and in writing. At the same time, a question was raised as to whether such a requirement was supported by State practice, and it was suggested that the paragraph be deleted or, alternatively, that "shall" be replaced with "should". Some members proposed allowing for oral invocation in certain circumstances, such as in situations where there was an imminent threat of coercive measures.

147. With respect to paragraph 3, several members expressed support for removing the reference to mutual legal assistance treaties to avoid redundancy.

(h) Draft article 12 (Waiver of immunity)

148. Several members expressed support for the proposals presented in the second report, including the removal of the reference to mutual legal assistance treaties in paragraph 3, and the clarification that waiver must be express and in writing. It was noted that waiver may be granted either *proprio motu* or upon request by the forum State and may also be partial in nature. It was suggested that it be specified which authorities were competent to issue a waiver. Clarification was also requested on the issue of treaty-based waivers and on the revocation of waivers under paragraph 5. Several members supported the rule of irrevocability, citing the principle of good faith and the need for legal certainty. According to a different view, revocation, while generally impermissible, might be accepted by the forum State in individual cases or could constitute *lex specialis* based on the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[61] According to some members, the commentary should distinguish between revocation and invalidity, the latter being recognized under exceptional circumstances such as coercion, fraud or error, in line with articles 46 to 53 of the Vienna Convention on the Law of Treaties.[62]

(i) Draft article 13 (Requests for information)

149. Several members expressed support for retaining draft article 13, as it provided practical guidance for domestic authorities, appropriately reflected the discretionary nature of information requests and promoted bilateral communication to clarify jurisdictional issues

[60] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 196.

[61] *Yearbook ... 2006*, vol. II (Part Two), paras. 51–52. See also General Assembly resolution 61/34 of 4 December 2006, para. 3.

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

and to prevent misunderstandings. The proposed removal of references to mutual legal assistance treaties in paragraph 3 was also welcomed by some members.

150. Further clarification was requested in the commentary on the handling of confidential information, particularly involving personal data and national security, and on ensuring that refusal to provide information was not seen as prejudicial to the assessment of immunity.

(j) Draft article 14 (Determination of immunity)

151. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 14. Support was also expressed for maintaining draft articles 9 and 14 as separate provisions, with the interrelation clearly explained in the commentary. It was proposed that any outstanding queries could be clarified in the commentary. However, the view was expressed that the guarantees in the provision, particularly in paragraph 3, were not sufficient and merited further study.

152. Concerning paragraph 2, the removal of the reference to waiver was proposed, to avoid the suggestion that a waiver of immunity was not decisive.

153. Concerning paragraph 4, the deletion of the exception regarding precautionary measures contained in the second sentence of subparagraph (*b*) was suggested. In that connection, it was noted that, according to the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the determining factor in assessing whether there had been an attack on the immunity of an official was the subjection of the official to a constraining act of authority.[63] It was proposed that the first part of subparagraph (b) would be more precise if amended to refer to "coercive measures that may affect *the immunity of* the official". Some members proposed that, to reduce uncertainty, the reference to inviolability should be omitted and the matter explained in the commentary. The view was expressed that inviolability did not just apply to those officials enjoying immunity *ratione personae*.

(k) Draft article 15 (Transfer of the criminal proceedings)

154. Several members expressed support for the proposal of the Special Rapporteur not to amend draft article 15. It was noted that the provision served to balance the interests of the forum State and the State of the official. The view was expressed that transfer should be mandatory, as long as the State of the official agreed to submit the case to its own competent authorities for prosecution. It was suggested that, to address such concerns, the commentary should explain why transfer was discretionary and the conditions under which it would be appropriate. It was noted that, in some States, it would be impossible for the executive to compel the judiciary to comply with an international request to transfer. It was also suggested that the commentary could clarify the obligation of the State of the official upon a transfer to promptly and in good faith submit the case for prosecution and address the need to keep the forum State informed of important developments in the proceedings. It was noted that paragraph 4 was a guarantee against impunity, even if transfer were mandatory. The view was expressed that the presence of diplomatic representatives of the State of the official was a matter for the judicial authorities of the forum State.

(l) Draft article 16 (Fair treatment of the State official)

155. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 16. It was emphasized that the provision played an important hortatory role, even though the procedural rights concerned were protected by other instruments. It was proposed to add a reference to international law in paragraph 3, which only referred to the laws and regulations of the forum State.

(m) Draft article 17 (Consultations)

156. Several members expressed support for the proposal of the Special Rapporteur not to amend draft article 17. The view was expressed that the provision appropriately balanced the

[63] See *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 170.

interests of the forum State and the State of the official. In light of the comments of States, it was proposed that the provision be amended to a non-binding formulation or that the basis and intended flexibility of consultations be clarified in the commentary. It was noted that the provision also covered the obligation to notify.

(n) Draft article 18 (Settlement of disputes)

157. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 18. Several members considered that a dispute settlement clause would be an important part of a potential treaty. It was noted that some of the treaties referred to in the draft annex themselves contained compromissory clauses.

158. The view was expressed that the provision should make clear that, pending recourse to a dispute settlement procedure, the situation of the State official had to be given special consideration if he or she remained in the forum State and that a stay of the domestic proceedings should be possible. Support was expressed for the view that time limits would need to be established for any dispute settlement in relation to pending criminal proceedings.[64] It was suggested that the effects of the initiation of dispute settlement proceedings be clarified in the commentary, as well as how such initiation would lead to the suspension of national proceedings.

159. Differing views were expressed as to whether an opt-out provision concerning the jurisdiction of the International Court of Justice should be added. Some members expressed concern that the opt-out provision departed from the formulation typically found in widely accepted criminal law treaties adopted by States. It was noted, however, that such an opt-out provision would allow States to pursue the settlement of disputes through other peaceful means and could enhance support for the draft articles. A number of members underscored that the eventual dispute settlement clause was a matter for negotiation by States, and that the Commission should therefore focus on providing its own views. The view was expressed that it was not for the Commission to propose an opt-out clause.

(o) Final form

160. Several members agreed with the Special Rapporteur that draft articles were the most appropriate format for the outcome of the topic. It was highlighted that the work on the topic so far had proceeded on the assumption that the outcome would be draft articles and, thus, changing the approach would affect the substance of the topic. The view was expressed that the draft articles could serve as the foundation for the negotiation of an international instrument.

161. With respect to the Commission's recommendation to the General Assembly, some members stated that the Commission should recommend to the Assembly that the draft articles be considered as a basis for the negotiation of a treaty on the topic. That would protect the sovereign right of States and respect the separation of competences between the Commission and the Sixth Committee. The view was expressed that now was not the time to recommend the negotiation of a treaty. Some members agreed that the recommendation of the Commission to the Assembly should follow the two-step approach proposed by the Special Rapporteur in paragraph 17 of his second report. The view was expressed that using the same text as the Commission's recommendation with respect to the draft articles on prevention and punishment of crimes against humanity might be more appropriate.[65] Other members were of the view that any discussion of the final output and recommendation to the General Assembly was premature, as the Commission would only be in a position to consider the recommendation once the final text was adopted. It was stated that the Commission should leave it to the discretion of States to decide on the future of the draft articles and should not prejudge or anticipate the future negotiated outcome of the draft articles.

[64] See A/C.6/77/SR.27, para. 20.

[65] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 42.

(p) Future programme of work

162. Some members urged the Commission to undertake the second reading in a thorough manner and not proceed with haste given the sensitivity and importance of the topic. According to another view, the Commission should expedite its work on the topic to allow States to fully benefit from the outcome as soon as possible. Some members supported concluding the second reading at the Commission's seventy-seventh session.

3. Concluding remarks of the Special Rapporteur

163. In his summary of the debate, the Special Rapporteur focused first on general comments made by members, followed by specific comments on draft articles 7 to 18 and the draft annex. He assured members that comments regarding draft article 2 had also been taken into account.

164. The Special Rapporteur noted the overall support of members of the Commission for his approach to the second reading and the significant progress made by the Commission on the topic thus far. He highlighted that members shared the sentiment of States that the topic was of high importance and that it was imperative for the Commission to strike a balance between State sovereignty and combating impunity. He was of the view that the draft articles achieved a reasonable balance between a variety of concerns and reconciled a significant number of seemingly intractable conflicting opinions.

165. The Special Rapporteur stressed that the draft articles adopted on first reading were a result of careful and extensive consideration that took into account the comments by States, existing State practice and writings up to 2022. He reiterated his view that the practice of the Commission during second reading was to refine the text adopted on first reading and the Commission should only propose modifications to the draft articles where there were compelling reasons to do so. In his view, most of the outstanding issues raised by States could be dealt with in the commentary.

166. Regarding comments made by members on the geographical diversity of State practice, the Special Rapporteur expressed his agreement that the draft articles ought to be representative of the practice of States of all regions of the world. He indicated that practice cited in the commentary would be supplemented, particularly in the commentary to draft article 7. He stressed that there was limited State practice largely because the crimes giving rise to the inapplicability of immunity were exceptional crimes and not all States had been in the situation to prosecute foreign officials for such crimes.

167. The Special Rapporteur stated that there was general agreement among members that the most appropriate form for the final outcome of the topic was a set of draft articles that might be brought to the attention of States with the ultimate goal of concluding a treaty, while stressing that some provisions in the draft articles could only be given effect through the recommendation of the negotiation of a treaty. He opposed the idea of splitting the outcome so that some provisions would be presented in the form of draft articles and others as draft principles or conclusions. Regarding the recommendation to the General Assembly, he stated that proposing that the Assembly take note of the draft articles and negotiate a treaty at an appropriate time in the future provided States with the opportunity to address some contentious matters on the basis of the Commission's proposal.

168. On draft article 7, the Special Rapporteur acknowledged that differing views had been expressed by members. He stated that there was broad support for retaining draft article 7 in some form and, while recalling arguments raised by multiple members, noted that they were of the view that the provision largely reflected customary international law. He also stated that some members voiced support for retaining the provision even if in their view it did not reflect customary international law, and that most of those members still recognized a trend in State practice regarding the inapplicability of immunity in respect to certain international crimes. The Special Rapporteur recalled that a view had been expressed that the provision should be removed from the draft articles as it did not reflect existing law and that the State practice available demonstrated that support for exceptions to immunity was limited. The Special Rapporteur considered that, in light of the broad support for a provision on exceptions to immunity, and the spirit of flexibility shown by members, the Commission would be successful in its efforts to adopt a provision.

169. On the question of progressive development or codification, the Special Rapporteur saw merit in the opinion of some members that it would not be appropriate for the Commission to make a distinction between progressive development and codification in the commentary. According to the Special Rapporteur, the purpose of the draft articles was to serve as the basis for a treaty and States should have ample opportunity to discuss the scope of the provisions proposed.

170. Regarding the debate whether paragraph 1 of draft article 7 should contain a list of crimes or should be reformulated on more general terms, the Special Rapporteur agreed with members who had favoured a list, provided that the list was not exhaustive. He noted the suggestions that had been made to revise paragraph 1, including by reordering the crimes in the list. He stated that he would welcome discussing proposals in the Drafting Committee on how the nature of the provision could be clarified, either in the text of the provision itself or in the commentary. When recalling that members had discussed establishing criteria for crimes to be included in the list, the Special Rapporteur agreed that clear criteria was important and indicated that, although the commentary adopted on first reading already contained elements for such criteria, he would update the commentary.

171. The Special Rapporteur stated that, while there was broad support for inclusion of the crimes of aggression, slavery and the slave trade in paragraph 1, as proposed in the second report, some members had opposed adding those crimes. He noted the suggestions made for either the commentary or the text itself and indicated that he would be willing to discuss the various suggestions in the Drafting Committee. He recalled recent case law that could be relevant to the provision and that would be addressed in the commentary.

172. The Special Rapporteur addressed concerns raised by some members regarding the examples of practice included in the second report, stressing that such practice was not exhaustive. It was meant to bring to light the practice that had occurred since draft article 7 had been adopted on first reading, as well as practice that had not been included in his first report. He stated that the practice would nevertheless be reviewed before inclusion in the commentary. With regard to the issue of silence by States, the Special Rapporteur recalled that some members had pointed out the challenges of drawing conclusions based on "negative" State practice because it was difficult to determine the reasons behind it. On the relevance of the jurisprudence of the International Court of Justice in the case *Jurisdictional Immunities of the State*[66] and of the European Court of Human Rights in *Sassi and Benchellali v. France*,[67] the Special Rapporteur stated that they were not decisive for the current exercise, and the context of both decisions was critical. In conclusion, the Special Rapporteur believed that having a provision that contained an enumerated non-exhaustive list, including the three additional crimes he had proposed, had received broad support.

173. As to Part Four, the Special Rapporteur stated that there had been overwhelming support for the provisions therein and highlighted the value and importance of the safeguards in ensuring a balance between accountability and respect for sovereign equality of States. The Special Rapporteur also mentioned that Part Four was crucial to avoid politicization of draft article 7. While the Special Rapporteur concurred that some of the provisions of Part Four constituted progressive development, others – such as those related to fair treatment and due process – constituted codification. His views on the issue aligned more with the members who did not think that delineating between progressive development and codification was appropriate.

174. The Special Rapporteur noted that several members did not comment on some of the provisions in Part Four due to lack of time. He assured members that he had taken note of all the comments that had been made, including in their written statements, but in his summation, in the interest of time, he would focus on the provisions that received the most comments.

175. With respect to draft article 8, the Special Rapporteur stated that several members had supported his proposed changes, but noted that others believed that the proposed revised text would introduce ambiguity as to the application of the provision. The Special Rapporteur

[66] See footnote 54 above.
[67] See footnote 56 above.

considered that issues raised by members could be dealt with in the Drafting Committee and in the commentary.

176. Regarding draft article 9, the Special Rapporteur clarified that his proposal was to include the phrase "as far as practicable" in paragraph 1. Adding that phrase would introduce the necessary discretion for urgent or exceptional cases, such as when the official posed an imminent threat to public safety, without compromising the overarching obligation to examine immunity promptly.

177. On the issue of inviolability, the Special Rapporteur recalled the prior work of the Commission on the draft articles on diplomatic intercourse and immunities.[68] He highlighted that inviolability with respect to measures that would amount to direct coercion was a specific form of immunity from foreign criminal jurisdiction covering a broader set of jurisdictional acts. The Special Rapporteur recalled that the work on the present topic was not supposed to cover special regimes. He maintained that, absent a more specific legal regime, full inviolability only bestowed upon State officials enjoying immunity *ratione personae*. Accordingly, he expressed his view that no specific provision on inviolability was required, while acknowledging that the issue would be dealt with in the commentary.

178. With regard to draft article 10, the Special Rapporteur recalled the differing views of members on the provision and his proposed changes in paragraphs 1 and 3. He stated that all the issues raised had also been the object of extensive discussion during first reading. His proposal to add a qualifier was aimed at addressing some of the issues and he suggested discussing them in the Drafting Committee. The Special Rapporteur favoured keeping paragraph 2 for reasons of legal certainty, but expressed willingness to discuss its removal in the Drafting Committee, as suggested by some members.

179. On the calls by some members for clarification in the commentary of draft article 11, the Special Rapporteur indicated that he did not oppose expanding the commentary with regard to, *inter alia*, the value and legal consequences of invoking immunity, presumption of immunity and the form in which immunity should be invoked. As to the discussion on whether immunity was only applicable when invoked by the State official, the Special Rapporteur stated that, in several of the cases referred to in the commentary to draft article, as well in some cases cited in the second report, immunity had been considered by the forum State in spite of the lack of invocation. He also recalled the findings of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters* that were relevant to the issue.

180. Regarding draft article 12, the Special Rapporteur indicated that he was still not convinced that the waiver could be revoked. He reiterated his proposal, which had been supported by some members, of including in the commentary a reference to general grounds of invalidity.

181. Concerning draft article 14, while noting that there had been great support for retaining it, the Special Rapporteur suggested that refinements to the text of paragraphs 2 and 4 could be discussed in the Drafting Committee to address concerns raised by members. In that connection, he stated that the Drafting Committee could refine the text pertaining to the determination of immunity.

182. With respect to draft article 18, the Special Rapporteur mentioned that there was broad support for retaining a provision on dispute settlement, in particular a preference that the draft articles be recommended as a basis for the negotiation of a treaty. Regarding suggestions made on the possibility of opting out of the provision or including time limits, the Special Rapporteur was of the view that those issues would be better addressed in the context of future treaty negotiation, but also indicated that the Drafting Committee could further consider them.

183. The Special Rapporteur noted the suggestion for an additional provision on the basis of paragraph 196 of *Certain Questions of Mutual Assistance in Criminal Matters*.[69] He

[68] *Yearbook … 1958*, vol. II, document A/3859, para. 53.

[69] See para. 114 above. *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 196.

expressed doubts whether it would be advisable to include an entirely new provision at the stage of second reading, given that States would not have had the opportunity to comment on it. However, if the Commission decided that clarification on the issue was necessary, the Special Rapporteur would be amenable to addressing the matter in the commentary to draft article 11 on the invocation of immunity.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Commission on second reading at its seventy-sixth session

1. Text of the draft articles

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

…*

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

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

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

…**

Article 3
Persons enjoying immunity *ratione personae*

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

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their period of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their period of office.

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

…***

* The Commission and the Drafting Committee have not yet considered the titles of parts on second reading.

** Draft article 2 has been retained in the Drafting Committee pending consideration of the remaining draft articles.

*** The Commission and the Drafting Committee have not yet considered the titles of parts on second reading.

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission, on second reading, at its seventy-sixth session

185. The text of the draft articles and commentaries thereto provisionally adopted by the Commission, on second reading, at its seventy-sixth session is reproduced below.

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

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

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

Commentary

(1) The purpose of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single draft article the dual perspective, positive and negative, that determines the scope. Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a "without prejudice" clause, which excludes from the scope of the draft articles special regimes of international law on immunity of State officials. Paragraph 3 contains a clause referring to international agreements establishing or relating to the operation of international criminal courts and tribunals, which also remain outside the scope of the draft articles. In the past, the Commission has used various techniques for defining this dual perspective of the scope of a set of draft articles,[70] but in this case it was preferable to combine both perspectives in a single

[70] In the draft articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately reflected in the Convention adopted in 2004 (United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38, annex, arts. 1 and 3). On the other hand, in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16, and in the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997, United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2014 (*Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 44–45), also dealt with the scope in a single article consisting of two paragraphs,

draft article, since this presents the advantage of facilitating the simultaneous treatment of both perspectives of scope under a single title.

Paragraph 1

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "[t]he present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[71] The Commission decided that the scope of the draft articles should be defined as simply as possible, so it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions. The Commission used the language "from the criminal jurisdiction of another State" rather than "from the exercise of the criminal jurisdiction of another State", aligning the provision on the scope of the text with its title, as was done in article 1 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Commission noted that, while the phrase "exercise of" is used in other draft articles, it did not find that the phrase was necessary to define the general scope of the draft articles and decided to reserve it for use in other parts of the draft articles in which it is more suitably placed.[72]

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

(4) As to the first element, the Commission chose to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by State officials. The term "State officials" has been defined in draft article 2 (*a*), to whose text and commentary attention is drawn. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[73] However, the use of this term, and its equivalents in the other language versions, has raised certain problems,[74] and it should be noted that the terms used in the various language versions are neither interchangeable nor synonymous. Nonetheless, with a view to simplifying the text, the Commission has decided to retain the term "State official" to refer in general to all persons who enjoy immunity from foreign criminal jurisdiction contemplated in these draft articles. The expression "official of another State" used in some draft articles is equivalent to the expression "State official".

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

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between

---

the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[71] This wording has been used, for example, in draft article 1 of the draft articles on the expulsion of aliens.

[72] See draft articles 3 and 5, as well as draft articles 7, 8, 10, 14 and 16, as adopted on first reading, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 68.

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

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

States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State".

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the word "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, even where it exists, will not be exercised by the forum State over an official of another State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[75]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction does not exempt a person from criminal responsibility. It is a barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[76] which is followed in the majority of State practice and in the literature.

Paragraph 2

(9) Paragraph 2 refers to cases in which there are special rules of international law on immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law in diplomatic and consular relations.[77] However, there are other examples in contemporary international law, both treaty-based and custom based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. The Commission considers that these special regimes are well established in international law, and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[78] The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a "without prejudice" clause in paragraph 2. Accordingly, the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes. The framing of the provision as a "without prejudice" clause with respect to special rules of international law on immunity is intended to make clear that the provision does not affect either the immunity provided for by such rules, where such immunity exists, or any exceptions to it. Whether such immunity is available to a State official will depend on the special rules applicable to the official and the specific circumstances of the situation. The provision was also considered broad enough to preserve the inviolability and privileges enjoyed by certain persons under such special rules. Furthermore, the Commission chose to use the word "enjoyed" in paragraph 2 to maintain consistency with treaties establishing the kind of special rules referenced in the paragraph,

[75] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 19, para. 46. See also the Commission's commentary to article 6 of the draft articles on jurisdictional immunities of States and their property, particularly paragraphs (1)–(3) (*Yearbook … 1991*, vol. II (Part Two), pp. 23–24).

[76] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 60. The Court has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 124, para. 58, and p. 143, para. 100.

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

[78] *Yearbook … 1991*, vol. II (Part Two), pp. 21–22, draft article 3 and commentary thereto.

for example article 31 of the Vienna Convention on Diplomatic Relations, which concerns the immunity of diplomatic agents from the criminal jurisdiction of the receiving State.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on the fragmentation of international law, particularly conclusions 2 and 3.[79] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[80] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[81]

(11) The special regimes included in paragraph 2 relate in particular to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's armed forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[82]

(12) The first area includes special rules on the immunity from foreign criminal jurisdiction of persons carrying out specific functions in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained, in particular, in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions,[83] as well as the relevant rules of customary international law, fall into this category.

(13) The second area includes special rules on the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. This category includes the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[84] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization,

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

[80] In its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "[t]he article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (*Yearbook … 1991*, vol. II (Part Two), p. 22, para. (5) of the commentary). See also paragraph (1) of the commentary.

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

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

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

[84] This list corresponds to the one already formulated by the Commission in draft article 3, paragraph 1 (*a*), of the draft articles on jurisdictional immunities of States and their property.

especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when the agent is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[85] the Convention on the Privileges and Immunities of the United Nations[86] and the Convention on the Privileges and Immunities of the Specialized Agencies,[87] as well as other treaty-based and customary norms applicable in this area.

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

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

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

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

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

[85] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), A/CONF.67/16; or United Nations, Juridical Yearbook 1975 (Sales No. E.77.V.3), p. 87.

[86] Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.

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

criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

Paragraph 3

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

(20) The Commission determined that an express reference to agreements relating to international criminal courts and tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 emphasizes the separation and independence of the present draft articles, which do not affect the rights and obligations of States under agreements establishing or relating to the operation of international criminal courts and tribunals. Through this paragraph, the Commission sought to ensure that the present draft articles do not impair the achievements of such special legal regimes. The paragraph was also considered necessary to preserve existing rights and obligations of States in the event that a treaty is concluded on the basis of the present draft articles, which could otherwise be governed by the *lex posterior derogat legi priori* rule reflected in article 30 of the Vienna Convention on the Law of Treaties.[88]

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

(22) The expression "the rights and obligations of States" refers to any of the rights and obligations under a specific international agreement establishing or relating to the operation of an international criminal court or tribunal. The Commission has preferred this wording over other proposals such as "the question of immunity" regulated in such agreements or "the rules governing the functioning of international criminal tribunals", which were considered, respectively, as being too narrow or too broad in relation to the purpose of paragraph 3 of draft article 1. The phrase "international agreements establishing or relating to the operation of international criminal courts and tribunals" refers to the international rules considered to be special legal regimes for the purpose of paragraph 3 of draft article 1, bearing in mind the objective pursued by that clause. Therefore, this phrase does not mirror the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, because the phrase "which relate to matters dealt with in the present Convention" was not sufficiently clear to reflect the relationship between the present draft articles and the legal regimes applicable to international criminal courts and tribunals. The expression "international agreements" includes the constituent instrument of each international criminal court or tribunal, whether these agreements are concluded between States or between States and international organizations, including the Rome Statute of the International Criminal Court.[89]

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

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

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

resolutions adopted under Chapter VII of the Charter of the United Nations, with the corresponding obligations under the Charter.[90] Another case in point is the system of referrals by the Security Council to the International Criminal Court.[91] There may also be relevant agreements relating to the operation of hybrid or internationalized tribunals, which have often been created by provisions of domestic law, including as a result of initiatives originating from universal or regional international organizations.

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

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

Article 3
Persons enjoying immunity *ratione personae*

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

Commentary

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

(2) The Commission considers that there are two interlinked reasons, one representational and one functional, for according immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[92] Second, they must be able to discharge their functions unhindered.[93] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from

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

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

[92] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 27, para. 46).

[93] See *Arrest Warrant of 11 April 2000* (footnote 75 above), pp. 21–22, paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

jurisdiction of the Head of State. In this connection, mention should be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

(4) The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[94] and *Certain Questions of Mutual Assistance in Criminal Matters*[95] cases. It must be emphasized that examples of national judicial practice, although limited in number and geographical representativeness, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether other State officials also enjoy immunity from criminal foreign jurisdiction.[96]

---

[94] *Arrest Warrant of 11 April 2000* (see footnote 75 above), pp. 20–21, para. 51.

[95] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at pp. 236–237, para. 170.

[96] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see Federal Republic of Germany, Re *Honecker*, Federal Supreme Court, Second Criminal Chamber, Judgment of 14 December 1984 (Case No. 2 ARs 252/84), reproduced in *International Law Reports*, vol. 80, pp. 365–366; Spain, *Rey de Marruecos*, National High Court, Criminal Chamber decision of 23 December 1998; France, *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001); Spain, *Fidel Castro*, National High Court, plenary decision of the Criminal Chamber, 13 December 2007 (the Court had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008. Also in the context of criminal proceedings, but as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed their period of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See Spain, *Pinochet (solicitud de extradición)*, National High Court, Central Investigation Court No. 5, request for extradition of 3 November 1998; United Kingdom, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords, judgment of 24 March 1999, reproduced in *International Legal Materials*, vol. 38 (1999), p. 581; Belgium, *H.S.A.*, et.al. *v. S.A.*, et al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation, Judgment of 12 February 2003 (P-02-1139.F), reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596–605; Spain, *Scilingo*, National High Court, Criminal Chamber, Third Section, decision of 27 June 2003; France, *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Chamber, judgment of 19 January 2010 (09-84.818), *Bulletin des Arrêts, Chambre criminelle*, No. 1 (January 2010), p. 41; United Kingdom, *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice, judgment of 29 July 2011 ([2011] EWHC 2029 (Admin), *International Law Reports*, vol. 147, p. 633); and Switzerland, *A. c. Ministère public de la Confédération*, Federal Criminal Court (BB.2011.140), judgment of 25 July 2012. It should be emphasized that national courts have never denied that a Head of State has immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see United States of America, *Rukmini S. Kline* et.al. *v. Yasuyuki Kaneko* et.al., Supreme Court of the State of New York, judgment of 31 October 1988 (535 N.Y.S.2d 1258) (141 Misc.2d 787); Belgium,

(5) The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is enjoyed by persons who actually hold that office. The title given to the Head of State in each State, the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft articles.[97]

(6) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their functions of representing the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition that there is no need to produce full powers in the case of the Head of State, Head of Government and Minister for Foreign Affairs for the conclusion of treaties[98] and the equality of the three categories of officials in terms of their international protection[99] and their involvement in the representation of the State.[100] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and, implicitly, the United Nations Convention on Jurisdictional Immunities of States and Their Property.[101]

(7) All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments.

Mobutu v. SA Cotoni, Civil Court of Brussels, Judgment of 29 December 1988; Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal, Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in *International Law Reports*, vol. 102, p. 198); United States, *Lafontant v. Aristide*, District Court for the Eastern District of New York, Judgment of 27 January 1994, 844 F. Supp. 128; Austria, *W. v. Prince of Liechtenstein*, Supreme Court, Judgment of 14 February 2001 (7 Ob 316/00x); United States, *Tachiona v. Mugabe (*"*Tachiona I*"*)*, District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); United States, *Fotso v. Republic of Cameroon*, District Court of Oregon, order of 22 February 2013 (6:12CV 1415-TC).

97 In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook … 1972*, vol. II, document A/8710/Rev.1, pp. 312–313, para. (2) of the commentary to draft article 1), and no reference was accordingly made in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167).

98 Vienna Convention on the Law of Treaties, art. 7, para. 2 (*a*). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 92 above), p. 27, para. 46).

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

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

101 Article 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (paragraph 1 refers to the Head of State and paragraph 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in article 2, paragraph 1 (*b*) (iv). See paragraphs (6) and (7) of the commentary to article 3 of the articles on jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 22.

In this connection, it was noted that article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a specific mention of the Head of State while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft articles the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refer to any kind of immunity that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[102] In addition, far from rejecting the immunities that may be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[103] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(8) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[104] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[105] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. The Commission concluded that the *Arrest Warrant* case reflects customary international law and, accordingly, Ministers for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. In the view of the Commission, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction.

(9) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their period of office.[106]

---

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

[103] Para. (7) of the commentary to article 3 (*Yearbook … 1991*, vol. II (Part Two), p. 22).

[104] *Arrest Warrant of 11 April 2000* (see footnote 75 above), pp. 20–21, para. 51.

[105] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 95 above), pp. 236–237, para. 170.

[106] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, Judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418 (reproduced also in *International Law Reports*, vol. 47, p. 275) (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); United States, *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii, Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; United States, *Saltany and*

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

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

(12) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[107] With regard to the other high-ranking officials, the Court stated that the acts attributed to them were not carried out within the scope of their duties;[108] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[109]

(13) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[110] in others, the national courts found that the person on trial

Others v. Reagan and Others, United States District Court for the District of Columbia, Judgment of 23 December 1988, 702 F. Supp 319, *International Law Reports*, vol. 80, p. 19; United States, *Tachiona v. Mugabe ("Tachiona I")* (footnote 96 above); Belgium, *H.S.A.*, et.al. *v. S.A.*, et.al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation, 12 February 2003 (footnote 96 above).

107 See *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 95 above), pp. 236–240, paras. 170–180.

108 *Ibid*., p. 243, para. 191.

109 *Ibid*., pp. 243–244, para. 194. See, in general, paras. 181–197, *ibid.*, pp. 240–244.

110 In this connection, see United Kingdom, Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court, Judgment of 12 February 2004, reproduced in International and Comparative Law Quarterly, vol. 53 (2004), p. 771; and United Kingdom, Re *Bo Xilai* (Minister for Commerce and International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005, reproduced in *International Law Reports*, vol. 128, p. 713, in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, the United States executive branch recognized Mr. Bo Xilai's immunity because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*,

did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who benefit from such treatment,[111] which illustrates the major difficulty

District Court for the District of Columbia, 24 July 2006 (Civ. No. 04-0649): see United States, District Court for the District of Columbia, *Weixum* et al. *v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (deferring to the executive branch's position). In France, *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Cassation, Criminal Chamber, 19 January 2010 (see footnote 96 above), the Court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In Switzerland, *A. c. Ministère public de la Confédération*, Federal Criminal Court, 25 July 2012 (see footnote 96 above), the Tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his period of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[111] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), Judgment of 29 July 2011 (see footnote 96 above), in which the Court admitted, based on the International Court of Justice judgment in the *Arrest Warrant* case (see footnote 75 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the Court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 106 above)). Similarly, in a 2015 judgment, the Criminal Chamber of Court of Cassation of France denied the immunity *ratione personae* of a Second Vice-President responsible for defence and security because the official's functions were not those of a Head of State, Head of Government of Minister for Foreign Affairs. Court of Cassation, Criminal Chamber, 15 December 2015, No. 15-83.156. In the *United States of America v. Noriega* case, the Court of Appeals for the Eleventh Circuit, in its judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. 117 F.3d 1206 (*International Law Reports*, vol. 121, p. 591). Another court in the United States, in the *Republic of the Philippines v. Marcos* case, District Court for the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793), indicated that the Attorney General of the Philippines did not enjoy immunity *ratione personae*. In the *Fotso v. Republic of Cameroon* case, the executive branch informed the Court that the President of Cameroon enjoyed immunity as a sitting Head of State, and the case was dismissed. United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 25 January 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 25424, at *2–6 (D. Ore. Jan. 25, 2013). The executive branch did not address the immunity of the Minister of Defence and the Secretary of State for Defence, but the court later found that those officials enjoyed immunity, given that they "acted in their official capacities". United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 16 May 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 83948, at*3, *16–21 (D. Ore. May 16, 2013). It should be kept in mind that the two cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: United Kingdom, *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the Court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and Italy, *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation, Third Criminal Section, Judgment of 28 December 2004 (Rivista di diritto internazionale, vol. 89 (2006), p. 568), in which the Court denied immunity to the President of Montenegro before it became an independent State. In Switzerland, *Evgeny Adamov v. Office fédéral de la justice*, Federal Tribunal of Switzerland, Judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 339 (CH 2005)]), the Tribunal denied immunity to a former Minister of Atomic Energy of the Russian

involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out that, in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives – immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission – reflecting the uncertainty in determining precisely what immunity from foreign criminal jurisdiction might be enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[112]

(14) The Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[113] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (*b*) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument – as previously mentioned – does not apply to "criminal proceedings". Nevertheless, the Commission noted that high-ranking officials can enjoy the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State, which can offer a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

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

Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible that unspecified high-ranking officials could enjoy immunity.

[112] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 96 above) is a good example of this. In *Association Fédération nationale des victimes d'accidents collectifs*; *Association des familles des victimes du Joola* (see footnote 96 above), the Court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In *A. c. Ministère public de la Confédération* case (see footnote 96 above), after making a general statement about immunity *ratione personae*, the Court also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of United States, *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which, in its judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* cases (see footnote 110 above) was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister for Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

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

(16) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[114] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[115]

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their period of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their period of office.

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

Commentary

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

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

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

> After a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[116]

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

[114] See para. (2) of the commentary to draft article 1 above.
[115] See *Arrest Warrant of 11 April 2000* (footnote 75 above), p. 25, para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 76 above), p. 124, para. 58.
[116] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 61.

the Convention on Special Missions.[117] The Commission itself, in its commentaries to the draft articles on jurisdictional immunities of States and their property, stated that "[t]he immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[118] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[119]

(4) Consequently, the Commission considers that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the period of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies. The term "period of office", as used in the English text, mirrors the terminology used by the International Court of Justice in the *Arrest Warrant* case[120] and was preferred to the phrase "term of office", which the Commission considered might refer only to fixed periods of time in office. The terms "*mandat*" and "*mandato*" in French and Spanish, respectively, were considered sufficiently clear.

(5) Only during the period of office does immunity *ratione personae* extend to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity".[121] This configuration reflects State practice.[122]

---

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

[118] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts" (*Yearbook ... 1991*, vol. II (Part Two), p. 18, paragraph (19) of the commentary to draft article 2, para. 1 (*b*) (v).

[119] Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, France: *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, Judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, Judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716–718; *Société Jean Dessès c. prince Farouk et dame Sadek*, Tribunal de Grande Instance de la Seine, 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689 (English version reproduced in *International Law Reports*, vol. 65, pp. 37–38); United States: In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, Judgment of 16 June 1994, 25 F.3d 1467 (9th Cir. 1994), *International Law Reports*, vol. 104, p. 119, at pp. 123 and 125. A British court recently found that the former King of Spain, Juan Carlos de Borbón y Borbón, has no longer enjoyed immunity *ratione personae* since his abdication. See United Kingdom, *Corinna Zu Sayn-Wittgenstein Sayn v. HM Juan Carlos Alfonso Víctor María de Borbón y Borbón*, High Court of Justice, Queen's Bench Division, Judgment of 24 March 2022, [2022] EWHC 668 (QB), para. 58. In the context of criminal cases, see Spain, *Pinochet* (footnote 96 above).

[120] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 61.

[121] The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (*Yearbook ... 1958*, vol. II, document A/3859, p. 98, paragraph (4) of the commentary to article 29 of the draft articles on diplomatic intercourse and immunities).

[122] See, for example, *Yaser Arafat (Carnevale re. Valente – Imp. Arafat e Salah)*, Italy, Court of Cassation, Judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), 2 November 1989 (footnote 96 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 96 above), at p. 592; *Gaddafi*, Court of Appeal of Paris, 20 October 2000 (footnote 96 above) (English version in *International Law Reports*, vol. 125, p. 490, at p. 509); *H.S.A.*, et al. *v.*

(6) As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[123] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[124] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

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

(8) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, and it is understood to apply to both categories.[125] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the expressions "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following the wording used by the International Court of Justice in the *Arrest Warrant* case.

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

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

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

---

S.A., et al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (footnote 96 above), at p. 599; *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Supreme Court of Sierra Leone, Judgment of 14 October 2005 (S.C. No. 1/2003); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008 (footnote 96 above), pp. 156–157. Among more recent cases, see *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Appeal of Paris, Investigating Chamber, Judgment of 16 June 2009, confirmed by the Court of Cassation, Judgment of 19 January 2010 (footnote 96 above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 96 above), para. 55; and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 96 above), legal ground No. 5.3.1. See also *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber (France), judgment of 13 June 2013.

123 *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 55.

124 *Ibid*.

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

enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their period of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their period of office. As regards acts performed prior to the period of office, it must be noted that immunity *ratione personae* applies only if the criminal jurisdiction of a foreign State is to be exercised during the period of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[126]

(12) In any event, it must be noted that, as the Court also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to his or her period of office, but solely as suspending the exercise of foreign criminal jurisdiction during the period of office of those high-ranking officials.[127] Consequently, when the period of office ends, the acts carried out during or prior to the period of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the period of office.

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

(14) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after his or her period of office ends. Paragraph 3 proceeds from the principle that immunity *ratione personae* ceases after the period of office ends. Consequently, immunity *ratione personae* no longer exists after the period of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[128]

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

[126] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 55.

[127] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, p. 25, para. 60).

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

enjoying such immunity, since that is not in line with paragraph 1 of the draft article.[129] Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles.

(16) The draft article, as adopted on first reading, referred in paragraph 3 to "the application of" rules. That phrase was deleted to broaden the scope of the "without prejudice" clause. The paragraph is intended to preserve not only the rules that strictly concern the applicability of immunity *ratione materiae*, but also related rules on process and procedure. In addition, the word "concerning" was replaced with "on" in order to more clearly define the scope of the paragraph, and in response to the suggestion that "concerning" may include rules not directly related to immunity *ratione personae*. The appropriate changes were also made in the Spanish version, that is, replacing "*relativas a la*" with "*sobre*", while the French version remained unchanged in that regard. In the French version, "*l'extinction*" was replaced with "*la cessation*", to align the text with the usage in other relevant instruments and in light of comments made by States on the terminology.[130]

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.

Commentary

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

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

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

(4) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed by State officials in an official capacity, as the concept was defined in draft article 2 (*b*).[131] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies

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

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

[131] See, draft article 2 (*b*) and paragraphs (21)–(35) of the commentary thereto, as adopted by the Commission on first reading. *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 68–69.

to both categories of acts. This is not altered by the deletion of the word "only", which was considered redundant.

(5) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (*a*), namely that a State official is: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (*a*), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (*a*), must be duly kept in mind for the purposes of the present draft article.[132]

(6) The material scope of immunity *ratione materiae* as set out in draft article 5, paragraph 1, does not prejudge the question of limitations or exceptions to immunity, which is addressed in draft article 7.

(7) In addition, attention must be drawn to the fact that paragraph 1 uses the expression "from the exercise of foreign criminal jurisdiction", as draft article 3 does to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[133]

(8) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[134] has not been challenged in practice and is generally accepted in the literature.[135]

(9) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the models in the 1961 Vienna Convention on Diplomatic Relations[136] and the 1946 Convention on the Privileges and Immunities of the

[132] See paragraphs (3)–(20) of the commentary to draft article 2, as adopted by the Commission on first reading. *Ibid.*

[133] See, above, paragraph (16) of the commentary to draft article 3.

[134] See, *a contrario sensu*, paragraph (19) of the commentary to draft article 2, paragraph 1 (*b*) (v), of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated" (*Yearbook … 1991*, vol. II (Part Two), p. 18).

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

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

United Nations.[137] The expressions "continues to subsist" and "have ceased to be State officials" are based on those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2, subparagraph (*a*).[138]

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

(11) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 5, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a "without prejudice" clause. In conformity with that paragraph,[139] immunity *ratione materiae* also applies to former Heads of State, Heads of Government and Ministers for Foreign Affairs since they fall under the definition in draft article 2, subparagraph (*a*), of "State officials". The Commission does not consider it necessary to refer explicitly to those officials in the present draft article, because their enjoyment of immunity *ratione materiae* stems from the nature of acts performed in an official capacity.

(12) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. However, such "cessation … is without prejudice to the rules of international law on immunity *ratione materiae*" (draft article 4, paragraph 3). As the Commission stated in the commentary to that draft article, "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*". The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of the period of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs".[140]

(13) This is precisely the situation referred to in paragraph 3 of draft article 5. The paragraph proceeds on the basis that, during their period of office, Heads of State, Heads of

---

by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

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

[138] For the meaning of the term "individual", see paragraph (6) of the commentary to draft article 2, as adopted by the Commission on first reading (see footnote 131 above).

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

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

Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. This does not prevent these State officials, after their period of office has ended, from enjoying immunity *ratione materiae*. Consistent with amendments adopted to draft article 4, the expression "term of office" was amended to "period of office" in draft article 5.

(14) The requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during his or her period of office. The purpose of draft article 5, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said, "does not prejudge the content of the immunity *ratione materiae* regime".[141]

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (art. 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (art. IV, sect. 12), which govern situations similar to those covered in the paragraph in question, namely the situation of persons who enjoyed immunity *ratione personae*, after the end of their period of office, with respect to acts performed in an official capacity during such period of office. The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and the moment when immunity is invoked. Like the treaties on which it is based, draft article 5, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term "immunity". Yet although the term is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their period of office has ended.

[141] Para. (15) of the commentary to draft article 4 above.

Chapter VI
General principles of law

A. Introduction

186. The Commission, at its seventieth session (2018), decided to include the topic "General principles of law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.[142] The General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

187. The Commission considered the first report of the Special Rapporteur (A/CN.4/732) at its seventy-first session (2019).[143] At its seventy-second session (2021), the Commission considered the Special Rapporteur's second report (A/CN.4/741 and Corr.1), and the memorandum it had requested from the Secretariat (A/CN.4/742) at its seventy-first session.[144] At the seventy-third session (2022), the Commission considered the Special Rapporteur's third report (A/CN.4/753).[145]

188. At the seventy-fourth session (2023), on the basis of the draft conclusions proposed by the Special Rapporteur in his three reports, the Commission provisionally adopted 11 draft conclusions on general principles of law, together with commentaries thereto, on first reading.[146]

B. Consideration of the topic at the present session

189. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/785), with the bibliography thereto (A/CN.4/785/Add.1), as well as comments and observations received from Governments (A/CN.4/779 and Add.1). The Special Rapporteur, in his fourth report, examined the comments and observations received from Governments on the draft conclusions, as adopted on first reading. He made proposals for consideration on second reading, in light of the comments and observations, and proposed a recommendation to the General Assembly.

190. At its 3707th to 3712th meetings, from 5 to 12 May 2025, the Commission considered the fourth report of the Special Rapporteur. Following the debate on the plenary, the Commission, at its 3712th meeting, on 12 May 2025, decided to refer draft conclusions 1 to 12, as contained in the fourth report, to the Drafting Committee, taking into account the comments and observations of Governments, as well as the debate in plenary on the Special Rapporteur's report. The summary of the plenary debate can be found in paragraphs 206 to 270 below.

191. At its 3721st meeting, on 27 May 2025, the Chair of the Drafting Committee introduced the report of the Drafting Committee (see A/CN.4/L.1018).[147] At the same meeting, the Commission took note of the report of the Drafting Committee, containing draft conclusions 1 to 12, provisionally adopted by the Committee on second reading at the present session. The adoption of draft conclusions 1 to 12 by the Commission was postponed to the seventy-seventh session, owing to the unavailability of time for the preparation, translation and consideration of corresponding commentaries as a consequence of the reduced length of the present session.

---

142 *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 363.

143 *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 202–262.

144 *Ibid., Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 166–239.

145 *Ibid., Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 94–149. See also A/CN.4/L.971.

146 *Ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 35–41. See also A/CN.4/L.982.

147 Statement of the Chair available on the website of the Commission at https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2025_dc_chair_statement_gpl.pdf&lang=ES. Statements made at the 3721st meeting are reflected in document A/CN.4/SR.3721.

1. Introduction by the Special Rapporteur of the fourth report

192. The Special Rapporteur began by stating that general principles of law were one of the sources of international law envisaged in Article 38, paragraph 1, of the Statute of the International Court of Justice and therefore merited comprehensive and careful treatment. According to the Special Rapporteur, the Commission should continue its approach of maintaining a balance between rigour and flexibility on the topic, as it had done when working on other sources of international law.

193. The Special Rapporteur recalled the various States, experts and academic institutions that had commented on the topic since the adoption of the draft conclusions on first reading at the seventy-fourth session of the Commission. In that connection, he stated that delegations had generally welcomed the draft conclusions, which could facilitate the work of all those called on to identify and apply general principles of law. He also recalled that there was support for the intended final form of draft conclusions.

194. He explained that the fourth report consisted of three sections: (*i*) introduction; (*ii*) comments and observations received from Governments, both general and specific; and (*iii*) his suggestions as to the final outcome of the Commission's work on the topic. Regarding the bibliography, he stated that it would soon be issued as an addendum to his fourth report and he would welcome input by members thereon.

195. In the view of the Special Rapporteur, the Commission was in a position to conduct the second reading, but he expressed regret that it was unrealistic to conclude it at the present session given its reduced length.

196. With respect to draft conclusion 1, the Special Rapporteur clarified that the provision was introductory in nature and he had not suggested any changes to it. He recalled comments from Governments and noted that the starting point of the Commission's work was Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, analysed in light of practice, jurisprudence and teachings. In response to some suggestions that had been made by Governments to include an illustrative list of general principles of law, he stated that the Commission had already given much consideration to the idea of a list and decided against it, as a list would necessarily be incomplete and could generate the erroneous impression that there were no general principles of law other than those in the list. Regarding comments suggesting the inclusion of a definition of general principles of law, he explained that the draft conclusions as a whole already gave general indications on what should be understood as general principles of law. The Special Rapporteur indicated a willingness to expand the commentary to draft conclusion 1 to clarify the issue of the terminology used, particularly by ensuring that a general principle of law was effectively referred to in practice by the term "principle".

197. Regarding draft conclusion 2 and the use of the term "community of nations" as adopted on first reading, the Special Rapporteur noted the use of the term in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.[148] He stated that the main question that had emerged from the use of the term was which actors had the capacity to recognize general principles and contribute to their formation. Taking into account existing practice, he was of the view that, while recognition by international organizations was also possible, recognition by States was mainly what contributed to the formation of general principles of law. The Special Rapporteur had thus proposed three additional paragraphs to draft conclusion 2 to address recognition by States and the role that international organizations and others may have in the recognition process.

198. Within the context of draft conclusion 2, the Special Rapporteur recalled that some delegations had raised the issue of general principles with a more limited scope, such as those that were regional and non-universal. He clarified that, after studying the practice, including that of the Caribbean Court of Justice, he had proposed a new draft conclusion (draft conclusion 12, "General principles of law with a limited scope of application") in his fourth

[148] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

report. The new proposed draft conclusion contained a “without prejudice” clause with regard to general principles of law with a limited scope of application.

199. Concerning draft conclusion 3, the Special Rapporteur noted that the existence of the first category of general principles (i.e., those deriving from national legal systems), was unanimously supported by States. Regarding the second category (i.e., those formed within the international legal system), several States were of the view that the category existed, although others continued to express concerns and doubts as to its existence. The Special Rapporteur reaffirmed that the second category was rooted in the practice of States and the jurisprudence of international courts and tribunals, while mentioning that teachings also supported its existence. He did not propose any changes to the provision. According to the Special Rapporteur, international law was a legal system like any other legal system and thus could itself generate general principles of law. He clarified that the fourth report also analysed how to distinguish general principles of law and customary international law, stressing that the distinction lay in the different methodologies for the identification of the two sources.

200. The Special Rapporteur did not propose any changes to draft conclusions 4, 5 and 6. While he noted that States had commented on the provisions both in writing and in the Sixth Committee, he proposed addressing in the commentary questions that warranted clarification. Notably, the Special Rapporteur suggested expanding the commentary to draft conclusion 6 to clarify the question of compatibility and applicability and the criteria involved in the determination of compatibility.

201. On draft conclusion 7, the Special Rapporteur recalled that States had expressed differing views with regard to the existence of the second category of general principles of law. He stressed that one of the main issues was the methodology used for identification of general principles of law falling under the second category and the fact that some States were of the view that the methodology proposed was too vague and could lend itself to circumventing the consent that was required for the formation of international norms. The Special Rapporteur suggested clarifying the methodology in the commentary. As explained in the fourth report, the methodology was essentially inductive and deductive. He proposed no changes to draft conclusion 7.

202. No changes were proposed to draft conclusion 8 either, as the Special Rapporteur highlighted that the provision had received general support from States. He suggested that the Commission consider adding clarifications in the commentary to address a few issues that had been raised by States.

203. The Special Rapporteur proposed changes to draft conclusion 9 following comments in the Sixth Committee regarding the term “most highly qualified publicists”. He explained that the changes aimed at using broader language to ensure diversity.

204. With respect to draft conclusion 10, the Special Rapporteur proposed to invert the order of paragraphs 1 and 2 as adopted on first reading. He clarified that the proposal was based on comments by some States that general principles of law were not always used to fill gaps, and the goal of the change was to give paragraph 1, as adopted on first reading, less prominence, given that it reflected a statement of fact of what was mainly, but not always, the function of general principles of law.

205. The Special Rapporteur did not propose any changes to draft conclusion 11, since the provision enjoyed general support from States. He stated that States had broadly supported the position that there was no hierarchy between general principles of law and other sources of international law, consistent with the stance adopted by the Commission in its work on the fragmentation of international law. The Special Rapporteur urged the Commission to avoid using the expression “subsidiary source”, since it was clear that general principles of law should not be confused with subsidiary means to determine rules of international law, as was clear from Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

2. Summary of the debate

(a) General comments

206. A number of members expressed concern that a lack of terminological clarity affected the set of draft conclusions and emphasized that the work of the Commission did not clearly distinguish between general principles of law as an autonomous source of international law, peremptory norms of general international law (*jus cogens*) and principles of international law in a broader sense. It was noted that principles of international law, as distinct from general principles of law, were general rules of conduct that expressed, in simplified and general terms, what was prescribed in treaty or customary international law, but did not constitute autonomous sources of law. A clearer terminological distinction in the commentary between general principles of law and principles of international law was called for. It was also suggested that such terminological inconsistencies could underlie a number of the comments and requests for clarification by States in relation to the draft conclusions as adopted on first reading.

207. Some members argued that the Commission should avoid engaging in an exercise of extensive progressive development in a topic concerning one of the sources of international law. In that connection, it was expressed that the Commission's final outcome on the topic should reflect State consent as a cornerstone of international law and be firmly anchored in State practice.

208. While some support was expressed for the suggestion of some States to include a definition of general principles of law in the draft conclusions, other members rejected that suggestion. It was argued that general principles of law were products of specific social and historical contexts and, historically, they had been defined by their substantial ambiguity and fluidity as a source of international law and had rarely been invoked. A view was expressed requesting a definition of "general" to shed clarity on the scope of application of general principles of law.

209. A number of members expressed concern regarding the limited number of written observations submitted by States on the draft conclusions adopted on first reading, as well as the underrepresentation of certain regions, including Asia and Africa, in the input received by the Commission. It was emphasized that, during the second reading, the Commission should focus primarily on the views of States that were more directly reflective of existing law and practice and should avoid significant revisions to the text adopted on first reading unless there were compelling reasons to do so.

(b) Draft conclusion 1 (Scope)

210. Members generally favoured retaining the text adopted on first reading. Several members agreed that any list of general principles of law would be necessarily incomplete and might inhibit essential developments in the field. It was stated that, even if the commentary were to include a list, it would be necessary to emphasize its purely indicative nature. The view was expressed that a non-exhaustive list of examples of recognized general principles of law would not only enhance the practical value of the work of the Commission, but also usefully sharpen the Commission's conceptual focus. It was underscored that the scope of the topic should be establishing criteria for identifying general principles of law rather than determining their content.

(c) Draft conclusion 2 (Recognition)

Paragraph 1

211. It was generally agreed that the term "civilized nations" contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice was anachronistic or outdated and the Commission should thus use a different term. Several members suggested replacing the term "community of nations" in paragraph 1 (in English, as adopted on first reading) with the term "community of States" or "international community", while others favoured retaining the text of the first reading.

212. The negotiation history of the International Covenant on Civil and Political Rights was recalled and the view was expressed that the term "general principles of law recognized by the community of nations" used in article 15, paragraph 2, of the Covenant was not intended to capture the essence and meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. Additionally, it was stated that specific reference to "States" promoted legal certainty. According to other members, the term "international community" would acknowledge the development of international law and the role of international organizations, thereby adequately addressing the concerns the Special Rapporteur had attempted to deal with by proposing new paragraphs to the provision in the fourth report. In that connection, the Spanish term "*comunidad internacional*" used in article 15, paragraph 2, of the Covenant and in the Spanish version of draft conclusion 2 was mentioned. The commentary adopted on first reading and the rationale behind the Commission's decision to use the term "community of nations" was highlighted; it was stated that "community of nations" was enough not to exclude the practice of international organizations.

213. Further explanation was requested by several members on the criterion of recognition and the precise extent to which recognition was required. It was stated that recognition seemed to be the consequence of the existence of a general principle, i.e., a principle was considered to be recognized when it existed, and not the other way around. Support was voiced for the assertion in the fourth report that general principles of law should not be confused with peremptory norms of general international law (*jus cogens*), which required acceptance and recognition by the international community as a whole. A view was expressed that the threshold for the recognition of general principles of law should refer to the "international community of States" to emphasize that it was the view of States that counted towards such recognition and could serve as a safeguard against the transposition of less representative and not widely recognized principles into international law.

Newly proposed paragraphs 2, 3 and 4

214. While some members supported the addition of three new paragraphs as proposed by the Special Rapporteur in the fourth report, several members questioned that approach. Members in favour of the new paragraphs recalled the conclusions on identification of customary international law and the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*),[149] while pointing out the possibility that international organizations and other actors could play a role or might be relevant in the formation of general principles of law. It was emphasized that recognition was principally done by States, but international organizations – as extensions of States – could also play a role. The Malabo Protocol[150] and the African Union Model Law on Universal Jurisdiction over International Crimes[151] were mentioned as examples of how international organizations could contribute to the emergence of general principles of law. On the other hand, it was considered that the newly proposed paragraphs lacked clarity and created difficulties; some members were of the view that they appeared to be related to the existence of a general principle rather than its recognition and blurred even further the distinction between general principles of law and customary international law. Several members suggested dealing with the issues covered in the newly proposed paragraphs in the commentary.

215. Clarification was sought as to the distinction between formation and recognition referred to in the proposed paragraph 2, since, under the provision, recognition would be an element of the process of formation of general principles of law. Concerning proposed paragraph 3, while several members welcomed the idea of clarifying the role that international organizations might play in the recognition process, it was suggested that the

[149] See *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), paras. 65–66, and *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44, respectively.

[150] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014), available on the website of the African Union, https://au.int.

[151] Adopted in July 2012 at 21st Ordinary Session of the Executive Council of the African Union in decision EX.CL/Dec.708 (XXI), contained in document EX.CL/731 (XXI)c.

issue be addressed in the commentary, where the nuances of the practice of international organizations could be taken up in greater detail. It was considered important to emphasize the role of States in the recognition process and elaborate on the circumstances under which international organizations could contribute to the process of recognition. Doubts were expressed as to whether international organizations could be interpreted as falling within the intended idea of "civilized nations" under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The meaning of the expression "in certain cases" in proposed paragraph 3 was questioned. Further explanation was sought on who were the "other actors" who might be relevant to the process of recognition, as referred to in proposed paragraph 4.

Proposals

216. Several proposals were made to amend the text of draft conclusion 2 proposed in the fourth report, *inter alia*: (*a*) formulating a new draft conclusion based on the three paragraphs proposed by the Special Rapporteur or moving them to draft conclusion 5; (*b*) adjusting the text to highlight the role of States and clarify the evidentiary nature of the contribution of international organizations to the formation of general principles of law; (*c*) retaining the first-reading text; (*d*) clarifying the apparent ambiguity in paragraph 1 by adding "as such" after the word "recognize"; and (*e*) deleting paragraph 3 if the term "international community" was used instead of "community of nations" in the draft conclusions.

Newly proposed draft conclusion (draft conclusion 12)[152]

217. Members generally supported the inclusion of a "without prejudice" provision as contained in draft conclusion 12 proposed in the fourth report. It was stated that the proposal was in line with recent developments, and advisory opinions of the Inter-American Court of Human Rights were recalled.[153]

218. Some members did not favour a new provision and expressed a preference for detailing the issues in the commentary to draft conclusion 2, stressing that the fourth report did not offer analysis of relevant State practice and no State had commented on the existence of subregional or regional general principles of law. It was considered that draft conclusion 12 might overlap with paragraph 2 of draft conclusion 7 and further explanation on how the two interacted was sought.

Persistent objector rule

219. Regarding the suggestion of some States to apply the persistent objector rule to general principles of law, several members stated that the suggestion had no basis in practice or the jurisprudence of international courts and tribunals. The view was expressed that further research on the matter and clarification in the commentary was necessary. Another view was that the principle of consent by States to international legal obligations was itself a general principle of law formed within the international legal system and, thus, if a State was able to demonstrate through persistent objection that it did not consent to a general principle of law formed within the international legal system, it ought not to be bound by such a rule.

(d) Draft conclusion 3 (Categories of general principles of law)

Subparagraph (a) – general principles of law derived from national legal systems

220. A number of members voiced support for subparagraph (*a*) as adopted on first reading, which reflected the first category of general principles of law. It was stated that it was firmly grounded in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice and enjoyed broad support among States. The view was expressed that the second category contained in subparagraph (*b*) belonged to the realm of progressive development. The view was also expressed that certain general principles might simultaneously be in both categories,

[152] For detailed observations on draft conclusion 12, see paras. 262–266 below.

[153] *The obligations in matters of human rights of a State that has denounced the American Convention on Human Rights and the Charter of the Organization of American States*, Advisory Opinion OC-26/20, 9 November 2020, paras. 137 and 139; *Presidential reelection without term limits in the context of the Inter-American Human Rights System*, Advisory Opinion OC-28/21, 7 June 2021, para. 99.

a point that could be mentioned in the commentary. Some members considered that the Commission should refrain from classifying draft conclusion 3 as codification or as progressive development since, based on its well-established practice, the draft conclusion could fall into either category.

Subparagraph (b) – general principles of law formed within the international legal system

221. Differing views were expressed regarding the existence of the second category of general principles of law contained in subparagraph (*b*). Several members supported its existence, while a number of members reiterated their reservations or concerns and urged the Commission to exercise caution when dealing with the matter. Some members indicated openness to the existence of the second category.

222. It was stated that the existence of the second category reflected the development of an integrated system of international law over the century since the Statute of the Permanent Court of International Justice had been adopted. The view was expressed that State practice reflected that States engaged in activities tending to corroborate the existence of the second category, in particular when concluding multilateral treaties referring to principles that could be considered as part of the second category, and that some teachings also supported their existence. It was stressed that a more explicit form of State consent was required for the recognition of general principles of law formed within the international legal system. Conversely, doubts were expressed whether there was sufficient widespread State practice or teachings to validate the existence of the second category and, relatedly, whether they might be deemed independent sources. A question arose as to whether the cases cited in the fourth report did indeed refer to general principles of law formed within the international legal system. It was noted that, while the fourth report focused on the jurisprudence of international courts and tribunals to attest to the existence of the second category, the Special Rapporteur had acknowledged that general principles of law as a source of international law should not be seen as court-centric. Emphasis was placed on the lack of consensus among States regarding the existence of the second category. Some members relied on the text of Article 38, paragraph 1 (*c*), to argue that the Statute of the International Court of Justice did not exclude the second category of general principles of law formed within the international legal system.

223. With regard to the Special Rapporteur's assertion that international law itself, like any legal system, had the capacity to generate principles specific to it, the view was expressed that domestic legal systems did not generate general principles, rather they generated principles that, when also recognized in other domestic legal systems, became general in nature. The methodology for recognition of general principles of law formed within the international legal system was questioned.

224. Suggestions were made to, *inter alia*: (*a*) refer in the commentary to the number of States that opposed the existence of the second category; (*b*) reflect in the Commission's work some level of doubt as to whether the second category had been generally accepted by States; and (*c*) provide more and clearer examples of State practice related to general principles of law that fell within the second category. A proposal was made to align the text of subparagraph (*b*) with that of subparagraph (*a*) and thus remove the reference to "may be formed" from the former; it was stressed that the second category covered principles that existed or were effectively used in the international legal system and not just those that might be formed within it. Some members did not favour that proposal. The view was expressed that subparagraph (*b*) should be removed, as well as draft conclusion 7 in its entirety. Should the Commission decide to retain subparagraph (*b*), it was considered essential to supplement the commentary to detail the methodology for the identification of general principles of law formed within the international legal system and clarify the precise circumstances under which they might emerge.

(e) Draft conclusion 4 (Identification of general principles of law derived from national legal systems)

225. Members generally expressed support for the two-step methodology set out in draft conclusion 4 to identify general principles of law derived from national legal systems. Some members expressed support for a proposal made in the Sixth Committee to privilege an approach with a normative evaluation to assess the transposability and applicability to the

international legal system, rather than an empirical approach in the draft conclusion. In that same vein, it was noted that principles incompatible with fundamental requirements of the international legal order should be excluded. Thus, they expressed support for using of the phrase "[m]ay be transposable to the international legal system" in paragraph (*b*) of draft conclusion 4, as proposed in the Sixth Committee.

226. The view was expressed that general principles of law were primarily understood as norms identified through an inductive process and that such methodology to ascertain them was related to their legitimacy, as it was grounded on the fact that they were repeated in different legal systems. The view was also expressed that, since draft conclusions 4 to 6 concerning the methodology to identify general principles of law derived from national legal systems had been positively received by States, the suggestions for improvements could be addressed in the commentary.

(f) Draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world)

227. Several members expressed support for draft conclusion 5 as adopted on first reading. It was further observed that the comparative analysis contemplated in draft conclusion 5 involved a two-step verification: first, the identification of the existence of a principle in the domestic law of a given State; and, second, once such existence was established, the determination of its existence in other legal systems of the world following the same exercise.

228. Several members emphasized that the comparative analysis in draft conclusion 5 should include not only geographical regions, but also a variety of economic, social, cultural and linguistic traditions and legal systems of the world. Several members also highlighted that the term "common" in paragraph 1 of draft conclusion 5 should not be understood as "universal", but rather as a "broad and representative".

229. With regard to paragraph 3 of draft conclusion 5, it was suggested that the draft conclusion or the commentary underscore the role of decisions of the highest national courts, as well as of doctrine, in the identification of general principles of law common to the various legal systems of the world. A view was expressed that the centrality of State consent in relation to the sources of international law should be emphasized. Caution was expressed as to possible excessive reliance on subjective judicial discretion in the identification of general principles of law. It was further proposed that the expression "other relevant materials" for a comparative analysis of the various legal systems of the world, mentioned in paragraph 3 of draft conclusion 5, be clarified.

230. A view was expressed pointing to a potential contradiction between the role of judicial decisions in the identification of general principles of law under paragraph 3 of draft conclusion 5 and their characterization as subsidiary means for the determination of such principles under draft conclusion 8. Another view indicated that no such contradiction existed, as draft conclusion 5 addressed the identification of the commonality of a general principle of law, whereas draft conclusion 8 referred to the subsidiary nature of judicial decisions in their determination.

(g) Draft conclusion 6 (Determination of transposition to the international legal system)

231. Some members expressed support for draft conclusion 6 as adopted on first reading and emphasized that the provision appropriately reflected the rigorous yet flexible approach to ascertaining transposition proposed by the Special Rapporteur. It was also noted that the current text of draft conclusion 6 adequately conveyed that express or formal recognition by States of general principles of law was not required to determine their transposition into the international legal system. It was suggested that, to avoid a possible interpretation that transposition required formal action, the term "transposition" should be replaced with "incorporation" or "reception". It was noted that, when read in conjunction with the commentary, the draft conclusion made clear that compatibility did not imply automatic recognition. A view was expressed that the need to evidence the transposition of a general principle of law from the domestic systems into international law prevented judicial activism from imposing obligations on States without, at a minimum, their implicit consent.

232. Other members voiced concern on the lack of clarity of the term "compatibility" and its possible disconnection from the consent of States and requested further clarification and the inclusion of examples in the commentary. Several members called for the development of objective indicators to assert the compatibility of a general principle of law originating in domestic legal systems with the international legal system, and considered that recognition, to ensure there was State consent, should not be presumed nor should it operate automatically. Some proposals were made to amend the text to indicate that the transposition of a principle common to the various legal systems of the world to the international legal system be conditioned on: the recognition by States of its compatibility with the international legal system; an assessment of either its compatibility or the extent of its recognition by States; or recognition of its compatibility by the international community.

233. A number of members reiterated their concern with regard to a possible mismatch between the text and the title of the draft conclusion. It was argued that the draft conclusion addressed the conditions for transposition ("transposability") rather than a definition of transposition or a methodology to ascertain it.

(h) Draft conclusion 7 (Identification of general principles of law formed within the international legal system)[154]

Paragraph 1

234. Several members raised concerns regarding the lack of clarity surrounding the term "intrinsic", which was considered too vague or insufficiently reflective of State consent. In that connection, many members called for the inclusion of more objective elements defining a clearer and more circumscribed methodology for identifying general principles of law formed within the international legal system. Elements such as wide and representative acceptance, consistency with the structure of international law and a binding character were suggested as possible relevant criteria. It was noted that numerous States had expressed criticism of the wording of draft conclusion 7 – a greater number than those States expressing satisfaction with it.

235. A proposal was made to underscore the element of wide and representative acceptance in the methodology indicated in paragraph 1 of draft conclusion 7, to emphasize that it was "necessary to ascertain that the community of nations has *widely and representatively* recognized the principle *as legally binding and applicable* to the international legal system".

236. Several members expressed the view that the methodology suggested for the identification of the second category of general principles of law,[155] with its inductive and deductive analysis, risked conflating general principles of law and customary international law. It was also contended that most of the examples of general principles of law formed within the international legal system contained in the reports of the Special Rapporteur were examples of principles with a conventional or customary origin. In that sense, a clear distinction between the methodologies for the identification of general principles of law formed within the international legal system and customary rules was called for.

237. A number of members observed that the methodology set out in paragraph 1 of draft conclusion 7 lacked clarity or was not sufficiently distinct from the methodology for identifying principles common to the various legal systems of the world under draft conclusion 4. In that connection, it was suggested that additional provisions be included to set out a clear methodology for ascertaining the intrinsic character of the principle to the international legal system, following the approach taken in draft conclusions 5 and 6 in the context of general principles of law derived from national legal systems. As an alternative, it was also proposed that the methodological differences between the two categories of general principles of law be further developed upon in the commentary.

[154] See also the summary of the debate concerning draft conclusion 3, subparagraph (b), in paras. 221–224 above.

[155] Two categories of general principles of law were highlighted: general principles of law derived from national legal systems, on the one hand, and general principles of law formed within the international legal system, on the other.

Paragraph 2

238. Several members expressed concern regarding paragraph 2 of draft conclusion 7. It was argued that the provision lacked clarity, unduly expanded the scope of the second category of general principles of law or rendered the content of paragraph 1 of the draft conclusion redundant. Some members suggested the deletion of paragraph 2, particularly in light of the newly proposed draft conclusion 12. A view was expressed in favour of deleting the provision in its entirety.

239. Some members expressed support for the "without prejudice" clause contained in paragraph 2 of draft conclusion 7, maintaining that paragraphs 1 and 2 were complementary rather than contradictory. A view was expressed that the provision could be interpreted as referring in paragraph 1 to principles intrinsic to the international legal system and in paragraph 2 to principles implicit in specialized fields of international law.

(i) Draft conclusion 8 (Decisions of courts and tribunals)

240. There was general support for draft conclusion 8. With respect to that draft conclusion, the retention of which some States had questioned, members stressed the importance of consistency with the ongoing work of the Commission on subsidiary means for the determination of rules of international law and of not prejudging the possible outcome of that work. It was suggested that the commentary to draft conclusion 8 indicate that the provision was without prejudice to the work of the Commission on subsidiary means for the determination of rules of international law. A proposal was made to delete draft conclusions 8 and 9 concerning subsidiary means for the determination of rules of international law, from the present topic, since the issue was being addressed separately by the Commission. It was further proposed that the Commission should align its treatment of decisions and teachings from the study of subsidiary means to ensure consistency between the two outputs, including by adding further details to draft conclusion 8 of the present topic to mirror the parallel draft conclusion in the subsidiary means work.

241. The view was expressed that more precision could be introduced in draft conclusion 8 to ensure that the role of decisions in draft conclusion 5 as evidence of the existence of principles common to various legal systems of the world was distinguished from draft conclusion 8, which referred to judicial decisions as subsidiary means for the determination of general principles of law. It was also suggested that the commentary should address the criteria for the consideration of judicial decisions and the weight to be given to them. It was suggested that the commentary should emphasize the requirement of representativeness of decisions of national courts. The use of the term "decisions" was welcomed. A proposal was made to change the title of the draft conclusion to "decisions of courts and tribunals which address the existence and content of a general principle of law".

242. A suggestion was also made to make expressly clear in the commentary the distinction between the use of decisions and evidence under draft conclusion 5 and their use under draft conclusion 8 as subsidiary means for the determination of general principles of law. The view was expressed that decisions of higher national courts should be given greater weight than other domestic court decisions. Another view was that there should be no distinction between the decisions of national and international courts as Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice did not contain such distinction.

(j) Draft conclusion 9 (Teachings)

243. Members generally supported draft conclusion 9 as presented in the fourth report. Members welcomed the necessity of representativeness when assessing teachings. Members emphasized the need to maintain consistency of the treatment in the present topic with the Commission's ongoing work on subsidiary means for the determination of rules of international law. It was suggested that no modification be introduced to the text, in the present topic, considering the current stage of the work of the Commission on subsidiary means for the determination of rules of international law, since the work on the latter was still ongoing. The view was expressed that draft conclusion 9 should be formulated in the same terms as in the subsidiary means topic.

244. A proposal was made to update the text of draft conclusion 9 based on the formulation used in the draft conclusions on subsidiary means for the determination of rules of international law. That was to indicate that teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, could constitute subsidiary means for the determination of general principles of law.

245. Some members supported draft conclusion 9 and considered that there was merit in having draft conclusions referring to subsidiary means for the determination of rules of international law in the context of general principles of law, in a similar manner as had been done in other work of the Commission, such as the conclusions on the identification of customary international law.

246. The view was expressed that a case-by-case analysis of teachings could allow for subjective interpretation and there were legal issues where teachings and judicial decisions had reached different conclusions. Support was expressed for the proposition that the category of teachings should include written and unwritten materials. Some members welcomed the clarification regarding the phrase "the most highly qualified", suggested by the Special Rapporteur.

(k) Draft conclusion 10 (Functions of general principles of law)

247. With respect to draft conclusion 10, members underscored the importance of the gap-filling role of general principles of law and noted that they were frequently used for that purpose, although their function was broader. Some members welcomed the reversal of the order of paragraphs 1 and 2, which they perceived as emphasizing that general principles could be the basis for rights and obligations. Other members stressed that gap-filling and avoiding a *non liquet* were main and specific functions of general principles of law and suggested maintaining the formulation adopted on first reading. It was pointed out whether the distinction between the two categories of general principles of law, as provided for in draft conclusion 3, was properly reflected in draft conclusion 10, which appeared to erode the significance of the second category of general principles of law by according the gap-filling role to both categories of general principles of law.

248. The view was expressed that draft conclusion 10 introduced confusion by implying that the principles covered by the present topic could also include non-legally binding principles. An example was the principle of good faith mentioned in the commentary to the first-reading text and which the International Court of Justice held "is not in itself a source of obligation where none would otherwise exist".[156]

249. Regarding paragraph 1, some members suggested reversing the order of the subparagraphs so as to list first the possible use of subsidiary means as sources of obligations before a reference to their gap-filling function. It was observed that the current structure could imply that there were only two functions and suggested just retaining two paragraphs. The view was expressed that the proposed change to the paragraphs as adopted on first reading was problematic because it attenuated one of the main functions of principles, their gap-filling role, by moving it to the second paragraph.

250. A suggestion was made to remove the reference to the coherence of the international legal system from paragraph 1, as it was considered that, depending on the situation, any source of international law could fulfil that role.

251. In relation to paragraph 1, subparagraph (*b*), a concern was raised regarding the proposed reference to primary and secondary rules in the body of the draft conclusions, since such distinction was only referred to in the commentaries of previous work of the Commission. Another suggestion was made to remove the reference to primary rights and obligations, as it could risk being interpreted to mean that the consent of States in the formation of international law could be bypassed.

[156] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at para. 94.

252. Regarding paragraph 2, it was noted that States had found the paragraph too descriptive and it was suggested that it be made more normative, for example by replacing "mainly" with "may be".

(l) Draft conclusion 11 (Relationship between general principles of law and treaties and customary international law)

Paragraph 1

253. Members generally supported paragraph 1 of draft conclusion 11. It was indicated that general principles of law were not in a hierarchical relationship with other sources of international law. Some members recalled that States had noted a possible contradiction between the paragraph and draft conclusion 10, where the complementary and gap-filling functions implied the existence of a hierarchy among the sources of international law under Article 38, paragraph 1 (*a*) to (*c*) of the Statute of the International Court of Justice. Some members expressed support for the view of several States that there was no contradiction between draft conclusions 10 and 11 because it was an issue of *lex specialis*, or sequential application, rather than one of a hierarchical relationship between general principles and other sources. It was further suggested that, to respond to the suggestions of States, the commentaries to draft conclusions 10 and 11 provide more guidance and examples on the practical application of general principles of law.

254. With regard to the question of hierarchy, the view was expressed that a distinction might be drawn between the two categories of general principles of law. It was suggested that general principles of law formed within the international legal system were not in a hierarchical relationship with treaties and customary international law. However, that would not be applicable to the general principles derived from national legal systems, which would be resorted to because treaties and customary international law did not explicitly apply.

Paragraph 2

255. It was suggested that draft conclusion 11 could elaborate on the relationship between general principles of law and customary international law and the commentary could further clarify the distinction between the two sources. It was emphasized that it was often difficult to distinguish whether a given norm reflected customary international law or constituted a general principle of law. It was underlined that general principles of law should not be treated as a less exigent version of customary international law.

256. Members expressed support for the view that the same norm could coexist in different sources and reference was made to the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* judgment of the International Court of Justice,[157] where this view had been affirmed regarding customary international law and treaty law.

257. It was noted that a practical difficulty could emerge when determining the parallel existence of a general principle of law and a rule of customary international law. If a general principle of law was not sufficiently invoked in State practice, it would not exist as a rule of customary international law. However, if sufficient practice and *opinio juris* did emerge, it would not be obvious that a separate source of general international law would "exist" in a meaningful sense parallel to customary international law. The principle of non-intervention was given as an example. Another similar view indicated that, once a general principle of law existed in customary international law or a treaty, the general principle of law would cease to exist. It was recommended that such parallel existence could be addressed with examples in the commentary or that it could be explained under paragraph 3 that practice usually led to the application of customary norms.

[157] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 424, para. 73; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 93, para. 175.

258. It was noted that the persistent objector rule was not included in the draft conclusions, while other concepts related to customary international law were. The view was expressed that it would be difficult to envisage the circumstances in which the persistent objector rule was applied to a general principle of law, but it was acknowledged that such a rule would be applicable to a subsequent customary rule emerging with a similar content. In that respect, concern was voiced that the persistent objector rule would face conceptual difficulties if a State could object to the formation of a customary rule, but not to a general principle of law with the same content. It was suggested that the persistent objector rule might be applicable to a general principle of law formed within the international legal system, but not to those derived from national legal systems. The view was expressed that the persistent objector rule, as known in customary international law, had no bearing on general principles of law.

Paragraph 3

259. In relation to paragraph 3, concerning a possible conflict between a general principle of law and a rule contained in a treaty or customary international law, it was noted that there could be a contradiction with paragraph 2. If the main function of general principles of law was gap-filling, it would be difficult to envisage the circumstances in which there could be an overlap between a general principle of law and another source or in which a conflict between two sources could occur.

260. Attention was also drawn to the possible contradiction between paragraph 3 and draft conclusion 10. It was noted that, pursuant to the methodology proposed by the Special Rapporteur to identify general principles of law, account was to be taken of evidence of the recognition of the principle at the international level, such as in international instruments, resolutions of organizations and the practice of States. However, that proposition might give the impression that, to address the *lacunae* left by treaties and customary international law, there was a need to refer to general principles, which themselves required an analysis of the existing rules of international law found in such sources.

261. In another view, paragraphs 2 and 3 could be retained, subject to the proviso that they found application only in connection with the second category of general principles of law. The view was expressed that the possible conflict between sources had arguably occurred in the *S.S. "Wimbledon"* case.[158] It was suggested that the commentary indicate that, if a general principle of law were to conflict with a peremptory norm of general international law (*jus cogens*), the latter would prevail in accordance with the hierarchy of norms. It was also suggested that the relationship between general principles of law and peremptory norms of general international law (*jus cogens*) be further clarified.

(m) Draft conclusion 12 (General principles of law with a limited scope of application)

262. With respect to draft conclusion 12, some members supported its inclusion and noted that it was natural to consider that general principles of law, like rules of customary international law, could be universal or regional in their scope of application. Other members indicated that they did not object to the inclusion of the draft conclusion, but considered that the concept proposed should be clarified and analysed in further detail. Clarification was requested as to whether the proposed draft conclusion referred to: principles applicable only in a bilateral, regional or subregional context; principles existing in certain regimes of international law; or principles with a limited material scope of application, such as principles of a procedural nature.

263. A proposal was made for the draft conclusion to clarify whether it referred to principles applicable only in the relations between certain subjects of international law, such as a limited number of States, following a similar formulation to that used by the Commission in its work on identification of customary international law. It was also noted that, while peremptory norms of general international law (*jus cogens*) were universally binding and non-derogable, leaving no room for regional variation, the same could not be said of general principles of law, which might admit a more limited or context-specific scope.

[158] Permanent Court of International Justice, *S.S. "Wimbledon"*, Judgment, 17 August 1923.

264. Some members opposed the inclusion of draft conclusion 12 and considered that the principles referred to therein could suggest the existence of an additional category of principles beyond those mentioned in draft conclusion 7. The view was expressed that no analysis of relevant State practice had been done and States had not commented on the possible existence of regional general principles of law. It was noted that such a new category would only bind States members of a particular regional international organization and would not be principles universally recognized by the community of nations nor intrinsic to the international legal system, which would seem to contradict the draft conclusion requiring that general principles be common to the various legal systems of the world. However, it was stressed that principles with a limited scope of application could be considered general principles of law in a broader sense if they met the conditions set out in draft conclusion 4.

265. It was highlighted that the scope of application of the principles proposed was limited to the respective region or subregion and should not transgress peremptory norms of general international law (*jus cogens*). The view was expressed that the use of the term "limited" could be reductionist of the complexities of regional, bilateral or local general principles of law.

266. Suggestions were made to the text of draft conclusion 12, including: (*a*) adjusting the title to align it with the scope of the provision; (*b*) replacing the word "limited" with "specific" or "particular" to reflect the application of the principles mentioned therein; (*c*) aligning the text with conclusion 16 of the conclusions on identification of customary international law;[159] and (*d*) referring to general principles "applicable only among a limited number of States" or "applicable only to a part of the community of nations". A suggestion was made to include in the commentary to the draft conclusion the practice of the Court of the Eurasian Economic Union.

(n) Final form

267. Several members agreed that the final form of the work on the topic should be draft conclusions, in line with the work of the Commission on sources of international law. The view was expressed that choosing the form of draft conclusions required paying close attention to their content, as they were more subtle and could give rise to varying interpretations. According to a further view, the final output of the topic should reflect the difficulties inherent to it and strive to provide the necessary nuanced solutions.

268. With respect to the recommendation to the General Assembly, a suggestion was made to recommend that the Assembly: (*a*) take note of the draft conclusions and annex them to a resolution; (*b*) commend them to the attention of States and all those that may be called upon to identify and apply general principles of law; and (*c*) call for their widest possible dissemination.

(o) Future programme of work

269. The view was expressed that the Commission had before it two options to deal with the topic: (*a*) thoroughly review the first-reading text to answer fundamental questions that had not been clarified during the first reading; or (*b*) work on the first-reading text and simply provide additional clarifications in the commentary as the Special Rapporteur had suggested. It was acknowledged that at the current stage it might be too late for the former, but at a minimum the Commission should prepare a new draft conclusion explicitly setting out how exactly to determine the existence of a general principle of law formed within the international legal system as an independent source of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. It was stated that, were the Commission to decide upon option (*b*), the commentary would have to be carefully prepared and ensure that all the nuances pertaining to the topic were dealt with in great detail.

270. While regret was voiced that, owing to the reduced length of the session, it would not be possible to conclude the second reading on the topic at the present session, hope was

[159] The conclusions adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), paras. 65–66. See also General Assembly resolution 73/203 of 20 December 2018, annex.

expressed that progress would be made in finalizing the draft conclusions in the Drafting Committee and that the second reading would be concluded at the next session of the Commission.

3. Concluding remarks of the Special Rapporteur

271. The Special Rapporteur expressed his appreciation to the members of the Commission for their constructive comments and suggestions on the fourth report on general principles of law. He welcomed the general support for referring the draft conclusions to the Drafting Committee and finalizing the work on the topic with a set of draft conclusions accompanied by commentaries. He also acknowledged the interest shown by academic institutions and regional organizations in the Commission's work on general principles of law.

272. The Special Rapporteur recalled that the present stage of work corresponded to the second reading of the draft conclusions and agreed with the view, emphasized by some members, that the structure and content adopted on first reading should be preserved unless there were compelling reasons for change. He agreed that a rigorous and careful approach was essential, given the systemic implications for the sources of international law. He emphasized the need to ensure respect for the established system of sources of international law, as developed by States over the years.

273. The Special Rapporteur took note of suggestions for further clarification of terminology, particularly in distinguishing general principles of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice from other types of "principles" that did not necessarily constitute general principles of law. He confirmed that such clarification could be provided in the commentaries and reiterated that terminological precision remained a central challenge in the consideration of the topic.

274. The Special Rapporteur noted the suggestion to include a non-exhaustive list of general principles of law. While views were divided on whether such a list should appear as a separate draft conclusion, he observed general support for illustrating examples throughout the commentaries and expressed his agreement with that approach.

275. The Special Rapporteur recalled that draft conclusion 1 had not been further discussed and that there was general agreement on its content. He considered that no drafting changes were needed, but that the commentary could include clarifications regarding the scope of the general principles of law addressed.

276. With respect to draft conclusion 2, the Special Rapporteur noted general agreement that recognition was central to the existence of general principles of law, though views differed on how best to express that. He proposed that the Drafting Committee continue work on the basis of the text adopted on first reading, with additional clarifications to be provided in the commentary. He observed that members proposed different alternatives to replace the term "civilized nations" as used in Article 38, paragraph 1 (*c*), including "international community" and "community of States". He emphasized that the choice involved substantive considerations regarding which actors may contribute, by their recognition of general principles of law, to the formation of such norms. The Special Rapporteur indicated that the commentary could reflect those differing perspectives, while emphasizing the primary role of States in recognizing the existence of general principles of law.

277. The Special Rapporteur also noted that some members had raised the possible relevance of the persistent objector rule, while others questioned its applicability due to a lack of supporting practice or jurisprudence. He considered that its inclusion would have little practical value and should be avoided.

278. The Special Rapporteur took note of the general support for maintaining the two-category structure set out in draft conclusion 3, distinguishing general principles derived from national legal systems from those formed within the international legal system. He acknowledged that several members affirmed that the second category was not *lex ferenda*, and it was firmly rooted in the intellectual and legal history of international law. The Special Rapporteur reiterated his conviction that general principles of law falling within the second category existed and there was sufficient practice and teachings to support their inclusion in the draft conclusions. He acknowledged, however, that some members remained cautious or

unconvinced and indicated that further clarification in the commentaries would be appropriate.

279. With regard to the methodology for identifying general principles of law, the Special Rapporteur noted overall support for the two-step approach concerning principles derived from national legal systems, as reflected in draft conclusions 4 to 6. He observed that comments focused particularly on the notion of "transposition" and the need to clarify its meaning, including whether alternative terminology such as "transposability" might be more appropriate. He indicated that such issues could be addressed in the commentary and considered by the Drafting Committee.

280. In relation to draft conclusion 7, concerning general principles of law formed within the international legal system, the Special Rapporteur noted divergent views regarding the clarity of the methodology and the formulation of the second paragraph. He agreed with those members who proposed deleting paragraph 2 and addressing its content in the commentary instead. He confirmed his view that paragraph 1 should be retained and further developed through additional guidance in the commentary.

281. The Special Rapporteur also addressed suggestions made with respect to draft conclusions 8 and 9, in particular, their relationship to the ongoing work of the Commission on subsidiary means for the determination of rules of international law. While noting different preferences, he suggested that, in the absence of consensus on modifying the text, the version adopted on first reading could be maintained and further elaborated in the commentary, including with regard to the importance of linguistic diversity.

282. The Special Rapporteur noted that draft conclusion 10 had given rise to differing views. He noted that some members supported reversing the order of the paragraphs to avoid suggesting that general principles applied only in the absence of treaty or customary rules, while others considered their primary function to be the filling of legal gaps and saw no need for change. He also noted that concerns were raised regarding the role of general principles in ensuring systemic coherence or generating rights and obligations, as well as a possible inconsistency with draft conclusion 11. The Special Rapporteur indicated that those issues, including potential differences in the functions of the two categories of general principles, would be addressed in the commentary.

283. With respect to draft conclusion 11, the Special Rapporteur noted that some members considered that the distinction between general principles of law and customary international law could be further elaborated upon in the commentary. It was suggested that general principles derived from national legal systems might stand in a hierarchical relationship with treaties and customary international law, whereas those formed within the international legal system would not. One member questioned the relevance of paragraph 3, given the unlikeliness of conflict between general principles and other sources. The Special Rapporteur, however, recalled that such conflicts could arise—for example, where States derogated from generally applicable principles by treaty—and affirmed that the principle of *lex specialis* would govern such situations.

284. Regarding the newly proposed draft conclusion 12, the Special Rapporteur welcomed the broad support expressed for its inclusion. He noted suggestions for refinement and indicated that such proposals would be considered by the Drafting Committee. He also acknowledged the interest expressed in identifying further examples of possible general principles with a limited scope of application.

Chapter VII
Subsidiary means for the determination of rules of international law

A. Introduction

285. The Commission, at its seventy-third session (2022), decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur.[160] Also at its seventy-third session,[161] the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant for its future work on the topic, to be submitted for the seventy-fourth session (2023); and a memorandum surveying the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic, to be submitted for the seventy-fifth session (2024).

286. The General Assembly, in paragraph 26 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

287. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,[162] which addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also considered the previous work of the Commission on the topic; the nature and function of sources of international law and their relationship to the subsidiary means; and the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and its status under customary international law. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[163]

288. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 5, as presented in the Special Rapporteur's first report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 3, together with commentaries, and took note of the report of the Drafting Committee on draft conclusions 4 and 5.

289. At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur,[164] which addressed: the work of the Commission on the topic thus far; the functions of subsidiary means for the determination of rules of international law, including in the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the practice of the Court and other international tribunals and scholarly writings concerning the functions of subsidiary means; and the general nature of precedent in domestic and international adjudication, including Article 38, paragraph 1 (*d*), and its relationship to Article 59 of the Statute of the International Court of Justice, as well as the relationship between Article 59 and Article 61 of the Statute. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in "the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic".[165] The Commission subsequently decided to refer draft conclusions 6, 7 and 8, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate. The Commission provisionally adopted draft conclusions 4 to 8 with commentaries.

---

160 At its 3583rd meeting, on 17 May 2022. The topic had been included in the long-term programme of work of the Commission during its seventy-second session (2021), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), annex).

161 At its 3612th meeting, on 5 August 2022.

162 A/CN.4/760.

163 A/CN.4/759.

164 A/CN.4/769.

165 A/CN.4/765.

B. Consideration of the topic at the present session

290. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/781) and the preliminary bibliography (A/CN.4/781/Add.1). The Special Rapporteur, in his third report, had studied the work of private and public expert bodies, and the possible consideration of resolutions of international organizations and of intergovernmental conferences as subsidiary means. The report, consistent with the work plan for the topic, also addressed the question of the risk of conflicting decisions of international courts and tribunals and the possible link between the supplementary means of interpretation under the law of treaties and the subsidiary means of determining rules of international law, the study of which the Commission had indicated it would undertake. The report also reflected on the views of States on draft conclusions 1 to 8, with commentaries, and proposed five draft conclusions on, respectively, the work of private and public expert bodies, the issues of their weight, resolutions of international organizations, the coherence of international law and the possible relationship between subsidiary means for the determination of rules of international law and supplementary means of interpretation of treaties.

291. At its 3712th to 3717th meetings, from 12 to 19 May 2025, the Commission considered the third report of the Special Rapporteur. At its 3717th meeting, on 19 May 2025, the Commission decided to refer draft conclusions 9, 10, 11, 12 and 13, as contained in the third report, to the Drafting Committee, taking into account the comments and observations made during the plenary debate. At the same meeting, the Commission further referred to the Drafting Committee all the draft conclusions adopted at previous sessions for the purpose of finalizing the first reading.

292. At its 3727th meeting, on 30 May 2025, the Second Vice-Chair of the Commission, on behalf of the Chair of the Drafting Committee, introduced the report of the Drafting Committee on the topic (see A/CN.4/L.1019).[166] At the same meeting, the Commission took note of the report of the Drafting Committee containing draft conclusions 1 to 13, provisionally adopted by the Committee on first reading at the present session. The adoption of draft conclusions 1 to 13 by the Commission was postponed to the seventy-seventh session, owing to the unavailability of time for the translation and consideration of the commentaries that had been prepared by the Special Rapporteur, as a consequence of the reduced length of the present session. The summary of the plenary debate can be found in paragraphs 310 to 350 below.

1. Introduction by the Special Rapporteur of the third report

293. The Special Rapporteur highlighted the positive feedback received from States regarding the progress made on the topic to date, as well as the support for the scope, direction and outcome delineated in its work. He noted with appreciation the substantially increased number of delegations that had referred to the topic in the Sixth Committee in 2024. The Special Rapporteur also noted that many delegations agreed with the draft conclusions provisionally adopted by the Commission, and recalled that most criticism had related to textual adjustments to some aspects of draft conclusions 5 to 8 and their respective commentaries.

Possible amendments to previously adopted draft conclusions

294. In response to comments from States, the Special Rapporteur proposed some possible modifications to one draft conclusion. For draft conclusion 5, the Special Rapporteur noted that several States had invited the Commission to address the issue of the weight of teachings. The Special Rapporteur recommended two alternatives. First, he suggested incorporating a new paragraph 2 applying the general criteria contained in draft conclusion 3 to teachings. Alternatively, he suggested including a separate draft conclusion on the weight of teachings,

[166] Statement of the Chair of the Drafting Committee at the seventy-sixth session (2025), available on the website of the Commission at https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2025_dc_chair_statement_sm.pdf&lang=E. Statements made at the 3727th meeting are reflected in document A/CN.4/SR.3727.

which would be consistent with draft conclusions 4 and 8, which addressed decisions of courts and tribunals and their weight, respectively. He emphasized that either approach should be mirrored in other categories of subsidiary means.

295. The Special Rapporteur also noted that some delegations had requested clarification on the relationship between draft conclusions 3 and 8, concerning the criteria to determine the weight to be given to materials. He proposed that the Commission adopt a *lex specialis* approach and adjust the text of the *chapeau* to draft conclusion 8 by deleting the language providing the criteria as being additional to the factors in draft conclusion 3. However, considering the severe time constraints due to the reduced length of the present session, the Special Rapporteur recommended revisiting those issues at the appropriate time.

Types of teachings

296. The Special Rapporteur had, in his third report, classified teachings into three categories: (*a*) those by individual scholars, practitioners or publicists; (*b*) those by collectives of private persons or *ad hoc* specialized expert groups; and (*c*) those by expert bodies created or empowered by States or international organizations. He suggested assessing their weight based on authorship and content.

297. The Special Rapporteur explained that private organizations included scientific societies, academic research institutes and professional associations of international lawyers, whose work aimed at influencing State behaviour and could inform the interpretation and application of international legal norms. Examples included the Institute of International Law (Institut de Droit International) and the International Law Association. The Special Rapporteur further explained that private works had been used by courts, including the International Court of Justice, and that more examples of influential works of private expert groups could be found in the second memorandum prepared by the Secretariat.[167] The Special Rapporteur had proposed draft conclusion 9, entitled "Outputs of private expert groups", to formally acknowledge their importance, and suggested applying the criteria in draft conclusion 3 to determine the weight to be given to them. In the alternative, the Special Rapporteur proposed adopting a stand-alone draft conclusion guiding assessments of the weight of the outputs of private expert groups.

298. In relation to draft conclusion 10 concerning the pronouncements of public expert bodies, the Special Rapporteur clarified that "expert body" concerned an entity created or empowered by States and consisted of independent experts nominated and elected by States but serving in their personal capacity. He considered that the final outputs, as opposed to the preparatory work, of public expert bodies with close links to States ought not be categorized as teachings. Most of their preparatory reports could however be considered teachings.

299. Examples of such expert bodies included codification bodies, such as the Commission and the expert treaty bodies created by States to monitor implementation of certain human rights treaties. The Special Rapporteur emphasized that the report distinguished the work of the Commission as the main codification body of the United Nations composed of independent experts. He reaffirmed that the Commission's final outputs should not be grouped with "teachings of publicists" under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, as it operated within a formal institutional framework and its work reflected significant State engagement. He also distinguished the work of the Commission from that of the United Nations Commission on International Trade Law (UNCITRAL), which was comprised of State representatives.

300. The Special Rapporteur considered that, while some Commission outputs resembled scholarly writings, the Commission had a dual mandate to assist States to codify and progressively develop international law and that, because those functions often overlapped, its work was best understood as a hybrid effort that combined legal creation, State practice consolidation and expert deliberation. The Special Rapporteur considered that the Commission, owing to its capacity to make recommendations to the General Assembly, could contribute to the development of new treaty law, the collection of State practice contributing to the formation of customary international law or the clarification of general principles of

[167] A/CN.4/765.

law, thus spanning multiple categories under Article 38, paragraph 1, including (*a*), (*b*) and (*c*). The Special Rapporteur concluded that the weight of the Commission's final outputs depended on how frequently its outputs were cited, accepted and relied upon by others and noted that the Commission's authority was often accepted on its own terms, and that States, international tribunals and national courts regularly cited the Commission's work as authoritative statements of international law. The Special Rapporteur proposed that the weight of the Commission's work be evaluated using the general criteria in draft conclusion 3 and ultimately underlined that the rigour and reception of States of the work, including in the General Assembly, were decisive considerations.

301. The Special Rapporteur noted that there was wide recognition of the work of human rights treaty bodies, which performed a range of functions entrusted to them by States, including adopting general comments, issuing views and adjudicating disputes. Their outputs varied, but in some cases shared formal and procedural qualities with judicial decisions when engaging in resolving complaints brought by individuals against States alleging human rights violations. To describe the various types of outputs, the Special Rapporteur supported retaining the term "pronouncements", as previously used by the Commission in its conclusions on subsequent agreements and subsequent practice in relation to interpretation of treaties, noting the use of a wide range of such materials by States and courts in interpreting and applying international law and underlining the need not to introduce new language which could create uncertainty for States and other users of the Commission's work.

302. There were also certain specialized bodies in specialized fields of international law whose work carried weight. In relation to the work of the International Committee of the Red Cross, which had been described as having a hybrid character, the Special Rapporteur noted that the Committee was empowered by States to fulfil significant functions under international humanitarian law and that, despite its non-governmental status, its contributions were often given considerable weight.

Resolutions of international organizations and intergovernmental conferences

303. The Special Rapporteur recalled that views had differed among members of the Commission as to whether resolutions of international organizations and intergovernmental conferences could serve as subsidiary means. He noted that in the Commission's work on the identification of customary international law and the ongoing work on general principles of law, resolutions could be used as evidence of State practice or *opinio juris* and of general principles of law formed within the international legal system. Furthermore, he considered that the distinction between resolutions as evidence of the elements of customary international law or general principles of law and as subsidiary means was substantive rather than semantic. He referred to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[168] as an example of a resolution that could be used to undertake systematic legal analysis that clarified the scope of existing rules and recalled that such assessment was also supported by the conclusions on identification of customary international law, which recognized that resolutions might provide evidence for determining the existence and content of rules of international law, even if they could not in and of themselves create such rules. The Special Rapporteur referred to certain decisions where the International Court of Justice had engaged with resolutions as materials carrying analytical weight in the interpretation of legal norms and noted that resolutions functioned in a dual manner, in some cases, like judicial decisions and teachings by offering persuasive legal analyses.

304. The Special Rapporteur proposed the inclusion of draft conclusion 11, where paragraph 1 would acknowledge that resolutions "may serve" such a role, signalling flexibility and contextual dependence; paragraph 2 would address the issue of the weight of resolutions, distinguishing between substantive resolutions and aspirational or political ones; and paragraph 3 would consist of a "without prejudice" clause, affirming that resolutions might be used for other purposes, such as contributing to treaty interpretation or evidencing State practice.

[168] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

Fragmentation and the coherence of international law

305. In relation to the question of fragmentation, on which he had requested Commission guidance and had taken into account the views of States, the Special Rapporteur proposed the inclusion of draft conclusion 12, which was aimed at supporting a principled and coherent application of international law across diverse institutional contexts and which sought to clarify that courts and tribunals tended to consider the reasoning of decisions from other judicial bodies for the sake of clarity, stability and consistency. The Special Rapporteur stressed the role of the International Court of Justice in fostering coherence in international law and considered that there existed an undeniable pattern indicating that, though courts were not bound by each other's rulings, such rulings might nonetheless be persuasive.

Relationship between subsidiary means and supplementary means of interpretation

306. The Special Rapporteur had examined the issue in his third report, in response to a request for further study by States and other observers of the Sixth Committee, leading to his proposed inclusion of draft conclusion 13 addressing the relationship between subsidiary means for the determination of rules of law and supplementary means of interpretation under article 32 of the Vienna Convention on the Law of Treaties. He further reiterated the distinct functions between the two concepts and acknowledged that both on occasion interacted in judicial practice. He also recalled that the Commission's prior work had treated interpretation as a distinct yet interrelated function of subsidiary means.

307. The Special Rapporteur noted differing views expressed in the Sixth Committee and among members of the Commission on draft conclusion 6 and the possible relationship between subsidiary means and supplementary means of interpretation under the Vienna Convention on the Law of Treaties. He considered that much of the confusion stemmed from the terminology, with "subsidiary" and "supplementary" suggesting a functional overlap. The Special Rapporteur reiterated that the difference was notably easier to distinguish in theory than in practice: while subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice guided the determination of legal rules, the supplementary means under the Vienna Convention on the Law of Treaties pertained to treaty application and interpretation. The Special Rapporteur, noting that the item had not been included in his initial syllabus for the topic, clarified that the same materials could function in both capacities.

Future work

308. Turning to the structure of the draft conclusions, the Special Rapporteur underlined the necessity to organize them as logically as possible. In the proposed structure, Part I would include draft conclusion 1 and be entitled, "Introduction"; Part II would include draft conclusions 2 to 4 and be titled, "General provisions"; Part III, comprising draft conclusions 5 to 10, would be entitled, "Subsidiary means under customary international law"; and, finally, Part IV, titled "Other means generally used to determine rules of international law", would include draft conclusions 11 to 13.

309. As regards the future programme of work, which had been adhered to up to the present session, the Special Rapporteur regretted the impossibility of completing a first reading at the present session and called for such opportunity at the next session.

2. Summary of the debate

(a) General comments

310. During the plenary debate, members thanked the Special Rapporteur for his rich third report and the analysis and proposals contained in it. They welcomed the interest shown by States in the topic and reiterated that subsidiary means, as referred to in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, were not sources of international law and stressed the importance of not confusing the two.

311. Some members emphasized the enduring importance of the topic in light of the evolving and decentralized nature of international law. It was noted that the first reading allowed for greater flexibility and should be used to strengthen the draft conclusions based on comments received from States.

312. It was also observed that the report opened a space for critical reflection on structural inequalities in the production and reception of international legal doctrine, and that the Commission should approach the topic with openness to pluralism and difference. It was emphasized that the Commission's treatment of teachings should engage with diverse intellectual traditions, including those inspired by critical, feminist and post-colonial legal theories. Some members indicated that the authority accorded to legal writings should be assessed in light of the historical, political and ideological contexts in which they were produced, recognizing that such writings might not be ideologically neutral and that claims of universality might obscure underlying regional perspectives. Other members expressed concern that departing from the technical meaning of "context", as codified in article 31 of the Vienna Convention on the Law of Treaties, would have serious implications for norms such as the prohibition of discrimination, the threat or use of force and terrorism, to mention just a few.

313. The view was expressed that there was a need to streamline and rationalize the reports. It was emphasized that the Commission should avoid overly doctrinal or nuanced formulations that might confuse rather than assist States and other international actors. While members appreciated the Special Rapporteur's approach, others observed that the report addressed broader themes, such as coherence and fragmentation in international jurisprudence or the relationship between subsidiary and supplementary means, which might distract from the core objective of clarifying the role of subsidiary means and causing structural incoherence.

314. The view was expressed that the practice and case law in the field were marked by ambiguities and conceptual overlap, requiring the Commission to strike a balance between offering simplified criteria to enhance clarity or preserving nuances at the risk of reduced practical guidance. It was noted that the task of the Commission was also to balance the original context and text of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice with the practice of modern international law.

315. Regarding the scope and categories of subsidiary means, some members supported a broad understanding of subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, emphasizing its non-exhaustive nature and the need to reflect the realities of modern international legal practice. Some members cautioned against expanding Article 38, paragraph 1 (*d*), into a catch-all provision, which would include new forms of subsidiary means, as it risked introducing ambiguity. It would be more appropriate to distinguish between the broader scope of Article 38, paragraph 1, as a whole and that of its subparagraph (*d*), so as to preserve the structural balance and avoid conceptual overreach.

316. With regard to draft conclusion 3, several members considered that it set out useful general criteria for assessing the weight of subsidiary means. The view was expressed that the authority of teachings was not necessarily accepted from the outset but often emerged over time through a process of scrutiny and contestation.

317. Regarding draft conclusion 4, concern was expressed that the current formulation stating that judicial decisions and teachings "are" subsidiary means could obscure the fact that such materials might also serve other functions under international law. It was suggested that the provision could be revisited at the second reading to enhance conceptual clarity. It was also proposed that it be clarified whether the scope of "decisions of courts and tribunals" included outputs of quasi-judicial entities, such as human rights treaty bodies.

318. Regarding draft conclusion 5, support was expressed for adopting an inclusive understanding of teachings that embraced non-traditional forms of scholarship, including digital formats such as blogs, websites and podcasts. The need to clarify the treatment of artificial intelligence-assisted works was also highlighted. A methodological point was made that the influence of teachings should not be assessed solely based on the citation practices of international tribunals, but also by their impact in domestic courts and on executive policymaking, particularly in areas lacking specialized international adjudication.

319. Concerning draft conclusion 6, support was expressed for the Special Rapporteur's proposal to reposition draft conclusion 6 earlier in the text, following draft conclusion 2. It was observed that a clearer terminological distinction should be drawn between "determination" and "interpretation", as their interchangeable use might cause ambiguity.

320. With regard to draft conclusion 8, some members suggested that it be clarified that it served as a complement to the general framework set out in draft conclusion 3. Several members emphasized that certain criteria in draft conclusion 3, such as quality of reasoning and reception by States, were equally relevant to assessing the weight of judicial decisions. Some members proposed including a separate draft conclusion or additional criteria on the weight of teachings, in line with the treatment of judicial decisions in draft conclusion 8, incorporating factors such as gender, linguistic, geographical and legal system diversity, as well as depth of the engagement with relevant sources of international law and analysis of State practice.

321. Members supported the Special Rapporteur's proposed structure of the draft conclusions, particularly organizing them into parts and the repositioning of draft conclusion 6, on the "Nature and function of subsidiary means", to an earlier part of the structured text. It was suggested that private expert groups might be more appropriately reflected under the category of teachings, in recognition of their scholarly contributions. Some members noted that placing them under "Other means generally used to determine rules of international law" in Part IV could inadvertently obscure their academic character. Concern was also raised regarding the title for Part III, "Subsidiary means under customary international law". The view was expressed that the draft conclusions be reorganized into separate parts on teachings and on decisions of courts and tribunals, with draft conclusion 9, on private expert groups, relocated to the part on teachings. It was further suggested that Part III be entitled simply as "Teachings and decisions".

322. With respect to the format, the view was expressed that presenting the project as draft conclusions was appropriate, as confirmed by broad State support and consistent with the practice of the Commission on topics relating to Article 38 of the Statute of the International Court of Justice.

(b) Draft conclusion 9 (Outputs of private expert groups)

323. With regard to draft conclusion 9, members agreed with the Special Rapporteur that outputs of private expert bodies, when reflecting the independent and collective views of qualified publicists from diverse backgrounds, might serve as subsidiary means for the determination of rules of international law. Members also debated the limited analysis of how States, rather than solely courts, relied on scholarly writings, particularly in their pleadings. It was suggested that the commentary to draft conclusion 9 provided further detail regarding the authors and types of materials covered.

324. Several members suggested that the distinction between "private" and "public" bodies lacked operational value and could lead to conceptual confusion, particularly given the diversity of institutional arrangements and overlapping characteristics in practice. The view was expressed that the issue should be dealt with preferably in the commentary rather than in a stand-alone draft conclusion. It was proposed to merge draft conclusions 9 and 10, or to subsume them under the category of "teachings" in draft conclusion 5. Other members, who saw merit in recognizing works of public expert groups as subsidiary means, suggested merging only draft conclusion 9 with draft conclusion 5 on "Teachings", while retaining draft conclusion 10 as a separate provision.

325. Some members considered that the distinction between the categories of expert groups should be based on function, namely, the independence in the conduct and adherence to a scientific, objective and impartial method, rather than formal status of the body concerned. It was also suggested that the decisive factor should be the qualifications and the substantive quality of the analysis. Some members called for greater clarity on the definition of "private expert groups". It was also proposed that the qualifier "expert" be added to reinforce the requirement of high qualification and to align with the requirements in the Statute of the International Court of Justice. Caution was expressed regarding potential bias in the work of certain private expert bodies, and methodological transparency was emphasized for assessing the weight of their outputs.

326. Some members expressed concerns about whether draft conclusion 9 added value beyond that of draft conclusion 5 and draft conclusion 2, paragraph (*b*). It was noted that the proposed formulation of draft conclusion 9, including its placement under Part IV and the

use of the term “may”, could imply *a contrario* that outputs by individuals or groups could fall within the third category of “other subsidiary means” rather than that of teachings, thereby creating ambiguity regarding their classification.

327. The view was expressed that legal opinions issued by governmental legal advisers could play a distinct role and should be treated consistently with the Commission’s work on the identification of customary international law. It was also observed that teachings should include views expressed by judges or arbitrators outside adjudicative proceedings, but should not include their separate opinions when exercising their judicial functions.

328. Regarding paragraph 2 of draft conclusion 9, it was noted that it appropriately reaffirmed the role of draft conclusion 3, although views were expressed that it might be repetitive. It was suggested that, in addition to the general criteria in draft conclusion 3, other factors, such as the historical, political and temporal context in which an output was produced, as well as the status of the document, whether final or an interim version subject to change, could be considered as potentially pertinent to assessing the weight and continued relevance of the outputs.

329. While the title of draft conclusion 9 referred to “outputs of private expert groups”, the text included references to individual authors, creating ambiguity about the intended scope of the provision. Several members suggested that the reference to individual authors should either be explicitly reflected in the title or removed from the text, as outputs by individuals were already addressed under draft conclusion 5. It was also proposed to replace the word “*textes*” with “*travaux*” in the French version of the title to better capture the nature of the materials concerned.

(c) Draft conclusion 10 (Pronouncements of public expert bodies)

330. Some members suggested merging draft conclusions 9 and 10, while distinguishing full-time academics from experts and bodies whose documents might be regarded as expert views. It was emphasized that the main question was whether the work embodied the will of the State or was created under State authorization, and that the subdivision between public and private added little value. It was noted that the difference between the two draft conclusions based on their public or private character was difficult to ascertain in practice. It was suggested that, if a differentiation be kept, it should focus on whether the work followed an objective and impartial scientific method. The view was expressed that draft conclusions 9, 10 and 11 could be merged. According to another view, keeping the draft conclusions separate could be useful.

331. It was noted that the draft conclusions did not differentiate between expert bodies on the basis of the mandate, structure, legal authority, appointment criteria, legal expertise or type of output, but on the public or private character of the body. The view was expressed that the work of official bodies should not be treated as teachings, but as a *sui generis* category. Some members suggested the Special Rapporteur explore such nuances in the draft conclusions or the commentaries and noted that such pronouncements were not sources of international law in themselves. It was further suggested that the analysis be extended to other entities, such as conciliation committees and compliance and implementation committees of multilateral environmental agreements. Some doubts were expressed regarding whether those outputs could all be treated under one draft conclusion, but the view was expressed that a single provision could provide a logical overview, while nuances could be provided in the commentary.

332. Members reiterated that the Commission had a special role and emphasized that they served in a personal capacity as independent experts. It was also noted that the Commission had a mandate from the General Assembly, that members were nominated and elected by States and that the Commission took into account the comments and views of States. It was recalled that the work of the Commission had the potential to serve as the basis for conventions in projects concerning draft articles, where its outputs would become *travaux préparatoires*. Several members expressed the view that the outputs of the Commission should be treated in a nuanced manner, considering the differing nature of documents, including whether they were final or interim in nature, or involved the progressive development or codification of international law. The view was expressed that possible

elements of progressive development could not serve as subsidiary means until the provisions contained therein had developed into law. According to another view, reports of Special Rapporteurs resembled teachings and final texts and commentaries adopted by the Commission could be treated as works of expert groups. It was recommended that the normative value of commentaries prepared by the Commission be clarified. Another view was expressed that the wording of the draft conclusions should reflect the wording of the Statute of the International Court of Justice that referred to the "most highly qualified publicists".

333. It was underlined that expert bodies might not only perform interpretative functions but might also render decisions in relation to individual complaints, which could not be regarded as teachings. The view was expressed that there could have been more focus on determining whether, in practice, the outputs of treaty bodies were actually used as subsidiary means, before moving to classification. Support was voiced for the position of the Special Rapporteur that decisions of human rights treaty bodies should be called "pronouncements", but the view was expressed that the term might be too ambiguous. It was noted that further clarification was needed for the term "expert bodies", as well as what made them "public".

334. Members referred to the status of the International Committee of the Red Cross and were divided as to whether its outputs should be regarded as teachings or as the work of an expert body. The view was expressed that not treating its outputs as teachings could create a tension between its State-empowered functions and its impartial role, while it was suggested that generally its outputs differed from academic works. A suggestion was made to distinguish works of the International Committee of the Red Cross that were declaratory of international law or contributing to its development.

(d) Draft conclusion 11 (Resolutions of international organizations and intergovernmental conferences)

335. Some members considered that certain non-binding resolutions could serve as subsidiary means for the determination of rules of international law. Other members considered that the role of resolutions adopted by international organizations or at intergovernmental conferences pertained to the formation of law and not to the category of subsidiary means and, therefore, that draft conclusion 11 should not be retained. It was noted that certain resolutions of international organizations could create obligations, including Security Council resolutions under Chapter VII of the Charter of the United Nations or the resolutions of the Conferences of the Parties of certain treaties. It was mentioned that it should be acknowledged that, depending on the instruments creating treaty bodies or organs of international organizations, there might be a specific legal value attributed to resolutions.

336. It was noted that the examples cited by the Special Rapporteur of the use of resolutions of international organizations concerned primarily their evidentiary role to demonstrate the existence of rules of customary international law. Some members considered that the example in the *Legal Consequences of the Separation of the Chagos Archipelago* suggested that the International Court of Justice referred to the normative character of the terms used in General Assembly resolution 1514 of 14 December 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples,[169] in assessing its contribution to the formation of customary international law and not as a subsidiary means for determining rules of international law. The view was expressed that the only context where an international organization could adopt a document that could be considered in the category of subsidiary means would not be a resolution but rather an expert document such as a study on a specific technical question such as those of the secretariat of the Commission.

337. Other members noted that, although resolutions of international organizations and intergovernmental conferences could serve as subsidiary means for the determination of rules of international law, that role was often confused with their use for the determination of the elements of customary international law or general principles or as instruments of treaty interpretation. However, such nuances were not yet reflected in the text proposed by the

[169] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, paras. 150–168.

Special Rapporteur and often courts and tribunals would not draw such a distinction when using such materials. Thus, it was suggested that the commentary should describe the nuances and include more elements to distinguish the various roles that resolutions might play and whether they were used as subsidiary means.

338. Some members observed that resolutions were negotiated and adopted by State representatives and were influenced by political considerations and bargaining mechanisms rather than emerging from genuine academic legal scholarship. In respect of paragraph 1 of draft conclusion 11, a suggestion was made to emphasize resolutions of the organs of the United Nations, specifically those of the General Assembly.

339. A proposal was made to have a separate draft conclusion concerning the weight to be given to resolutions of international organizations or intergovernmental conferences, in a similar formulation to draft conclusions 3 and 8, as more factors would need to be considered. Another suggestion was made to include such aspects in the commentary.

(e) Draft conclusion 12 (Coherence in decisions of courts and tribunals)

340. Some members supported a conclusion calling for the avoidance of conflicting decisions on the same issues by different courts and tribunals. According to those members, the Special Rapporteur's proposed text could be streamlined to note that coherence of international law should be respected and applied. Other members considered that draft conclusion 12 should not be retained since its subject matter was outside the scope of the topic. It was noted that not many States were supportive of the analysis of fragmentation in the present topic. It was suggested that revisiting an issue addressed in the Commission's previous work might risk duplicating efforts and could benefit from careful consideration to ensure consistency with the Commission's previous work. It was further noted that much of the potential discussion on fragmentation could be addressed in the commentaries to the draft conclusions dealing with the absence of precedent and the weight to be given to decisions.

341. The view was expressed that unity and coherence were not threatened by conflicting decisions, and that stability should not be overemphasized, as it could prevent the progress of international law. Another view was expressed that coherence should not be a priority for international law.

342. Some members considered that there were few cases of serious interpretative conflicts between international courts and tribunals. It was also noted that examples such as the *Bosnia Genocide*[170] and *Tadić*[171] might not pose a genuine conflict as they concerned different subject matters. It was emphasized that, while *Bosnia Genocide* concerned the circumstances under which a State could be responsible for the actions of non-State actors, the *Tadić* decision concerned the incidental question of the characterization of a conflict in the analysis of individual criminal accountability.

343. The view was expressed that the analysis of the Special Rapporteur of the possible divergent decisions of international courts and tribunals focused on the International Court of Justice but left out the important contribution of the Appellate Body of the World Trade Organization to unity and coherence of law, as well as the rich case law of investment tribunals, which took into account each other's decisions.

344. Some members considered that divergence in decisions was not a negative phenomenon, particularly in areas where international law was inchoate, and noted that variation across tribunals was due to various factors, such as different mandates and applicable laws. It was also emphasized that there could be various justifications for the different approaches of tribunals, which could lead to decisions being different but not necessarily conflicting. An observation was made concerning the practical value of

[170] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at paras. 397–398.

[171] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 97.

distinguishing the use of materials as subsidiary means from other functions, since international courts and States rarely specified how such materials were used.

345. A suggestion was made to emphasize the value of applying subsidiary means to ensure coherence in international law. A view was expressed that draft conclusion 12 could be retained as a way to provide guidance when there were conflicting decisions. It was questioned whether subsidiary means could effectively function as a tool to address the fragmentation of international law. Another view was expressed that conclusions should state the existing law and that such content was better suited for a guideline or other recommendatory provision.

(f) Draft conclusion 13 (Relationship between subsidiary means and supplementary means of interpretation)

346. Some members supported the Special Rapporteur's proposed draft conclusion 13. Other members did not support the inclusion of the proposed draft conclusion or considered that it should be substantially revised. It was emphasized that the draft conclusions should not conflate subsidiary means with supplementary means of treaty interpretation, as they were different concepts. Several members considered that the overlap was not between means themselves, but rather the materials that could serve as subsidiary means or for other purposes, including in the context of the interpretation of treaties, which was already covered by draft conclusion 6, paragraph 2. For example, jurisprudence or the decisions of expert bodies could be used to determine the object and purpose of a treaty or if there was a subsequent practice in the sense of article 31 of the Vienna Convention on the Law of Treaties. It was noted that the International Court of Justice used its decisions as subsidiary means when it referred to prior judgments where it determined the interpretation to be retained in respect of a treaty term or clause, because it had already applied articles 31 and 32 of the Vienna Convention on the Law of Treaties.

347. Concern was expressed regarding a possible overlap with prior work of the Commission on topics related to treaty interpretation, such as the topic on subsequent agreements and subsequent practice in relation to interpretation of treaties. The view was expressed that supplementary means of treaty interpretation were generally equated to *travaux préparatoires.* Some members were of the view that the two concepts were not interchangeable and noted that not all supplementary means could be used as subsidiary means. However, it was noted that some writings could be used to "confirm" the meaning of a treaty provision, for example in situations where the treaty did not have *travaux préparatoires*. Some such writings were particularly authoritative, such as in the case of the Virginia Commentaries in the context of the United Nations Convention on the Law of the Sea. However, it was also noted that *travaux préparatoires* could not be considered as subsidiary means.

348. In relation to paragraph 1, the view was expressed that the statement that the interpretive function of subsidiary means was distinct from the determination of the existence and content of rules was erroneous. It was noted that the interpretive function of the terms in a treaty was precisely to assist in determining the content of treaty rules.

349. In relation to paragraph 2, it was pointed out that it referred especially to the decisions of courts and tribunals, while there was ample evidence that the same role could be attributed to teachings.

350. A proposal was made to transform draft conclusion 13 into a "without prejudice" clause. Another proposal was to delete the draft provision and explain the distinction in the commentary. The view was expressed that an explanation of the differences between both categories could be helpful for domestic judges, legal advisors and practitioners outside international adjudication. The position was taken that if retained, the title of the draft conclusion should be modified as it rather referred to the use of the same materials in treaty interpretation more generally.

3. Concluding remarks of the Special Rapporteur

351. The Special Rapporteur thanked the many members of the Commission who had participated in the rich debate on his third report. He observed that he had taken into careful

account all members' views, and in relation to drafting proposals, would take those into account for revisions to draft conclusions that he would present to the Drafting Committee. He noted the general agreement in the Commission on structuring the draft conclusions into five parts, including his recommendation to move draft conclusion 6 earlier, so as to follow draft conclusion 2.

352. On the teachings of private expert groups and the works of public expert bodies (draft conclusions 9 and 10), the Special Rapporteur observed that several members were aligned in recognizing the importance of distinguishing the outputs of private expert groups and public expert bodies, not based on the composition and organic character of the groups, but for the methods of operation and the perceived authority of the work. He recalled that several members had suggested merging draft conclusions 9 and 10, while others supported a separate draft conclusion for public expert groups, and proposed merging draft conclusions 9 and 5, placing private expert bodies under the section addressing teachings. He further recalled that members had suggested that the decisive factor in determining whether the work should fall under the category of teachings should be the independence and scientific quality of the work itself.

353. The Special Rapporteur identified two possible alternatives for the future work, either developing a separate draft conclusion on private expert groups in parallel with one on public expert bodies or incorporating it into the previously adopted draft conclusion on teachings. He recommended maintaining draft conclusion 10 as well as a separate provision addressing the works of private expert bodies, and using the commentary to elaborate on the differences, including nuanced situations like that of the International Committee of the Red Cross. He noted strong support for the inclusion of a separate draft conclusion on the criteria to determine the weight of pronouncements of expert bodies and a separate draft conclusion on the weight of teachings, instead of as a second paragraph of draft conclusion 5. He further proposed including the second sentence of draft conclusion 5 on the representativeness of the teachings in the separate draft conclusion on the weight that would include paragraphs (*b*) to (*e*) of draft conclusion 3, as paragraph (*a*) would become superfluous.

354. Regarding resolutions of international organizations and intergovernmental conferences as subsidiary means (draft conclusion 11), the Special Rapporteur recalled that, while some members had supported the conclusion that resolutions could in certain circumstances serve as subsidiary means, others had opposed such a conclusion. The view had been expressed that resolutions might serve both as evidence of State practice and subsidiary means, while it had been observed that the characterization as subsidiary means might risk diminishing their weight or legal status in other contexts, especially regarding the formation of customary international law. In response to the comments, the Special Rapporteur recalled the finding of the Commission in its work on identification of customary international law and peremptory norms of general international law (*jus cogens*) that a single instrument might serve more than one function and acknowledged that he did not include binding resolutions in his analysis. Binding resolutions, for example those of the Security Council, did not – as he had pointed out in his report – fall within the scope of the topic of subsidiary means since they carried different legal implications for Member States under the Charter of the United Nations and constituted hard obligations for States. He further acknowledged the methodological difficulties arising from the use of resolutions as subsidiary means and noted that whether they could be used for that purpose usually had to be inferred by analysing the circumstances. He expressed flexibility regarding the consideration of the topic in the Drafting Committee.

355. On the question of fragmentation or the need for unity and coherence of international law (draft conclusion 12), the Special Rapporteur recalled that he had examined the matter after seeking the guidance of the Commission and Member States on it. Members of the Commission seemed divided on its inclusion, some seeing it as a valuable addition to the topic, while others opposed it as falling outside of the scope of the topic. He noted that the Commission's prior work in the study of the fragmentation of international law had expressly set aside the specific issue of conflicting decisions. He noted that some members had expressed reservations that the draft conclusion was narrowly focused on the judicial elements of fragmentation. He recalled the point made by some members that fragmentation could be seen in a more positive light as an expression of diversity, but he underlined the

risks that omitting the consideration of fragmentation risked increased reliance on conflicting jurisprudence and referred to the value of including the draft conclusion. He would remain flexible and take the guidance of the Commission in that regard.

356. On the relationship between subsidiary means for determining rules of law and supplementary means of interpretation of treaties (draft conclusion 13), which he had studied in response to the requests of members of the Commission and States, the Special Rapporteur recalled that support had been expressed for discussing the role of subsidiary means in the interpretation of international law. He also noted that the relationship between subsidiary means and supplementary means was not obvious. Other members had asserted that the topic was unnecessary as the matter was sufficiently covered by draft conclusion 6, paragraph 2, and that the issue was outside the scope of the draft conclusions. He expressed his preference for addressing the issue in a draft conclusion, if consensus could be found, and, alternatively, noted that the matter could be explained in the commentary to draft conclusion 6, paragraph 2.

357. The Special Rapporteur noted that there was wide support for the referral of all the draft conclusions proposed in his third report to the Drafting Committee, taking into account the debate in the plenary. While regretting the disruption to the work plan for the topic, which had implications for the work in the remainder of the quinquennium, he looked forward to a successful completion of the first reading on the topic at the present or following session.

Chapter VIII
Settlement of disputes to which international organizations are parties

A. Introduction

358. The Commission, at its seventy-third session (2022), decided to include the topic "Settlement of international disputes to which international organizations are parties" in its programme of work[172] and appointed Mr. August Reinisch as Special Rapporteur for the topic. Also at its seventy-third session,[173] the Commission requested the Secretariat to prepare a memorandum providing information on the practice of States and international organizations which may be of relevance to its future work on the topic, including both international disputes and disputes of a private law character. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and their views for the purposes of the memorandum.

359. The General Assembly, in paragraph 7 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

360. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur.[174] The Commission provisionally adopted draft guidelines 1 and 2, together with commentaries thereto, and decided to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties".[175] At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur,[176] as well as the memorandum by the Secretariat providing information on the practice of States and international organizations which may be of relevance to the future work of the Commission on the topic, including both international disputes and disputes of a private law character.[177] The Commission provisionally adopted four additional draft guidelines and commentaries thereto.[178]

B. Consideration of the topic at the present session

361. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/782). In his third report, the Special Rapporteur focused on the discussion of disputes between international organizations and private parties. He also provided an analysis of the practice of settling of such disputes, as well as of policy issues relevant to the Commission's work on the topic, and outlined his plans for the future work on the topic. The Special Rapporteur proposed five draft guidelines on: the scope of the relevant part of the draft guidelines; resort to means of dispute settlement; the jurisdictional immunity of international organizations; access to justice; and dispute settlement and procedural rule of law, as well as human rights requirements.

---

[172] At its 3582nd meeting, on 17 May 2022. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Yearbook … 2016*, vol. II (Part Two), annex I, p. 233).

[173] At its 3612th meeting, on 5 August 2022.

[174] A/CN.4/756.

[175] See *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 44–49.

[176] A/CN.4/766.

[177] A/CN.4/764.

[178] See *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 58–63.

362. As a consequence of the reduction of the length of the present session, the Commission was unable to consider the third report of the Special Rapporteur in plenary. At its 3702nd meeting, on 28 April 2025, the Commission decided to establish a Working Group of the Whole on the topic, to allow for a preliminary exchange of views on the third report. At the same meeting, the Commission decided to appoint Mr. August Reinisch, Special Rapporteur, as Chair of the Working Group.

363. The Working Group held one meeting, on 20 May 2025.

364. At its 3718th meeting, on 23 May 2025, the Commission took note of the oral report of the Chair of the Working Group. The report of the Working Group is reproduced in section C below.

C. Report of the Working Group

365. At the beginning of the meeting of the Working Group, the Chair recalled the informal consultations held on the topic at the seventy-fifth session and presented a brief introduction to the third report on the topic. He indicated that the third report would be fully introduced in plenary at the seventy-seventh session of the Commission.

366. Members of the Working Group generally expressed appreciation for the thoroughness of the third report, which focused on disputes between international organizations and private parties. A number of members also expressed regret that the Commission would not be able to conclude its first reading of the topic at the present session.

367. Several members expressed support for distinguishing between disputes involving international organizations based on the parties, rather than the subject matter or the applicable law. Some members encouraged the Special Rapporteur to still distinguish between the applicable law in the draft guidelines, where appropriate. It was highlighted that disputes between international organizations and private parties represented the most prominent part of the dispute-settlement practice of international organizations. The evolution of the scope of the topic since it was first proposed in the 2016 syllabus[179] towards a more inclusive approach, in order to encompass all types of disputes to which international organizations are parties, was noted. It was also observed that it was possible for a dispute to involve an international organization, a State and private parties. Some members offered further examples of the relevant practice of international organizations or the case law of national courts.

368. Several members of the Working Group expressed views on the draft guidelines proposed in the third report of the Special Rapporteur. Concerning draft guideline 7, the possibility of defining "private parties" in the text was raised. It was also observed that its proposed title, "Disputes between international organizations and private parties" was not aligned with that of the analogue of the provision, namely draft guideline 3, and would be more appropriate for a part of the draft guidelines, comprising the provisions proposed in the third report of the Special Rapporteur.

369. Concerning draft guideline 8, a number of members suggested modifying the provision to take into account the power imbalance between international organizations and private individuals. It was observed that the notion of good faith was often interpreted differently in different legal systems, and the view was expressed that the reference to "a spirit of cooperation" did not adequately take the power imbalance into account. Considering the increasing financial challenges facing many international organizations, the Working Group was encouraged to consider the possibility that an international organization may be the less powerful party in a dispute with a private entity.

370. A number of members supported the further development of draft guidelines 9 and 10, on the jurisdictional immunity of international organizations and the right of access to justice, respectively, including clarification of the relationship between the two concepts. While the exclusion of immunity from the scope of the topic in the 2016 syllabus was recalled,[180] several

[179] See *Yearbook … 2016*, vol. II (Part Two), annex I.
[180] See *ibid.*

members considered that it was necessary to address immunity in greater detail. The sensitivity of achieving the right balance between immunity and access to justice was highlighted. Several members reflected on which of the terms “should” or “shall” was most appropriate in each provision. The possibility of merging the two provisions was also raised.

371. It was noted that, particularly for private parties, the effectiveness of access to justice was an important concern. Additionally, the deletion of “arbitration” and “judicial settlement” in draft guideline 10 was proposed to refocus the provision on alternative means of dispute settlement.

372. Concerning draft guideline 11, several members highlighted the importance of explaining the applicable human rights, both under customary international law and applicable treaties, in the commentary. The additional relevance of labour standards and other protections for private parties to contracts was underscored.

373. A number of members made suggestions for additional draft guidelines addressing legal issues discussed in the third report of the Special Rapporteur. Those included the exercise of diplomatic protection against an international organization; distinguishing cases where arbitration was based on mutual consent from those where unilateral recourse to arbitration was possible; and the right to an effective remedy. The further exploration of questions relating to compensation was also proposed.

374. The Chair of the Working Group also invited members to express their views on the possibility of developing model clauses. In general, members expressed a cautious approach to the idea, emphasizing that the preparation of model clauses would require both careful drafting and additional time. Some members observed that a large number of model clauses would be necessary to address the diversity of the relevant practice. One alternative suggested was for the Commission to identify sample provisions. According to another view, the identification of examples of effective and reasonable alternatives to judicial and arbitral dispute settlement would be of most use to States and international organizations. Further emphasis on practical guidance for States, international organizations and private parties was also encouraged.

375. Overall, members of the Working Group expressed the hope that the Commission would be able to proceed expeditiously with its work on the topic at its seventy-seventh session. Several members encouraged the Special Rapporteur to prepare commentaries in advance of the seventy-seventh session, to allow for the possible conclusion of the first reading. The Special Rapporteur indicated his openness to that approach and that he was exploring the practicalities of it in consultation with the secretariat.

376. The Chair of the Working Group reiterated his gratitude to all the members for their active participation and constructive spirit throughout the meeting of the Working Group. He expressed his intention to reflect on the views and suggestions expressed by colleagues in the Working Group and his hope that the progress made at the current session would facilitate the work of the Commission with a view to the conclusion of the first reading on the topic at its seventy-seventh session. He also thanked the Secretariat for its continuing assistance. He added that he had prepared a preliminary bibliography and table of cases on the topic and invited members to submit additional suggestions in order to prepare a revised revision for the conclusion of the first reading.

Chapter IX
Non-legally binding international agreements

A. Introduction

377. The Commission, at its seventy-fourth session (2023), decided to include the topic "Non-legally binding international agreements" in its programme of work and appointed Mr. Mathias Forteau as Special Rapporteur.[181]

378. The General Assembly, in paragraph 7 of its resolution 78/108 of 7 December 2023, subsequently took note of the decision of the Commission to include the topic in its programme of work.

379. The Commission, at its seventy-fifth session (2024), had before it the first report of the Special Rapporteur. The Commission considered the first report of the Special Rapporteur at its 3681st to 3687th meetings, from 10 to 19 July 2024.[182]

B. Consideration of the topic at the present session

380. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/784). In his second report, the Special Rapporteur further examined the subject matter of the topic, the terminology to be used and the scope of the topic. The Special Rapporteur also addressed the first substantive issue related to the topic, as identified in his first report, namely, the distinction between treaties and non-legally binding international agreements. The Special Rapporteur proposed six draft conclusions.

381. As a consequence of the reduction of the length of the present session, the Commission was unable to consider in plenary the second report of the Special Rapporteur. At its 3702nd meeting on 28 April 2025, the Commission decided to establish a Working Group of the Whole on the topic, to allow for a preliminary exchange of views on the second report. At the same meeting, the Commission decided to appoint Mr. Mathias Forteau, Special Rapporteur, as Chair of the Working Group.

382. The Working Group held one meeting, on 21 May 2025.

383. At its 3718th meeting, on 23 May 2025, the Commission took note of the oral report of the Chair of the Working Group. The report of the Working Group is reproduced in section C below.

C. Report of the Working Group

384. At the beginning of the meeting of the Working Group, the Chair briefly introduced the second report, which included an introduction on the general elements, such as the object and the purpose of the topic, the terms used, the scope of the topic, and a possible "without prejudice" clause. Such an approach was taken on the basis of the discussions that had taken place the previous year both within the Commission and the Sixth Committee. The second report also included a study of the first substantive issue of the topic, namely the distinction between treaties and non-legally binding international agreements.

385. The Chair briefly drew the attention of the Working Group to the recent judgment of the International Court of Justice, of 19 May 2025, in the *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)* case, which appeared to confirm his approach in the draft conclusions proposed in the second report with regard to assessing

[181] At its 3656th meeting, on 4 August 2023. The topic had been included in the long-term programme of work of the Commission during its seventy-third session (2022), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), annex I).

[182] A/CN.4/772. For the consideration, see *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), chap. VIII, paras. 215–300.

whether or not a given agreement was legally binding under international law. He recalled that he had proposed, in the second report, four draft conclusions for the introductory part, and two draft conclusions on the general approach to be followed to assess whether an agreement was legally binding or not.

386. The purpose of the meeting was to undertake a preliminary exchange of views on the second report, in particular with a view to helping the Special Rapporteur prepare for the seventy-seventh session, including for purposes of the third report. In particular, the views of members were sought on the best way forward to address the pertinent indicators to distinguish treaties and non-binding agreements, either in the form of additional draft conclusions or other forms of output. The third report would address the second substantive issue of the topic, concerning the possible legal implications under international law of non-legally binding international agreements.

Preliminary exchange of views in the Working Group

387. Members expressed their regret concerning the lack of time for the consideration of the second report at the present session and noted that, while a preliminary debate in the format of the working group was helpful, they would provide their detailed remarks in the plenary meetings at the Commission's next session.

388. Members further expressed general appreciation for the second report, especially for the concise, cautious and non-prescriptive approach taken therein, while taking into account contemporary practice and the views of States. They also reiterated the practical importance of the topic. The main challenge of the topic was to find the right balance between the need to ensure greater legal security in the field and maintaining flexibility.

389. Members welcomed the Special Rapporteur's intention to analyse in the third report the elements contained in the judgment in the case *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, including the indicators for determining whether a document was a treaty or a non-legally binding agreement. Some members expressed the view that the emphasis of the Court on the intention of the parties had provided additional support for the approach taken in the second report and had confirmed some of the proposals on the possible indicators.

390. It was observed that the purpose of the topic was to clarify the features of non-legally binding instruments so as to distinguish them from treaties. Some members expressed the view that the content of draft conclusion 1 on the purpose of the topic could be better addressed in the commentary, and that the aspects of the draft conclusion on the scope of the draft conclusions should be shorter, in line with the usual practice.

391. Concerning draft conclusion 2 on the use of terms and the title of the topic, differing views were expressed about the term "agreements" in the title of the topic. Several members expressed support for the term, in particular in light of the *travaux préparatoires* and the text of the Vienna Convention on the Law of Treaties. Some members were of the view that the term might be misleading and problematic in some languages or legal systems, and urged the Special Rapporteur to remain open to considering other possible terms, such as "instruments". Other members were open to discussing the issue and, while they agreed to retain the use of the term "agreements" on a provisional basis, they reiterated that that would be without prejudice to a final decision once the draft conclusions had been discussed in the Commission and the Sixth Committee had had an opportunity to comment on the Commission's work.

392. It was noted that, if the Commission were to eventually opt for an alternative term, that term ought to be better than "agreement", and should not be an alternative that would present new difficulties. A suggestion was made to refer to the fact that non-binding agreements were not governed by international law. Some proposals were made to adjust the title in English to bring it into conformity with other languages. Clarity was sought about the relationship between non-legally binding international agreements and Article 38 of the Statute of the International Court of Justice.

393. Support was expressed for the scope of the topic to be limited to written instruments between States, between States and international organizations or between international organizations, as stated in proposed draft conclusion 3. Some members were of the view that

further study regarding agreements concluded directly by ministries and sub-State authorities at the international level was necessary, including to better define what the phrase "sub-State authorities" concretely referred to.

394. While some questioned the usefulness of the "without prejudice" clause in draft conclusion 4, other members expressed support for its content.

395. Support was expressed for draft conclusion 5 on the assessment of whether an agreement was legally binding or not, which was considered to be in line with the Vienna Convention on the Law of Treaties and its *travaux préparatoires*. Members found useful the analysis and suggestions of relevant indicators that could be used to distinguish between treaties and non-legally binding international agreements. Support was expressed for including such indicators either in the draft conclusions themselves or in an indicative list as an annex. On the other hand, some members urged caution so as not to be overly prescriptive when developing such a list.

396. In relation to the indicators, members expressed support for the proposal that the intention of the parties should be the essential criterion and that the remaining elements should be considered in context. To stress the importance of the essential criterion of the intention, a suggestion was made to invert the order of paragraphs 1 and 2 of draft conclusion 5. Some members provided comments on specific indicators the which relevance of which needed to be assessed, including the terms used, the circumstances of the conclusion of the instrument, the subsequent conduct of the parties, the presence of final clauses, clauses on the governing law, registration with the United Nations, dispute settlement provisions, and clauses providing expressly that the instrument was non-legally binding. Proposals were made to classify the indicators and to elaborate on the weight to be given to them. Some members cautioned against suggesting a too detailed set of indicators, which could limit the evolution of State practice.

397. With regard to draft conclusion 6, which concerned the scenario where all the parties to an agreement expressly indicated that it was or was not legally binding under international law, a concern was raised that the provision could raise real issues over the status of instruments that did not contain a specific clause identifying the parties' intention. It was also suggested that the issue be dealt with in the commentary.

398. Several members expressed support for the final output to be in the form of draft conclusions, with some expressing openness to a different form. It was stated that draft conclusions would be useful for States to help get clarification from existing practices. The view was expressed that draft conclusions were not appropriate, as they were reserved for the work of the Commission related to sources of international law. Finally, support was expressed for a renewed call to States to share their practice on the subject.

Conclusion

399. The Chair of the Working Group thanked members for their positive and constructive engagement during the preliminary exchange. He indicated that he intended to present a third report at the seventy-seventh session taking into account the recent judgment of the International Court of Justice, the views of States at the Sixth Committee and the additional materials that become available concerning the practice of States. He noted that he would start addressing in his next report the second substantive issue of the topic, namely the possible legal implications of non-legally binding international agreements. He also stressed that he would take into account all the remarks made in the Working Group, and duly noted that the views expressed in the Working Group were preliminary and without prejudice to more substantial views to be elaborated by members when the second report would be discussed in the plenary at the seventy-seventh session.

Chapter X
Prevention and repression of piracy and armed robbery at sea

A. Introduction

400. The Commission, at its seventy-third session (2022), decided to include the topic "Prevention and repression of piracy and armed robbery at sea" in its programme of work[183] and appointed Mr. Yacouba Cissé as Special Rapporteur for the topic. Also at its seventy-third session,[184] the Commission requested the Secretariat to prepare a memorandum concerning the topic, addressing in particular elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States. The memorandum would also concern writings relevant to the definitions of piracy and of armed robbery at sea and resolutions adopted by the Security Council and by the General Assembly relevant to the topic. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and views concerning the topic.[185]

401. The General Assembly, in paragraph 7 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

402. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur (A/CN.4/758), which addressed the historical, socioeconomic and legal aspects of the topic, including an analysis of the international law applicable to piracy and armed robbery at sea, and the shortcomings thereof. In that report, the Special Rapporteur reviewed the national legislation and judicial practice of States concerning the definition of piracy and the implementation of conventional and customary international law. The Commission also had before it the memorandum prepared by the Secretariat concerning the topic (A/CN.4/757), providing elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States, as well as information on resolutions adopted by the Security Council and by the General Assembly relevant to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee.[186] The Commission provisionally adopted draft articles 1 to 3, together with commentaries thereto.[187]

403. At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur (A/CN.4/770) and a second memorandum prepared by the Secretariat concerning the topic (A/CN.4/767), providing information on: the treatment of the provision containing the definition of piracy in the 1956 draft articles concerning the law of the sea; views expressed by States at the First United Nations Conference on the Law of the Sea, which resulted in the adoption of the Convention on the High Seas,[188] and at the Third United Nations Conference on the Law of the Sea, which resulted in the adoption of the United Nations Convention on the Law of the Sea;[189] and writings relevant to the definitions

[183] At its 3582nd meeting, on 17 May 2022 (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 239). The topic had been included in the long-term programme of work of the Commission during its seventy-first session (2019), on the basis of the proposal contained in annex C to the report of the Commission (*Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 290 (b)).

[184] At its 3612th meeting, on 5 August 2022 (A/77/10, para. 243).

[185] At its 3612th meeting, on 5 August 2022 (*ibid.*, para. 244).

[186] At its 3625th meeting, on 16 May 2023 (A/78/10, para. 54).

[187] At its 3634th, 3649th and 3651st meetings, on 2 June, 27 July and 31 July 2023, respectively (*ibid.*, paras. 55–56).

[188] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.

[189] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3.

of piracy and of armed robbery at sea. Following the debate in plenary, the Commission decided to refer draft articles 4, 5, 6 and 7, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate. That included the understanding that the Committee would first hold a general discussion on the topic as a whole and its future direction. The Commission took note of draft article 4.[190]

404. Also at its seventy-fifth session, the Commission was informed that Mr. Yacouba Cissé had resigned as Special Rapporteur for the topic.[191] At its 3701st meeting, on 2 August 2024, the Commission appointed Mr. Louis Savadogo as Special Rapporteur for the topic.

B. Consideration of the topic at the present session

405. At the present session, the Commission had before it a note by the Special Rapporteur (A/CN.4/786). In his note, the Special Rapporteur identified points of law which, in his opinion, could constitute the major themes of the work of the Commission on the topic. He also outlined general areas of inquiry based on the main features of the topic and provided methodological guidance addressed to the members of the Commission to focus their work.

406. At its 3702nd meeting, on 28 April 2025, the Commission decided to establish a Working Group of the Whole on the topic, to consider the note by the Special Rapporteur, and appointed Mr. Louis Savadogo as Chair of the Working Group.

407. As a consequence of the reduction of the length of the present session, the Working Group held only one meeting, on 22 May 2025.

408. At its 3719th meeting, on 26 May 2025, the Commission took note of the oral report of the Chair of the Working Group. The report of the Working Group is reproduced in section C below.

C. Report of the Working Group

409. The Working Group had before it the note by the Special Rapporteur. At the beginning of the meeting of the Working Group, the Chair briefly introduced the note, focusing on its purpose and the methodology employed in its preparation. An exchange of views on the note and the schedule of the proposed future work of the Commission on the topic followed.

410. Members of the Working Group welcomed the note, including the annex containing references to international legal instruments: universal and regional agreements, laws and regulations of States, and international and national case law. Members also expressed gratitude for the work of the previous Special Rapporteur for the topic, Mr. Yacouba Cissé. Several members considered that the future reports of the Special Rapporteur should build on the reports of the previous Special Rapporteur. It was suggested that the Commission revisit the draft articles already provisionally adopted in light of the evolution of its study of the topic. It was requested that the Special Rapporteur identify the way forward regarding the examination of draft articles 6 and 7, as proposed in the second report of the previous Special Rapporteur.

411. A number of members of the Working Group recalled the discussions at the previous session on the subject of the relationship between the topic and the United Nations Convention on the Law of the Sea. It was highlighted that there was broad consensus within the Drafting Committee for an approach that built on the provisions of the Convention. Some members underscored the importance of preserving the freedom of the high seas, the principle of universal jurisdiction over the crime of piracy and the balance between the rights of flag and coastal States established in the Convention.

412. Several members of the Working Group welcomed the proposal of the Special Rapporteur to study emerging issues relating to the topic, including the carrying of armed

[190] A/CN.4/L.1000. See also the report of the Chair of the Drafting Committee, available at https://legal.un.org/ilc/guide/7_8.shtml.

[191] See A/79/10, para. 82.

security personnel on board merchant ships, as well as legal questions linked to arbitrary seizures of ships under article 106 of the United Nations Convention on the Law of the Sea. Several members supported further clarification of the meaning of the terms "prevention" and "repression". The examination of other legal questions, notably those addressing the use of new technologies, including uncrewed aerial vehicles, maritime autonomous vehicles and cyberattacks, was also considered useful.

413. Several members of the Working Group expressed their support for the proposal of the Special Rapporteur to discuss the matter of universal jurisdiction in relation to the repression of piracy. It was noted that it was important to examine both the peremptory (*jus cogens*) character of the crime of piracy and the question of the obligation to extradite or prosecute (*aut dedere aut judicare*). The importance of distinguishing between prescriptive, enforcement and adjudicatory jurisdiction was emphasized.

414. Members of the Working Group recalled the interest expressed by several States in the Sixth Committee in including the question of rescue of victims and humanitarian assistance to victims of piracy in the work of the Commission on the topic. The possibility of examining the jurisdictional complexities resulting from situations occurring across multiple maritime zones was also raised.

415. Members of the Working Group generally welcomed the methodology proposed in the note. Several members highlighted the richness of regional and subregional practice in the prevention and repression of piracy and armed robbery at sea. The need to take such practice into account was noted. It was also observed that some regional human rights courts had jurisprudence relevant to the topic. The relevance of the 2023 resolution of the Institute of International Law to the work of the Commission on the topic was also highlighted.

416. Several members of the Working Group expressed their support for the proposed schedule of work, as reflected in chapter III of the note. Other members suggested revising the schedule to consider the questions proposed for the second and third reports at the same time. The consideration of issues of general or structural importance before more thematic issues was also proposed.

417. Concerning the final form of the work of the Commission on the topic, several members of the Working Group supported the continued development of draft articles on the topic. Others expressed a preference for draft conclusions or draft guidelines.

418. The Chair of the Working Group expressed his gratitude to all the members for their active participation and constructive approach throughout the meeting of the Working Group. He indicated that he would take the views expressed carefully into account and welcome receiving further written comments on the note from members. He also thanked the secretariat for its valuable assistance.

Chapter XI
Succession of States in respect of State responsibility

A. Introduction

419. At its sixty-ninth session (2017), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[192] The General Assembly, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

420. The Special Rapporteur submitted five reports from 2017 to 2022.[193] The Commission also had before it, at the seventy-first session (2019), a memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[194] Following the debate on each report, the Commission decided to refer the proposals for draft articles made by the Special Rapporteur to the Drafting Committee. The Commission heard interim reports and statements from the successive Chairs of the Drafting Committee on succession of States in respect of State responsibility at the sixty-ninth to seventy-third sessions (2017 to 2019, 2021 and 2022).

421. At its seventy-third session (2022), on 17 May 2022, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee (including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur's fifth report.

422. Also at its seventy-third session, the Commission provisionally adopted, with commentaries, draft guidelines 6, 10, 10 *bis* and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, as well as draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, which were provisionally adopted by the Drafting Committee in 2022. As a result of the change of the proposed form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.

423. At its seventy-fourth session (2023), the Commission had no report before it on the topic, as the Special Rapporteur was no longer a member of the Commission. At its 3621st meeting, on 10 May 2023, the Commission decided to establish a Working Group on the topic and appointed Mr. August Reinisch as its Chair. The Working Group decided to recommend that the Commission continue its consideration of the topic, while refraining, at that stage, from proceeding with the appointment of a new Special Rapporteur. It further recommended that the Working Group be re-established at the seventy-fifth session (2024) of the Commission, with the same open-ended composition, with a view to undertaking further reflection on the way forward for the topic and making a recommendation thereon, taking into account the views expressed, and the options identified, in the Working Group. At its 3648th meeting, on 27 July 2023, the Commission took note of the oral report of the Chair of the Working Group, including the recommendations contained therein.

424. At its seventy-fifth session (2024), the Commission re-established the working group, with Mr. August Reinisch as Chair. At its 3694th meeting, on 26 July 2024, the Commission considered and took note of the report of the Working Group.[195] At the same meeting, the Commission, having considered the recommendations of the Working Group:

[192] At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10)).

[193] A/CN.4/708, A/CN.4/719, A/CN.4/731, A/CN.4/743 and Corr.1, and A/CN.4/751, respectively.

[194] A/CN.4/730.

[195] See *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), chap. IX, sect. C.

(*a*) decided to establish at its seventy-sixth session (2025) a Working Group on succession of States in respect of State responsibility for the purpose of drafting a report that would bring the work of the Commission on the topic to an end;

(*b*) decided that the report would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work; and

(*c*) decided to appoint Mr. Bimal N. Patel as Chair of the Working Group to be established at the seventy-sixth session of the Commission and recommended that the Chair be encouraged to prepare the draft report of the Working Group in advance of the session, in close collaboration with interested members.

B. Consideration of the topic at the present session

425. At its 3702nd meeting, on 28 April 2025, the Commission decided to establish a Working Group of the Whole on the topic, further to the decision taken at its 3694th meeting, and appointed Mr. Bimal N. Patel as Chair of the Working Group.

426. As a consequence of the reduction of the length of the present session, the Working Group held one meeting, on 22 May 2025.

427. At its 3719th meeting, on 26 May 2025, the Commission took note of the oral report of the Chair of the Working Group. The report of the Working Group is reproduced in section C below.

C. Report of the Working Group

428. The Working Group had before it a draft report prepared by its Chair in advance of the present session (A/CN.4/L.1004). As a consequence of the reduction of the length of the session, the Working Group held a single meeting on 22 May 2025, with a duration of one and a half hours. The Working Group regretted that this was not sufficient time to allow for an in-depth consideration of the draft report. The Chair of the Working Group recalled the informal intersessional meeting held on the topic in December 2024 and presented a brief introduction to the draft report. The Working Group held a preliminary exchange of views and subsequently took note of the draft report.

429. Members of the Working Group paid tribute to the work of the previous Special Rapporteur for the topic, Mr. Pavel Šturma, which had made a substantial contribution to the Commission's understanding of the topic. Members also expressed gratitude to the previous Chair of the working group on the topic, Mr. August Reinisch, for his leadership.

430. Members of the Working Group generally reiterated their support for the decision to discontinue the work on the topic. It was suggested that the mandate of the Working Group to implement that decision should be more explicitly reflected in the draft report. Members recalled a number of the objective factors that had led to the discontinuation. Several members emphasized the lack of sufficient or consistent State practice, which posed a challenge for codification. The lack of regional representation in the practice, in particular that of African and Asian States, was also observed. The tension between the clean-slate and automatic succession approaches was recalled. It was also highlighted that the Commission's work had revealed that many States preferred to resolve questions concerning the succession of States in respect of State responsibility through the conclusion of *ad hoc* agreements.

431. While members of the Working Group generally welcomed the draft report, as well as the intersessional work contributing to its preparation, they expressed a desire to consider it paragraph by paragraph. Several members expressed appreciation for the thorough summary of the history of the topic and the problems the Commission would face were it to continue its work. A number of members expressed support for further streamlining the text of the draft report.

432. Members of the Working Group expressed views on the sections of the draft report that related to possible avenues for future enquiry into the topic. Several members stressed

the importance of avoiding giving the impression that the Commission would continue its work on the topic. It was suggested that the section should be deleted or, if kept, reframed in more hypothetical or concise terms. The need to avoid further substantive research into the topic was underscored.

433. Several members of the Working Group considered that the annex to the draft report, following the evolution of the draft articles to draft guidelines, was a useful reference. It was suggested that the term "evolution" might not best capture the change in format of the draft provisions.

434. A number of members of the Working Group expressed appreciation for the ongoing work of the Chair on a bibliography on the topic, including works in all six official languages of the United Nations. The Chair invited members to submit additional references for inclusion in a revised version of the bibliography to be prepared for the seventy-seventh session. He also thanked the Secretariat for its continued assistance.

435. The Chair reported the expectation of the Working Group that it would meet at the seventy-seventh session of the Commission with the hope that it would be given sufficient time to consider and adopt its report, allowing the work on the topic to come to an end. He invited members to send him written comments on the draft report and announced his intention to prepare a revised and more concise version in advance of the seventy-seventh session. He expressed the hope that the revised draft report would put the Working Group in a good position to proceed efficiently and conclude its work on the topic at the seventy-seventh session.

Chapter XII
Other decisions and conclusions of the Commission

A. Memorial for former members

436. At its 3702nd meeting, on 28 April 2025, the Commission heard statements in honour of the memory of former members Pemmaraju Sreenivasa Rao and Milan Šahović. At its 3728th meeting, on 30 May 2025, the Commission held a minute of silence in honour of the memory of former member Nabil Elaraby.

B. Inclusion of new topics in the programme of work

437. At its 3728th meeting, on 30 May 2025, the Commission decided to include the topics "Compensation for the damage caused by internationally wrongful acts" and "Due diligence in international law" in its programme of work and to appoint Mr. Mārtiņš Paparinskis and Ms. Penelope Ridings, respectively, as Special Rapporteurs.

C. Programme, procedures and working methods of the Commission and its documentation

438. On 28 April 2025, the Planning Group was constituted for the present session, with the first vice-chair, Mr. Masahiko Asada, as Chair.

439. The Planning Group held eight meetings on 30 April and 1, 2, 6, 15, 16, 19 and 23 May 2025. It had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-ninth session, prepared by the Secretariat (A/CN.4/778); General Assembly resolution 79/121 of 4 December 2024 on the report of the International Law Commission on the work of its seventy-fifth session; General Assembly resolution 79/126 of 4 December 2024 on the rule of law at the national and international levels; and the proposed programme budget for 2026, Programme 6, Legal affairs, subprogramme 3, concerning the progressive development and codification of international law. The Planning Group further held an exchange of views on a proposal entitled, "Survey of international law in relation to the work of the International Law Commission".

1. Impact of the reduction of the seventy-sixth session of the Commission

440. The Commission wishes to record its deep disappointment with the reduction of its annual session due to the serious liquidity crisis facing the Organization. The originally planned twelve-week session was reduced to a single five-week period (28 April to 30 May 2025). While the Commission is fully aware of the general impact across the whole United Nations of the liquidity crisis, it considers it important to stress that such reduction of its session is unfortunate and unprecedented in the history of the Commission, which has never met for less than nine weeks, and for which the duration of its annual sessions has been fixed by the General Assembly at ten to twelve weeks. The Commission also notes that the impact suffered in the reduction of its session was disproportionate compared to the reduction in the sessions of other United Nations bodies. Furthermore, this marks the second consecutive year of session reductions. The cumulative loss of nine weeks (two in 2024 and seven in 2025) represents the loss of nearly an entire annual session during the present quinquennium, and has resulted in the Commission no longer being able to meet the schedule of work presented in the first year of the present quinquennium (i.e. the seventy-fourth session, held in 2023).

441. The Commission requests the General Assembly to take note of the Commission's views on the impact of the reduction of its seventy-sixth session on its schedule of work and calls on the Assembly to ensure the continued successful functioning of the Commission, as the subsidiary body of the Assembly entrusted with assisting it with the progressive development and codification of international law under Article 13, paragraph 1 (*a*), of the

Charter, in accordance with the resolutions adopted by the Assembly, and including by calling on the Secretariat to seek ways of ensuring adequate funding for future sessions, including by insulating the programme budget for the Commission from that of the Office of Legal Affairs more generally.

442. In the view of the Commission, the reduction in the length of the present session not only contravenes the stipulation of the General Assembly of a 10-week minimum session but also raises serious concerns about establishing a precedent of reduced sessions in the future. Reduced sessions are already having an extremely negative impact on the programme of work of the Commission, including reducing the time for the consideration of each topic and extending the cycles of consideration and completion of each topic on its programme of work, thereby reversing efficiencies achieved in recent years from improvements to the working methods of the Commission. A reduction in the annual output of the Commission will necessarily also affect the work of the Sixth Committee. The resultant condensed annual reports will provide less subject matter to sustain the debate to be held during International Law Week in the Sixth Committee each year. The reduction of the session also affects the relationship of the Commission with other bodies due to the impossibility of scheduling exchanges of views during the session.

443. The Commission's expectation for its seventy-sixth session was to complete its work on sea-level rise in relation to international law, as well as to adopt two second-reading texts, under the topics "Immunity of State officials from foreign criminal jurisdiction" and "General principles of law", as well as to finalize two first-reading texts, for the topics "Subsidiary means for the determination of rules of international law" and "Settlement of disputes to which international organizations are parties". It also expected to conclude its work on the topic "Succession of States in respect of State responsibility", and to advance its work on other topics on its programme of work. However, owing to time constraints arising as a consequence of the reduction of the session, the Commission was only able to adopt a final report on the topic "Sea-level rise in relation to international law". While the Commission was able to advance in the consideration of the draft conclusions on general principles of law, and the draft articles on immunity of State officials from foreign criminal jurisdiction, the conclusion of their second reading was not possible at the present session owing to time constraints. The conclusion of the topic on "Succession of States in respect of State responsibility" also had to be postponed to the seventy-seventh session. Such delay will also have a knock-on effect, with the two topics initially planned to be concluded on first reading at the present session no longer being on track for completion on second reading during the present quinquennium.

444. In addition, the Commission was only able to dedicate a single meeting, under the format of a working group, for the consideration of the topics "Settlement of disputes to which international organizations are parties", "Non-legally binding international agreements", "Prevention and repression of piracy and armed robbery at sea" and "Succession of States in respect of State responsibility". The postponement of a significant proportion of the work planned for the present session to the seventy-seventh session will also necessarily constrain the amount of time available for the consideration of topics that were expected to be the primary focus of consideration at the seventy-seventh session, namely "Non-legally binding international agreements" and "Prevention and repression of piracy and armed robbery at sea".

2. Working Group on the long-term programme of work

445. At its 1st meeting, on 30 April 2025, the Planning Group decided to reconstitute the Working Group on the long-term programme of work for the present quinquennium, with Mr. Marcelo Vázquez-Bermúdez as Chair. The Chair of the Working Group presented an oral report of the work of the Working Group to the Planning Group, on 23 May 2025, including proposals for topics being considered at the current session to the Planning Group. The Planning Group took note of the oral report.

446. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the topics "The principle of non-intervention in international law", "Identification and legal consequences of obligations *erga omnes* in international law" and "Legal aspects of accountability for crimes committed against

United Nations personnel serving in peacekeeping operations" in the long-term programme of work of the Commission.

447. In the selection of the topics, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[196]

448. The Commission considered that the topics selected would constitute a useful contribution to the progressive development of international law and its codification. The syllabuses of the three topics appear in annexes II, III and IV to the present report.

449. The Commission recalls that eight other topics remain on the long-term programme of work, namely: (*a*) ownership and protection of wrecks beyond the limits of national maritime jurisdiction; [197] (*b*) jurisdictional immunity of international organizations; [198] (*c*) protection of personal data in transborder flow of information; [199] (*d*) extraterritorial jurisdiction;[200] (*e*) the fair and equitable treatment standard in international investment law;[201] (*f*) evidence before international courts and tribunals;[202] (*g*) universal criminal jurisdiction;[203] and (*h*) reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law.[204]

3. Working Group on methods of work and procedures

450. At its 1st meeting, on 30 April 2025, the Planning Group decided to establish the Working Group on methods of work and procedures of the Commission, with Mr. Charles Chernor Jalloh as Chair. Owing to time constraints as a result of the reduced length of the present session, the Working Group did not meet at the seventy-sixth session. The Chair of the Working Group made a statement at the last meeting of the Planning Group confirming that the Working Group intends to conduct the work planned for the present session at the seventy-seventh session.

4. Consideration of General Assembly resolution 79/126 of 4 December 2024 on the rule of law at the national and international levels

451. The General Assembly, in its resolution 79/126 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented at each of its sessions on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report remain relevant and reiterates the comments made at its previous sessions.

452. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its statute, is to promote the progressive development of international law and its codification.

---

196 *Yearbook … 1998*, vol. II (Part Two), p. 110, para. 553. See also *Yearbook … 1997*, vol. II (Part Two), para. 238.

197 *Yearbook … 1996*, vol. II (Part Two), para. 248 and annex II, Addendum 2.

198 *Yearbook … 2006*, vol. II (Part Two), para. 257 and annex II.

199 *Ibid*., annex IV.

200 *Ibid*., annex V.

201 *Yearbook … 2011*, vol. II (Part Two), para. 365 and annex IV.

202 *Yearbook … 2017*, vol II (Part Two), para. 267 and annex II.

203 *Yearbook … 2018*, vol II (Part Two), para. 369 and annex I.

204 *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 290 and annex II.

453. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level and aims at promoting respect for the rule of law at the international level. In this regard, the Commission expresses serious concern that the worsening financial difficulties facing the United Nations have led to a reduction in the length of its sessions, which in 2025 were limited to a single 5-week session (as opposed to the 12 weeks previously scheduled and approved by the General Assembly). This situation has had a significant impact on the organization of its work, affecting its programme of work and impairing the conditions under which it fulfils its mandate. Such conditions undermine the full and effective implementation of its mandate and, consequently, weaken the promotion of the rule of law at the international level.

454. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account the rule of law as a principle of governance and the human rights and sustainable development that are fundamental to the rule of law, as reflected in the preamble and Article 13 of the Charter of the United Nations, as well as in the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.

455. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)", which are mutually reinforcing. The Commission also welcomes recent developments addressing sustainable development and climate change, and the recourse to advisory proceedings, in particular, the General Assembly's request for an advisory opinion submitted by consensus to the International Court of Justice.

456. In accordance with its mandate of progressive development and codification of international law, its mission to promote respect for the rule of law at the international level and its supportive function to the General Assembly and to States, the Commission welcomes the calls expressed by the President of the General Assembly to elaborate legally binding instruments on prevention and punishment of crimes against humanity and on the protection of persons in the event of disasters. The Commission recalls that these topics have been integral to its programme of work, leading to the adoption of draft articles on the protection of persons in the event of disasters in 2016 and draft articles on the prevention and punishment of crimes against humanity in 2019.

457. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission is conscious of the extent and urgency of the challenges concerning the strengthening of the rule of law, including the need to ensure gender parity in national and international institutions. In this regard, the Commission itself recognizes that, in terms of its own composition, further progress should be made to comply with this objective.

458. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law, the Commission wishes to recall that much of its work consists of collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law.

459. The Commission particularly welcomes the General Assembly's decision to have invited Member States to focus their observations concerning the rule of law, during the debates in the Sixth Committee at the seventy-eighth session of the General Assembly, on the subtopic "Using technology to advance access to justice for all".

460. In this regard, the Commission emphasizes that, while technological advances pose new challenges, they also create significant opportunities for the development of international law. Discussions in past sessions on the topic of the prevention and repression of piracy and armed robbery at sea have illustrated how technology has transformed how such offences are committed. In its work, the Commission has endeavoured to examine both existing and emerging technologies, assessing their potential to enhance efforts to combat these criminal phenomena and to promote effective international cooperation, which remains essential to ensure that justice is done and that victims have access to justice and are able to effectively assert their rights. Aware of the technological disparities facing States, the

Commission seeks to formulate recommendations that are both firmly grounded in current realities and sufficiently flexible to remain relevant in the future. In this context, it reaffirms the importance of contributions from States and international organizations, particularly insofar as these help to deepen understanding of how technologies may serve to improve access to justice, both at the national level and in the framework of international commitments. The Commission further recalls that its website constitutes an essential tool to ensure the widest possible dissemination of its work and to foster ongoing dialogue with all stakeholders.

461. In keeping with its long-standing vocation, the Commission will continue to ground its work in reality, and thus satisfy the needs expressed by States. Bearing in mind the role of multilateral treaty processes in advancing the rule of law, the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.

462. During the present session, the Commission continued to make its contribution to the promotion of the rule of law, including by working on the topics in the programme of work for the present session: "Sea-level rise in relation to international law" (final report of the Study Group adopted in plenary); "General principles of law"; "Immunity of State officials from foreign criminal jurisdiction"; and "Subsidiary means for the determination of rules of international law". The Commission also considered, in the format of working groups, the topics "Settlement of disputes to which international organizations are parties"; "Non-legally binding international agreements"; "Prevention and repression of piracy and armed robbery at sea"; and "Succession of States in respect of State responsibility."

463. The Commission reiterates its commitment to the promotion of the rule of law in all of its activities.

5. Honoraria

464. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.[205] The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research. This is without prejudice to the establishment of the trust fund pursuant to paragraph 37 of resolution 77/103 of 7 December 2022.

6. Documentation and publications

465. The Commission once again emphasized the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national courts and international courts and tribunals in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other

[205] See *Yearbook … 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook … 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook … 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook … 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook … 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook … 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook … 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook … 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook … 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook … 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook … 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook … 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook … 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook … 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook … 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook … 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 302; *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 317; *ibid.*, *Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 270; *ibid.*, *Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 277; and *ibid.*, *Seventy-ninth Session* (A/79/10), para. 446.

relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission once again stressed that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission, in particular to be in a position to collect materials as representative as possible coming from the different legal systems of the world. It follows that Special Rapporteurs cannot be asked to reduce the length of their reports following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission to the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.[206]

466. The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages, before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterates the importance of Special Rapporteurs submitting their reports within the time limits specified by the Secretariat. Only on this basis can the Secretariat ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

467. On the other hand, the Commission called on the Secretariat to ensure that the documentation services involved in editing and translating documents increase their efficiencies, in particular, in ensuring the timely processing and circulation of Special Rapporteur reports from the original languages in which they are prepared to all the other official languages of the Commission.

468. The Commission recognizes the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.[207] The Commission notes with appreciation the efforts of the Secretariat in desktop publishing, which greatly enhanced the timely issuance of such publications for the Commission, despite constraints due to lack of resources.

469. The Commission again reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English version for timely correction and prompt release. The Commission once more called on the Secretariat to resume the practice of preparing provisional summary records in both English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission, subject to the availability of the resources to do so. The Commission further noted that the more recent practice of submitting to the members of the Commission the provisional records electronically for corrections to be made in track changes continued to work smoothly. The Commission also welcomed the fact that those working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

470. The Commission expressed its gratitude to all Services involved in the processing of documentation for their efforts in seeking to ensure timely and efficient processing of the

[206] For considerations relating to page limits on the reports of Special Rapporteurs, see, for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123–124. See also General Assembly resolution 32/151 of 9 December 1977, para. 10, and General Assembly resolution 37/111 of 16 December 1982, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

[207] See *Yearbook ... 2007*, vol. II (Part Two), paras. 387–395. See also *Yearbook ... 2013*, vol. II (Part Two), para. 185.

Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work. The work done by all Services was all the more appreciated under the ongoing financial constraints.

471. The Commission reaffirmed its commitment to multilingualism and recalled the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolution 76/268 of 10 June 2022.[208]

472. The Commission expressed its gratitude for the research support services provided for it by the United Nations Library in Geneva and expressed appreciation for the additional effort that had been required to maintain those essential services during the seventy-sixth session, despite extraordinary limitations on staff and acquisitions under liquidity measures and the added strain on resources required for preparation of the Library collections for the Strategic Heritage Plan renovations.

473. During the present reduced session, it was especially important for the Commission to have efficient and extended access to the specialized collections and reading rooms at the Library for focused research. The Commission expressed appreciation to the Director-General of the United Nations Office at Geneva and the Library administration for having ensured access to the Library spaces and collections throughout the seventy-sixth session. The Commission reiterated that Library services, collections, and facilities remained essential for its work. It was also considered crucial to provide the necessary support to enable the Library to fulfil its mandate and sustain its collections and services.

474. The Commission was concerned that current budget constraints could limit the capacity of the Library to offer specialized research assistance and to acquire additional publications essential for its work. The Commission also expressed concern regarding the temporary loss of access and potential risks of damage to the Library's valuable physical collections during the renovation process. The Commission further emphasized the importance of maintaining adequate budgeting and staffing levels for the Library to minimize disruptions to access and ensure preservation of the legal collections of the United Nations Library in Geneva during the renovation process.

475. The Commission further stressed that limitations imposed by the liquidity crisis that severely affected the work of the members of the Commission highlighted even more the necessity of the Library services for the work of the Commission at its seventy-seventh session, in New York and Geneva, as well as the importance of providing appropriate means to the Library to implement its mandate and maintain its collections and services.

7. *Yearbook of the International Law Commission*

476. The Commission once again confirmed that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 79/121, once again expressed its appreciation to Governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to this Trust Fund. The Commission wishes to express its gratitude for the contributions received from Austria, Ireland, Qatar and Türkiye to the Trust Fund since the seventy-fifth session in 2024.

477. The Commission recommends that the General Assembly, as it had done in its resolution 79/121, express its satisfaction with the remarkable progress achieved in recent years in addressing the backlog of the *Yearbook of the International Law Commission* in all six languages, and welcome the efforts made by the Division of Conference Management of the United Nations Office at Geneva, especially its Editing Section, in effectively

[208] See also General Assembly resolutions 69/324 of 11 September 2015; 71/328 of 17 September 2017; and 73/346 of 16 September 2019. See further General Assembly resolutions 77/103 of 7 December 2022 and 78/108 of 7 December 2023.

implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

8. Trust fund on assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto, established by General Assembly resolution 77/103

478. In resolution 79/121, the General Assembly expressed its appreciation for contributions made to the trust fund for assistance to Special Rapporteurs of the International Law Commission or Chairs of its Study Groups and matters ancillary thereto, established by resolution 77/103, and invited further contributions to the trust fund, in accordance with the terms of the trust fund, including the need for the financial contributions not to be earmarked for any specific activity of the International Law Commission, its Special Rapporteurs or Chairs of its Study Groups. Since the seventy-fifth session in 2024, contributions were received from Austria, Cyprus, the Czech Republic, Finland, France and the United Kingdom of Great Britain and Northern Ireland.

479. The Commission expressed its appreciation to States that had contributed to the fund and noted that the Codification Division had opened a call for applications for possible assistants to constitute a roster of suitable candidates to assist the Special Rapporteurs. It was noted that 573 applications had been received. It was expected that the first assistants would be selected and matched with Special Rapporteurs by the end of 2025. The Commission stressed the importance of diversity of legal systems, gender, language and regional diversity being taken into consideration and highlighted the importance of this initiative as a training opportunity for young international law professionals and scholars, especially those from developing countries.

9. Assistance of the Codification Division

480. The Commission reiterated its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs, Co-Chairs of the Study Group and Chairs of working groups, and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. The Commission also recognized the work of the Codification Division in providing texts in different languages to ensure the quality and representativeness of the work of the Drafting Committee. The Commission further expressed its concern regarding the reduction of resources allocated to the Codification Division, in particular the reduction of the number of staff available to service the Commission, and reiterated the importance of implementing all the decisions of the General Assembly concerning the indispensable role of the Codification Division, including in providing assistance to the Commission.

481. The Commission expresses its deep gratitude to Mr. Huw Llewellyn, who retired in 2024, for his years of service as its Secretary. The Commission further welcomed Mr. Arnold Pronto as its new Secretary.

482. The Commission further expresses its deep gratitude to Ms. Marianne Sooksatan for her three decades of dedicated service as the principal legal assistant to the Commission, and extended to her best wishes on her planned retirement.

10. Websites

483. The Commission reiterated its appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.[209] The Commission once again expressed the view that the website and other websites maintained by the Codification Division[210] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the rule of law and to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website

[209] http://legal.un.org/ilc.

[210] In general, available from: http://legal.un.org/cod/.

on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio streaming of the plenary meetings of the Commission. The Commission reiterated its view that it would be desirable to allocate additional funding to the website of the Commission to make it accessible in the six official languages of the United Nations.

11. Webcast

484. The Commission reiterated its concern about the discontinuance of the live streaming service of the United Nations webcast of its plenary meetings. The Commission noted the importance of the availability of the webcast to facilitate the engagement of the delegates of the Sixth Committee with the work of the Commission and noted the feedback obtained in the past that expressed interest in following the work of the Commission with such a tool. The Commission called on the Secretariat to allocate the necessary resources to ensure the availability of the webcast at future sessions.

12. United Nations Audiovisual Library of International Law

485. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law[211] in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission. The Commission acknowledged the current efforts to resume the activities of the United Nations Audiovisual Library of International Law and called for further efforts to overcome the delays in the addition of new content.

13. Resolutions of the General Assembly on the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity and on the protection of persons in the event of disasters

486. The Commission welcomed the adoption of resolution 79/122 of 4 December 2024 whereby the General Assembly decided to convene the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity to elaborate and conclude a legally binding instrument on the basis of the draft articles on prevention and punishment of crimes against humanity adopted by the Commission in 2019,[212] and resolution 79/128 of 4 December 2024 whereby the General Assembly decided to elaborate and conclude a legally binding instrument on the basis of the draft articles on protection of persons in the event of disasters adopted by the Commission in 2016.[213]

14. Dates and places of the seventy-seventh session of the Commission

487. Owing to the impact of the liquidity crisis of the United Nations on the activities of the Commission at the seventy-fifth and seventy-sixth sessions and taking into account the volume of work deferred from the seventy-sixth to the seventy-seventh session, including two topics at second reading and a further two topics reaching conclusion on first reading, the Commission stressed the importance of having a 12-week session for its seventy-seventh session.

488. At paragraph 281 of the report of its seventy-third session (2022), paragraph 291 of the report of its seventy-fourth session (2023), and paragraph 464 of the report of its seventy-fifth session (2024) the Commission recommended holding the first part of its seventy-seventh (2026) session in New York with the view to enhancing its dialogue with the General Assembly to facilitate direct contact between the Commission and delegates of the Sixth Committee. In resolution 79/121, the General Assembly reiterated its endorsement, in resolutions 77/103 and 78/108, of the Commission's request that the Secretariat proceed with the necessary administrative and organizational arrangements to facilitate the holding

[211] http://legal.un.org/avl/intro/welcome_avl.html.

[212] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. IV.

[213] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. IV.

of the first part of the seventy-seventh session of the Commission in New York. The Commission hopes that the Secretariat would, accordingly, be able to proceed with holding that part of the seventy-seventh session in New York, to the extent feasible within resources made available for the holding of its annual session in 2026. Particular attention was drawn to the need to ensure access to the venue of the meetings and availability of sufficient conference and library facilities at Headquarters and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. The need to ensure access and sufficient space for assistants to members of the Commission to attend meetings of the Commission was once again emphasized.

489. The Commission decided that its seventy-seventh session would be held in New York, from 20 April to 29 May 2026 and in Geneva from 29 June to 7 August 2026. In the event that insufficient resources are made available to hold the first part of the seventy-seventh session in New York, then the first part would be held in Geneva from 27 April to 5 June 2026.

D. Cooperation with other bodies

490. At the 3710th meeting, on 8 May 2025, Judge Iwasawa Yuji, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[214] An exchange of views followed.

491. Owing to the liquidity crisis facing the United Nations, the Commission's session, as approved by General Assembly resolution 79/121, was reduced from 12 to 5 weeks. Therefore, the Commission was unable to have an exchange of views with the African Union Commission on International Law, the Asian-African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law of the Council of Europe or the Inter-American Juridical Committee. The Commission continues to value its cooperation with such bodies and expresses the hope that the exchanges of views can be organized at future sessions.

492. On 20 May 2025, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on matters of mutual interest. Welcome remarks were made by Ms. Eva Svoboda, Director for International Law, Policy and Humanitarian Diplomacy, ICRC, and opening remarks by Ms. Cordula Droege, Chief Legal Officer and Head of the Legal Division, ICRC, and Mr. Mārtiņš Paparinskis, Chair of the Commission. A presentation was made on the work of the Commission on the topic "General principles of law" by Mr. Marcelo Vázquez-Bermúdez, Special Rapporteur on the topic. A presentation was made by Ms. Anne Quintin, Legal Adviser, and Ms. Droege on the "Global IHL Initiative". The presentations were followed by an exchange of views. Concluding remarks were made by Ms. Droege.

493. The Commission recalled that Rashtriya Raksha University (www.rru.ac.in), India, in collaboration with the Asian-African Legal Consultative Organization, and with the support of the Ministry of External Affairs of India, organized a commemorative event on 75 years of the International Law Commission in the service of peace, security and humanity, in March 2024, and with the University of Johannesburg, South Africa, in November 2024, followed by the publication of a commemorative book and its circulation.

E. Representation at the eightieth session of the General Assembly

494. The Commission decided that it should be represented at the eightieth session of the General Assembly by its Chair, Mr. Mārtiņš Paparinskis.

[214] The statement is recorded in the summary record of that meeting.

F. International Law Seminar

495. Pursuant to General Assembly resolution 79/121 of 4 December 2024, the fifty-ninth session of the International Law Seminar was held at the Palais des Nations from 26 May to 5 June 2025, during the present session of the International Law Commission. The Seminar is intended for young jurists specializing in international law, as well as young professors or government officials pursuing academic or diplomatic careers.

496. Twenty-five participants from different nationalities and all regional groups took part in the session.[215] The participants attended the plenary meetings of the Commission and attended specially arranged lectures and visits.

497. The Legal Office of the United Nations Office at Geneva was responsible for the administration and organization of the Seminar. Mr. Michael Schoiswohl, Senior Legal Adviser to the United Nations Office at Geneva, served as its director, assisted by Ms. Vinuon In. Mr. Vittorio Mainetti, international law expert and consultant, acted as coordinator, assisted by Mr. Mario Pasquale Amoroso, legal assistant.

498. On the first day of the Seminar, Mr. Michael Schoiswohl and Mr. Vittorio Mainetti opened the session, and Mr. Mārtiņš Paparinskis, Chair of the Commission, welcomed participants on behalf of the Commission. Lectures and briefings were delivered by several members of the International Law Commission. These included: Mr. Dapo Akande on "The work of the International Law Commission"; Mr. Mathias Forteau on "Non-legally binding international agreements"; Mr. Marcelo Vázquez-Bermúdez on "General principles of law"; Mr. Louis Savadogo on "Prevention and repression of piracy and armed robbery at sea"; Mr. August Reinisch on "Settlement of disputes to which international organizations are parties"; Mr. Charles Chernor Jalloh on "Subsidiary means for the determination of rules of international law"; Mr. Claudio Grossman on "Immunity of State officials from foreign criminal jurisdiction"; Ms. Patricia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria on "Sea-level rise and international law".

499. Other lectures were delivered by: Mr. Douglas Pivnichny, Legal Officer, and Mr. Arnold Pronto, Director, Codification Division, on "The work of the Codification Division"; Mr. Marcelo Kohen, honorary professor of the Graduate Institute of International and Development Studies, on "The advisory jurisdiction of the International Court of Justice"; and Mr. Michael Schoiswohl and Mr. Vittorio Mainetti on "Privileges and immunities of international organizations".

500. A ceremony was held with the Commission, on 30 May 2025, to mark the fifty-ninth session of the International Law Seminar. The Chair of the Commission, the Director of the International Law Seminar, and Ms. Shoira Alamonova (Uzbekistan), Mr. Taha Almasri (Libya), Ms. Dobroslawa Budzianowska (Poland) and Ms. Valeria Chiappini Koscina (Chile), on behalf of participants attending the Seminar, addressed the Commission.

501. Participants visited the International Labour Organization (ILO) and attended a presentation given by Ms. Tomi Kohiyama, Legal Adviser, and Ms. Lisa Tortell, Deputy Legal Adviser, on ILO standard setting and related developments. Participants also visited the Office of the United Nations High Commissioner for Refugees (UNHCR) and attended presentations by Mr. Lance Bartholomeusz, General Counsel and Head of Legal Affairs Service, and Mr. Massimo Frigo, Senior Policy Officer. Ms. Tatiana Valovaya,

[215] The following persons participated in the Seminar: Mr. Remah Abouzaid (Egypt), Mr. Cyrille Akollah Sone (Cameroon), Ms. Shoira Alamonova (Uzbekistan), Mr. Taha Almasri (Libya), Ms. Bilma Bandeira Mandinga (Sao Tome and Principe), Ms. Dobroslawa Budzianowska (Poland), Ms. Rosa A. Canales Calderón (Peru), Ms. Valeria Chiappini Koscina (Chile), Ms. Anuja Dutta (Nepal), Mr. Felipe Gimenez Losano (Argentina), Mr. Steeve Guillod (Switzerland), Mr. Luis Miguel Gutiérrez Ramirez (Colombia), Ms. Angela Ha (Australia), Mr. Youssef Hitti (Lebanon), Mr. Abraham Joseph (India), Ms. Ana Paula Lavalle Arroyo (Mexico), Mr. Julian Mestre Penalver (France), Ms. Adina-Maria Radu (Romania), Mr. Michel Rouleau-Dick (Canada), Mr. Gaston Olivier Some (Burkina Faso), Ms. Ying Sun (China), Ms. Thiraphorn Trivachirangkul (Thailand), Ms. Monika Velkova (Bulgaria), Ms. Luwam M. Weldemichael (Eritrea), Ms. Deniz Yildiz (Türkiye). The Selection Committee, chaired by Mr. Michael Schoiswohl, Director of the International Law Seminar, met on 29 April 2025, and selected 25 candidates from 169 applications.

Director-General of the United Nations Office at Geneva met with the participants and an official group photo was taken at the Salon Hongrois in the Palais des Nations. An exercise was organized and chaired by Mr. Keun-Gwan Lee, member of the Commission, offering participants an opportunity to simulate the work and proceedings of the International Law Commission. Social and cultural activities included a visit to the Geneva Hôtel de Ville and the historic Alabama Room, with the traditional hospitality extended by the Republic and Canton of Geneva.

502. The Seminar was scheduled to conclude with a diploma ceremony, on 6 June 2025, attended by the Director of the International Law Seminar, the Coordinator of the Seminar, and Mr. Keun-Gwan Lee, on behalf of the Commission.

503. Owing to the changes to the scheduling of the International Law Commission due to the financial situation of the United Nations, the Seminar could not be convened as per its established practice in July and, exceptionally, its duration had to be reduced from three to two weeks. To maintain the connection with the session of the Commission and allow for exposure to and exchange with the work of the Commission irrespective of the latter's shortened session, the first week of the Seminar was scheduled to run concurrently with the last week of the Commission, which resulted in a dense and intense programme for participants.

504. The Commission noted with preoccupation that, in recent years, the finances of the International Law Seminar have been adversely affected by economic and financial factors, which in turn has had an impact on what the Seminar can offer in terms of stipends. The situation has improved since 2022, due to two large voluntary contributions the Seminar has now secured on a regular basis. Continued voluntary contributions are essential to secure the Seminar's operation and accessibility. Therefore, the Seminar must reflect on ways and means to broaden its financial basis in the future. In 2025, 14 fellowships were granted (9 for travel and subsistence, 3 for subsistence only and 2 for travel only).

505. Since its inception in 1965, 1,361 participants from 179 countries have attended the Seminar. Some 828 have received a fellowship.

506. The Commission reiterates the importance it attaches to the Seminar, which enables young international lawyers, especially from developing countries, to deepen their understanding of the work of the Commission and the activities of international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar for its sixtieth session, in 2026, with as broad participation as possible, and adequate geographical distribution.

Annex I

Final report of the Study Group on sea-level rise in relation to international law

A. Introduction

1. In recent years, sea-level rise has become a subject of great importance for the international community. It is having an increasingly direct impact on many essential aspects of life for low-lying coastal States and small island developing States, and especially for their populations. Many other States are also likely to be indirectly affected, through, for example, the displacement of persons or lack of access to resources. Sea-level rise has become a global phenomenon that is creating global problems, with an impact on the international community as a whole.

2. According to scientific studies and reports,[1] climate change-related sea-level rise will accelerate in the future. As a result, the inundation of low-lying coastal areas and of islands will make these areas increasingly less habitable and, in some cases, even uninhabitable, resulting in their partial or full depopulation.

3. According to the 2030 Agenda for Sustainable Development, adopted by the General Assembly in 2015:

> Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea-level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk.[2]

4. The factual consequences of climate change-related sea-level rise prompt a number of important questions in three main areas of international law: (a) the law of the sea; (b) statehood; and (c) the protection of persons affected by sea-level rise. These three subtopics reflect the legal implications of sea-level rise for the constituent elements of the State, are interconnected and should be examined together.

5. Sea-level rise has been the subject of discussions in the main organs of the United Nations. The Security Council considered the agenda item entitled "Sea-level rise: implications for international peace and security" at its 9260th meeting, on 14 February 2023,[3] and the General Assembly held an informal plenary meeting on existential threats of sea-level rise amid the climate crisis on 3 November 2023.[4] On 16 January 2024, the General Assembly decided to convene a high-level plenary meeting on 25 September 2024 to address the existential threats posed by sea-level rise.[5]

---

[1] For example, Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis – Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2013); Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2022); and Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2022).

[2] General Assembly resolution 70/1 of 25 September 2015, para. 14.

[3] See S/PV.9260 and S/PV.9260 (Resumption 1). See also S/2023/79.

[4] See https://www.un.org/pga/78/2023/10/20/letter-from-the-president-of-the-general-assembly-informal-plenary-meeting-on-sea-level-rise-3-nov-concept-note/.

[5] General Assembly decision 78/544 of 16 January 2024. Seventy-eighth session, 53rd plenary meeting, 16 January 2024; see https://press.un.org/en/2024/ga11258.doc.htm.

6. The high-level plenary meeting was held in New York on 25 September 2024, on the overall theme of "Addressing the threats posed by sea-level rise".[6] During the high-level meeting, many delegations welcomed the work of the Commission on the topic, and the hope was expressed that the Commission's work could constitute a foundational pillar to resolving open legal questions in relation to sea-level rise and providing practical solutions.[7] The General Assembly acknowledged the ongoing work of the Study Group and encouraged States to share their views on the various aspects of the topic with the Commission.[8] A one-day high-level plenary meeting of the General Assembly is due to be held at its eighty-first session to continue discussions with the intention of adopting a declaration on the issue of sea-level rise.[9]

7. Sea-level rise in relation to climate change has been addressed in regional and bilateral declarations and initiatives,[10] and has been raised, *inter alia*, in advisory proceedings before the International Tribunal for the Law of the Sea,[11] the International Court of Justice[12] and the Inter-American Court of Human Rights.[13]

B. Mandate and work of the Study Group

8. At its seventieth session (2018), the Commission decided to recommend the inclusion of the topic "Sea-level rise in relation to international law" in its long-term programme of work.[14] The Federated States of Micronesia had submitted a written request to that effect, which was taken into consideration by the members of the Commission who proposed the topic.[15] Subsequently, in its resolution 73/265 of 22 December 2018, the General Assembly noted the inclusion of the topic in the long-term programme of work of the Commission.

9. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.[16] The topic would include three subtopics: issues related to the law of the sea, issues related to statehood and issues related to the protection of persons affected by sea-level rise.

10. The mandate of the Study Group was to undertake a mapping exercise concerning the legal questions raised by sea-level rise and interrelated issues, in order to assist States in developing practicable solutions to respond effectively to the legal issues arising from sea-level rise.[17]

11. The protection of the environment, climate change *per se*, causation, responsibility and liability under international law were excluded from the topic, as provided in the syllabus for the topic prepared in 2018.[18] Moreover, the aim of the topic would not be to propose

[6] General Assembly resolution 78/319 of 1 August 2024, para. 1. See also https://www.un.org/pga/78/high-level-meeting-on-sea-level-rise.

[7] Secretary-General's summary of the high-level meeting on addressing the threats posed by sea-level rise, para. 21.

[8] General Assembly resolution 78/319, preamble. See also the oral statements by Ireland and Antigua and Barbuda at the high-level meeting, available at https://webtv.un.org/en/asset/k1d/k1dftbxgfe.

[9] General Assembly decision 78/558 of 1 August 2024. See also the oral statement of the President of the General Assembly at the closing of the plenary segment of the high-level meeting, available at https://webtv.un.org/en/asset/k1x/k1xrvxcm7f.

[10] A/CN.4/783, paras. 339–351.

[11] *Ibid.*, paras. 352–361.

[12] *Ibid.*, paras. 362–380.

[13] *Ibid.*, paras. 381–384.

[14] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.

[15] *Ibid.*, annex B, para. 7.

[16] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 265.

[17] A/73/10, annex B, para. 18.

[18] *Ibid.*, para. 14.

modifications to existing international law, such as the United Nations Convention on the Law of the Sea.[19]

12. During the period from 2020 to 2024, the Co-Chairs examined each of the three subtopics in a series of four papers: the first issues paper,[20] the second issues paper,[21] and an additional paper to each issues paper.[22] All of the papers were issued with selected bibliographies.[23] The papers presented a set of preliminary observations of the Co-Chairs, along with summaries of the debates of the Study Group, which were commented on by States in the Sixth Committee, as reflected in the annual reports of the Commission.

13. The open-ended Study Group convened in 2021, 2022, 2023, 2024 and 2025. Summaries of the work of the Study Group may be found respectively in: chapter IX of the 2021 annual report of the Commission, on the subtopic of issues related to the law of the sea;[24] chapter IX of the 2022 annual report of the Commission, on the subtopics of issues related to statehood and to the protection of persons affected by sea-level rise;[25] chapter VIII of the 2023 annual report of the Commission, on the subtopic of issues related to the law of the sea;[26] chapter X of the 2024 annual report of the Commission, on the subtopics of issues related to statehood and to the protection of persons affected by sea-level rise;[27] and chapter IV of the 2025 annual report of the Commission, referring to all subtopics.[28]

14. The first issues paper,[29] on the subtopic of issues related to the law of the sea, was considered by the Study Group at the seventy-second session of the Commission (2021). Issues covered included the following: (a) the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces measured from the baselines, on maritime delimitations, and on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals, as well as on the rights of third States and their nationals in maritime spaces in which boundaries or baselines had been established, including the possible legal effects of sea-level rise on islands insofar as their role in the construction of baselines and in maritime delimitations was concerned; and (b) the possible legal effects of sea-level rise on the status of islands, including rocks, and on the maritime entitlements of a coastal State with fringing islands, and the legal status of artificial islands, reclamation or island fortification activities as response/adaptive measures to sea-level rise. A presentation on the practice of African States regarding maritime delimitation was given to the Study Group during the session. The first issues paper presented a number of preliminary observations.

15. At the seventy-second session of the Commission, the Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group. During discussions on the first issues paper, members of the Study Group recognized the importance of the topic and the legitimacy of the concerns expressed by those States affected by sea-level rise, together with the need to approach the topic in full appreciation of its urgency. The discussions concluded with suggestions for additional study by the Co-Chairs.[30]

---

[19] *Ibid.* United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[20] A/CN.4/740 and Corr.1.

[21] A/CN.4/752.

[22] A/CN.4/761 and A/CN.4/774.

[23] A/CN.4/740/Add.1, A/CN.4/752/Add.1, A/CN.4/761/Add.1 and A/CN.4/774/Add.1.

[24] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.

[25] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 153–237.

[26] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 128–230.

[27] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 331–417.

[28] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), paras. 37–76.

[29] A/CN.4/740 and Corr.1 and Add.1.

[30] See A/76/10, chap. IX. See also *ibid.*, para. 20.

16. The additional paper to the first issues paper[31] was considered by the Study Group at the seventy-fourth session of the Commission (2023). On the basis of the exchanges of views during meetings of the Study Group in 2021, the following issues and principles were studied in the additional paper: the issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones; the immutability and intangibility of boundaries; fundamental changes of circumstances (*rebus sic stantibus*); the effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlapped, and the issue of objective regimes; effects of the situation whereby an agreed land boundary terminus ended up being located out at sea; the judgment of the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case;[32] the principle that "the land dominates the sea"; historic waters, title and rights; equity; permanent sovereignty over natural resources; possible loss or gain by third States; nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation; and the relevance of other sources of law. The additional paper presented a number of preliminary observations.

17. At the seventy-fourth session of the Commission, the Study Group held 12 meetings, from 26 April to 4 May and from 3 to 5 July 2023. At its 3655th meeting, on 3 August 2023, the Commission considered and adopted the report of the Study Group on its work at that session. During its discussions, the Study Group engaged in an exchange of views on the principles examined in the additional paper, as reflected in the annual report of the Commission.[33]

18. The second issues paper,[34] on the subtopics of statehood and the protection of persons affected by sea-level rise, was considered by the Study Group at the seventy-third session of the Commission (2022). Issues covered on the subtopic of statehood included the criteria for the creation of a State, some representative examples of actions taken by States and other subjects of international law, concerns relating to the phenomenon of sea-level rise in relation to statehood and some measures that had been taken in that regard, and possible alternatives for the future in respect of statehood. With regard to the subtopic of the protection of persons affected by sea-level rise, the second issues paper contained a mapping exercise, covering the following: the existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise, and State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise. Preliminary observations and guiding questions for the Study Group were presented on both subtopics.

19. At the seventy-third session of the Commission, the Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at that session. The work of the Study Group during that session on the subtopics of issues related to statehood and to the protection of persons affected by sea-level rise is summarized in the annual report of the Commission.[35]

20. The additional paper to the second issues paper[36] was considered by the Study Group at the seventy-fifth session of the Commission (2024). Issues covered on the subtopic of statehood included the configuration of a State as a subject of international law and continued existence of the State, scenarios relating to statehood in the context of sea-level rise and the right of the State to provide for its preservation, and possible alternatives for addressing the phenomenon in relation to statehood. On the subtopic of the protection of persons affected by sea-level rise, the additional paper contained an analysis of the relevant legal issues and a

[31] A/CN.4/761 and Add.1.

[32] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139.

[33] See A/78/10, chap. VIII. See also *ibid.*, para. 18.

[34] A/CN.4/752 and Add.1.

[35] See A/77/10, chap. IX. See also *ibid.*, para. 19.

[36] A/CN.4/774 and Add.1.

set of 12 possible elements for legal protection of persons affected by sea-level rise. Preliminary observations were presented on both subtopics.

21. At the seventy-fifth session of the Commission, the Study Group held 10 meetings, from 30 April to 9 May and from 2 to 8 July 2024. The Study Group also had before it a memorandum prepared by the Secretariat identifying elements in the previous work of the Commission that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons affected by sea-level rise.[37] At its 3694th and 3698th meetings, on 26 July and 30 July 2024 respectively, the Commission considered and subsequently adopted the report of the Study Group on its work at that session. The work of the Study Group during that session on the subtopic of issues related to statehood and to the protection of persons affected by sea-level rise is summarized in the annual report of the Commission.[38]

22. In accordance with the syllabus,[39] the Co-Chairs of the Study Group prepared a final consolidated report on sea-level rise in relation to international law, which was based on their previous work, the debates in the Study Group and statements made by States in the Sixth Committee and other forums. In addition, the Co-Chairs addressed the possible interlinkages between the three subtopics.[40] A draft final report of the Study Group was contained in an annex to the final consolidated report of the Co-Chairs.

23. At the seventy-sixth session of the Commission (2025), the Study Group held six meetings, from 28 April to 5 May 2025. The Study Group had before it the final consolidated report of the Co-Chairs. At its 3720th meeting, on 26 May 2025, the Commission adopted the present final report of the Study Group on the topic "Sea-level rise in relation to international law" and concluded its consideration of the topic.[41]

C. Conclusions of the Study Group

24. The following conclusions are to be considered within the context of climate change-related sea-level rise, and are intended as a summary of the key findings of the work of the Study Group. The conclusions are based on the issues papers by the Co-Chairs and the additional papers thereto; the discussions in the Study Group, as summarized in the annual reports of the Commission; comments and observations by States; other relevant developments, such as regional declarations, regional and bilateral initiatives, and discussions in United Nations bodies, that constitute evidence of State practice on the topic of sea-level rise in relation to international law; and international judicial proceedings and decisions.

1. Law of the sea[42]

25. Climate change-related sea-level rise was not an issue of concern for the international community at the time of the negotiation and adoption of the United Nations Convention on the Law of the Sea. Consequently, no provisions were included in the Convention to address climate change-related sea-level rise in relation to baselines, the outer limits of maritime zones and the status of islands and of archipelagic waters.

26. Many States Parties have stressed that the United Nations Convention on the Law of the Sea is of fundamental importance, its integrity is to be preserved and any solution relating to climate change-related sea-level rise must be consistent with it.

[37] A/CN.4/768.
[38] See A/79/10, chap. X. See also *ibid.*, paras. 40–45.
[39] A/73/10, annex B, paras. 19, 20 and 26.
[40] A/CN.4/774, para. 314.
[41] See A/80/10, chap. IV.
[42] For the relevant sections of the reports of the Co-Chairs, see A/CN.4/740 and Corr.1, paras. 56–218; A/CN.4/761, paras. 16–280; and A/CN.4/783, paras. 12–26. For summaries of the relevant parts of the debate in the Study Group, as given in the annual reports of the Commission, see A/76/10, chap. IX; A/78/10, chap. VIII; and A/80/10, chap. IV.

27. The preservation of legal stability, certainty and predictability is directly linked to an interpretation of the United Nations Convention on the Law of the Sea and other rules of international law that allows for the preservation of baselines, the outer limits of maritime zones and associated entitlements notwithstanding changes to the coastline as a result of climate change-related sea-level rise. Bringing into question maritime boundaries agreed upon or otherwise duly established under international law owing to climate change-related sea-level rise would risk creating legal uncertainty and fresh disputes over maritime areas that had previously been settled.

28. An approach that required baselines and the outer limits of maritime zones to shift landward as a result of sea-level rise having led to the physical submergence of land territory could create an inequitable outcome whereby third States could gain rights in maritime zones, in particular in the exclusive economic zone, to the detriment of the coastal State.

29. There is no provision in the United Nations Convention on the Law of the Sea that imposes an obligation on States to update baselines, geographical coordinates or the outer limits of maritime zones once duly deposited with the Secretary-General in accordance with the Convention, and nor is there evidence of widespread State practice to that effect. Consequently, States are under no obligation to update baselines, geographical coordinates or the outer limits of maritime zones to account for changes as a result of climate change-related sea-level rise.

30. There is no provision in the United Nations Convention on the Law of the Sea or other rules of international law that imposes an obligation on States to update charts in relation to baselines, geographical coordinates or the outer limits of maritime zones, and nor is there evidence of widespread State practice to that effect. Consequently, States are under no obligation to update charts to account for changes as a result of climate change-related sea-level rise, without prejudice to issues relating to the safety of navigation.

31. There is no provision in the United Nations Convention on the Law of the Sea or other rules of international law that prevents States from preserving existing and lawfully established baselines, geographical coordinates and outer limits of maritime zones once duly deposited with the Secretary-General.

32. There is widespread support among States for the 2021 Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise.[43] General State practice exists, as evidenced by statements expressing widespread and consistent support, with regard to the preservation of baselines and the outer limits of maritime zones notwithstanding sea-level rise, in the interests of maintaining legal stability, certainty and predictability.

33. The principle of fundamental change of circumstances (*rebus sic stantibus*), as codified in article 62, paragraph 1, of the Vienna Convention on the Law of Treaties,[44] does not apply to maritime delimitation agreements, as they are covered by the exclusion for treaties establishing boundaries under article 62, paragraph 2 (a).

34. The preservation of baselines and maritime entitlements notwithstanding sea-level rise is consistent with the principle of permanent sovereignty over natural resources.

2. Statehood[45]

35. With regard to States particularly affected by climate change-related sea-level rise, there is strong support among States for the continuity of statehood and sovereignty and the

[43] Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, 6 August 2021. Available at https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise.

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

[45] For the relevant sections of the reports of the Co-Chairs, see A/CN.4/752, paras. 72–226 and 417–424; A/CN.4/774, paras. 69–123 and 294–301; and A/CN.4/783, paras. 27–46. For summaries of the relevant parts of the debate in the Study Group, as given in the annual reports of the Commission, see A/77/10, chap. IX, in particular paras. 193–213, 228–231 and 235; A/79/10, chap. X, in particular paras. 349–394; and A/80/10, chap. IV, in particular paras. 61–63.

maintenance of international legal personality and membership of international organizations.[46]

36. The continuity of statehood has been affirmed in the 2023 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise[47] and the 2024 Declaration of the Heads of State and Government of the Alliance of Small Island States on Sea-level Rise and Statehood.[48] These declarations have received widespread support from other States and regional organizations.[49]

37. State practice reveals a degree of flexibility in the interpretation and application of international law with regard to issues of statehood. Article 1 of the 1933 Convention on the Rights and Duties of States,[50] whose criteria are generally accepted for the purpose of identifying a State as a person or subject of international law, does not address the question of the continuity of statehood in the context of climate change-related sea-level rise.

38. The continuity of statehood in the context of climate change-related sea-level rise is based on the right of States to preserve their existence, the right of each State to preserve its territorial integrity and the right of peoples to self-determination. It is linked to legal stability, certainty and predictability, the sovereign equality of States, permanent sovereignty of States over their natural resources, the maintenance of international peace and security, equity and justice, and international cooperation. The continuity of statehood is essential to avoid situations of loss of nationality and statelessness.

39. In addressing situations regarding statehood in the context of climate change-related sea-level rise, the preservation of statehood correlates with the right of peoples, including Indigenous Peoples, to self-determination, as they cannot be deprived of the continuity of statehood without their consent. Respect for the right to self-determination requires consultation in good faith as to alternatives that may be applied to preserve their identities and international legal personality.

40. In order to preserve their rights, States particularly affected by climate change-related sea-level rise are entitled to take the measures available to them under international law, including adaptation measures, in response to different levels of submergence of land surface or challenges to habitability, while upholding their obligations under international law.

41. Regarding the enjoyment of the benefits of statehood and the related practical aspects, international cooperation is essential, in particular between States particularly affected by climate change-related sea-level rise and other members of the international community. Such cooperation should be based on respect for the sovereignty of the affected States and considerations of equity and fairness.

3. Protection of persons affected by sea-level rise[51]

42. Although the current international legal frameworks that are potentially applicable to the protection of persons affected by sea-level rise are fragmented and not specific to sea-level rise, such persons remain rights holders and States have a duty to respect, protect

[46] A/CN.4/783, paras. 148–299 and 335.

[47] Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, 9 November 2023. Available at https://forumsec.org/publications/reports-communique-52nd-pacific-islands-leaders-forum-2023.

[48] Declaration of the Heads of State and Government of the Alliance of Small Island States on Sea-level Rise and Statehood, 23 September 2024. Available at https://aosis-website.azurewebsites.net/aosis-leaders-declaration-on-sea-level-rise-and-statehood/.

[49] A/CN.4/783, paras. 35–46, 58–61, 345, 372, 402, 409, 414, 416–418, 421 and 423.

[50] Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.

[51] For the relevant sections of the reports of the Co-Chairs, see A/CN.4/752, paras. 227–416 and 425–437; A/CN.4/774, paras. 124–293, 302–306; and A/CN.4/783, paras. 47–56. For summaries of the relevant parts of the debate in the Study Group, as given in the annual reports of the Commission, see A/77/10, chap. IX, in particular paras. 214–220, 232, 233 and 236; A/79/10, chap. X, in particular paras. 395–413; and A/80/10, chap. IV, in particular paras. 64–70.

and fulfil their human rights obligations, including with regard to civil, political, economic, social and cultural rights.

43. In view of the absence of a dedicated legal framework, there is a need to develop legal and practical solutions to better protect persons affected by sea-level rise, including those who remain *in situ* and those who are internally or externally displaced by it.

44. On the basis of the current international legal frameworks, elements for legal protection of persons affected by sea-level rise include the protection of human dignity as a guiding principle for any action to be taken in the context of climate change-related sea-level rise.

45. Other elements for specific legal protection of persons affected by sea-level rise include the need for a combination of needs-based and rights-based approaches as the basis for protection, the need to delineate the human rights obligations of the different human rights duty bearers involved, namely the affected State and the host States, and the particular need to protect persons in vulnerable situations, who may be disproportionately affected.

46. There are various practical tools that may be used to address the protection of persons affected by sea-level rise, such as special climate mobility agreements, pathways and other alternative arrangements, humanitarian visas and similar administrative policies, and measures to prevent the loss of nationality and statelessness.

47. Affected persons and communities should be kept informed, be consulted and be encouraged to participate in decisions affecting them in the context of climate change-related sea-level rise.

48. As affirmed in the 2023 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise[52] and the 2024 Declaration of the Heads of State and Government of the Alliance of Small Island States on Sea-level Rise and Statehood,[53] international cooperation is required to protect persons and communities affected by sea-level rise, including to protect their culture, cultural heritage, identity and dignity and to meet their essential needs.

4. Cross-cutting issues and interlinkages between the subtopics[54]

49. The three subtopics – the law of the sea, statehood and protection of persons affected by sea-level rise – are interconnected. The continuity of statehood is directly linked to the preservation of maritime zones and entitlements and is integral to the preservation of existing rights, as the sovereignty of the State is the foundation for sovereign rights over natural resources. The preservation of maritime zones and entitlements is also directly linked to the economic well-being and livelihoods of the population, including present and future generations. At the same time, States have an important duty in ensuring the protection of their people, and continuity of statehood is necessary and fundamental to the provision of that protection, including to prevent situations of loss of nationality and statelessness. The ability of the State to continue to fulfil its human rights obligations is, therefore, also connected with the issue of continuity of statehood.

50. A common thread among the subtopics is the question as to how to preserve and protect existing rights in the face of the serious and unprecedented consequences of sea-level rise for States, especially small island States and low-lying coastal States.

51. Legal stability, certainty and predictability, as broadly recognized by many States, serve as cross-cutting principles for the preservation of maritime zones and their outer limits, together with their associated entitlements, as well as for the continuity of statehood, self-determination, permanent sovereignty over natural resources, the protection of affected

[52] 2023 Pacific Islands Forum Declaration (see footnote 47 above), para. 10.

[53] 2024 Declaration (see footnote 48 above), eighth preambular paragraph.

[54] For the relevant section of the report of the Co-Chairs, see A/CN.4/783, paras. 393–480. For the summary of the relevant part of the debate in the Study Group, see A/80/10, chap. IV, in particular paras. 71–76.

populations, and the maintenance of international peace and security and avoidance of conflict.

52. The preservation of existing lawful rights in relation to sea-level rise is essential for the continuity of statehood, the preservation of maritime entitlements and the protection of persons affected by sea-level rise. It is closely related to the principle of equity. A practical legal response to climate change-related sea-level rise should be one that prevents the loss of existing lawful rights, whether territorial or maritime. Sea-level rise cannot be a reason for any State to lose the rights associated with statehood, such as maritime entitlements, self-determination and permanent sovereignty over natural resources. Moreover, the preservation of such rights is fundamental for the State to be able to continue to promote, respect and fulfil the human rights of affected persons.

53. Fundamental principles of international law, such as sovereign equality of States, respect for territorial integrity, the right of peoples to self-determination, permanent sovereignty over natural resources, and the promotion and protection of human rights are recognized as customary international law and should not be undermined by climate change-related sea-level rise. Any legal solutions to address the territorial and maritime consequences of climate change-related sea-level rise need to be based on considerations of legal stability, certainty and predictability, sovereign equality of States, equity and the right of peoples to self-determination.

54. Equity, as another cross-cutting principle, applies to sea-level rise as the States most affected, in particular small island developing States, have contributed the least to climate change-related sea-level rise but will suffer the impact disproportionately to other States. The preservation of maritime zones, continuity of statehood and protection of affected persons are therefore matters of equity and solidarity.

55. The duty to cooperate is a principle of international law. States have an obligation to work together, as appropriate, to address the adverse effects of climate change-induced sea-level rise, particularly on the States most affected. The duty to cooperate is rooted, *inter alia*, in the Charter of the United Nations,[55] the Universal Declaration of Human Rights,[56] the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[57] and the United Nations Convention on the Law of the Sea. It is also a foundational principle of international human rights law, the law of the sea, climate change law, environmental law and disaster law. Cooperation among States and other members of the international community is critical to address the impact of sea-level rise in relation to the preservation of maritime zones, statehood and the protection of affected persons.

56. The interpretation and application of existing international law should be based on an approach that meets the needs of States and populations affected in the face of the possible adverse consequences of climate change-related sea-level rise to ensure legal stability, certainty and predictability, equity and the preservation of existing rights.

5. Possible ways forward

57. In the light of the above conclusions of the Study Group, the following approaches, individually or combined, may be considered by States, international organizations and other relevant actors in developing practicable solutions to effectively address the international legal issues arising from climate change-induced sea-level rise.

(a) Interpretation of existing instruments and rules of international law

58. An approach may be adopted that allows for the interpretation and application of existing instruments and rules of international law to take into account the adverse impact of sea-level rise. For example:

[55] Article 1, paragraph 3, Article 55 and Article 56.

[56] Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, preamble.

[57] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

(a) existing instruments and rules of international law may be applied in a manner that addresses the impact of sea-level rise so as to allow for a contemporary interpretation, and that takes into account the duty to cooperate, equity, solidarity, self-determination, permanent sovereignty over natural resources, the preservation of existing rights and the maintenance of legal stability, certainty and predictability as cross-cutting principles that apply to the legal consequences of sea-level rise;

(b) an interpretative statement or a subsequent agreement, as appropriate, may be adopted by the States Parties to the United Nations Convention on the Law of the Sea or by the General Assembly regarding the preservation of baselines and maritime zones under the Convention and other rules of international law;

(c) the elements for legal protection of persons affected by sea-level rise, as discussed in the Study Group, may be taken into account, as appropriate, in the interpretation and application of relevant instruments.

(b) Development of instruments and mechanisms specific to climate change-related sea-level rise

59. States, the General Assembly and other international organizations may, as appropriate, adopt binding or non-binding instruments and develop mechanisms that specifically address the legal issues arising from sea-level rise. For example:

(a) the General Assembly of the United Nations and the relevant organs of other international organizations may adopt resolutions or declarations in relation to the continuity of statehood, the preservation of sovereignty and the maintenance of membership of the United Nations and other international organizations;

(b) binding or non-binding instruments applicable to the protection of persons affected by sea-level rise may be adopted at the bilateral, regional or international level, and may include, as appropriate and *inter alia*, the elements for legal protection of persons affected by sea-level rise, as discussed in the Study Group;

(c) mechanisms may be developed within the United Nations or other international organizations and bodies, as appropriate, including at the regional level, to strengthen cooperation in addressing the adverse impact of climate change-related sea-level rise.

Annex II

[Original: French]

The principle of non-intervention in international law*

New topic proposed by Ivon Mingashang

Introduction

1. The purpose of the present syllabus is to submit a proposed topic to the Working Group on the long-term programme of work, highlighting the ways in which it meets the criteria for inclusion on the Commission's agenda.

2. The syllabus focuses on questions of international law concerning the terminological aspects, normative content and substance of the principle of non-intervention in international law.

3. A careful examination of State practice and lessons drawn from relevant international case law could aid in the identification of major themes, potential approaches and, to some extent, the salient points on which the study should focus, depending on whether the outcome to be produced is a work of codification or simply of progressive development of international law.[1]

I. Overview of the debate on the principle of non-intervention in international law

4. The principle of non-intervention is enshrined in Article 2, paragraph 7, of the Charter of the United Nations, which provides that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[2]

5. It appears, from a literal reading of this provision, that the prohibition it establishes in respect of the United Nations is *a fortiori* applicable in respect of Member States.[3] The

* The author is grateful to his colleagues at the Centre d'études en règlement des différends internationaux en Afrique (CERDIA) for their invaluable comments, which provided insights into the topic under consideration. Special thanks are due to Mr. Jean-Paul Mwanza K., doctoral student in international law at the University of Kinshasa, for his research and compilation of the bibliography at this stage of the study.

1 Report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session*, Sixth Committee, annex 1, para. 7. See also the statute of the International Law Commission, art. 15; and *The Work of the International Law Commission*, 10th ed., vol. I (2023), p. 49.

2 Charter of the United Nations, San Francisco, 1945, Article 2, paragraph 7.

3 M. Roscini, *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, Oxford, Oxford University Press, 2024. The author considers that the basis of the principle of non-intervention differs depending on whether it is invoked under customary international law or the Charter of the United Nations. In the latter case, the prohibition of intervention applies to the organs of the United Nations and not to Member States, and such intervention need not be coercive to be unlawful. According to G. Guillaume, "Article 2, §7", in J.-P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies. Commentaire article par article*, 3rd ed., Paris, Economica, 2005, p. 490, "[l]es travaux préparatoires montrent que ce texte avait été élaboré en vue de réglementer l'action de l'Organisation elle-même et non celle de ses Membres" [the

imperative of State sovereignty dictates simply that, at least in theory, no State enjoys any privilege authorizing it to intervene in the examination or solution of matters or situations falling within the internal order of a third State or, as the case may be, of a group of States to which it does not belong.

6. State practice is rife with striking examples of interventions that are potentially unlawful or prohibited under international law.[4] This is especially true of armed interventions and various forms of support for opposition political parties, rebel movements and civil society or other movements against established Governments.

7. A close look at the relevant international practice reveals that the principle lends itself to a variety of interpretations and applications.[5] The indeterminacy of the term's substantive content gives rise to confusion.

8. The Commission could thus draw on available elements of such practice to identify the legal parameters of this principle more precisely. It could also go further and demonstrate, for example, the existence or otherwise of a current *opinio juris* on this practice.

9. The difficulties arising from the ambiguity of the term are compounded by the tendency to conflate it with other legal institutions or categories such as non-interference, the obligation to protect and, in the distant past, concepts such as humanitarian intervention. Its exact content and formal limits thus do not seem to have been clearly determined in relation to other rules of this kind from the standpoint of modern international law. These difficulties mirror those surrounding the concepts[6] of which it is comprised and in relation to which its content and contours must be determined. Above all, this principle has been tempered by the enshrinement of parallel principles such as the non-recognition or rejection of regimes based

drafting history shows that this text was meant to regulate the action of the Organization itself and not that of its Members]. He acknowledges, however, that "représentants [des États], tout en reconnaissant que le paragraphe 7 [de l'article 2] ne se réfère qu'aux pouvoirs et fonctions de l'ONU elle-même, ont estimé qu'il ne laisse pas les États libres d'intervenir, individuellement ou collectivement, là où les Nations Unies ne le peuvent pas" [representatives [of States], while recognizing that paragraph 7 [of Article 2] refers only to the powers and functions of the United Nations itself, have taken the view that it does not leave States free to intervene, individually or collectively, where the United Nations cannot] (p. 492). See also the commentary on the same article in the 2nd edition, 1991, pp. 146 *ff*.

[4] O. Corten, A. Verdebout, "Les interventions militaires récentes en territoire étranger: vers une remise en cause du *jus contra bellum*?", in *Annuaire français de droit international*, vol. 60, 2014, pp. 135–169.

[5] It suffices to recall the diverging positions taken by States, international organizations, legal scholars, learned societies and many others when applying this principle to a given factual situation or assessing the latter in the light of the former. See Bannelier-Christakis, K., "Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent", *Leiden Journal of International Law*, 2016; O. Corten, A. Verdebout, "Les interventions militaires récentes en territoire étranger...", *op. cit.*, pp. 135–169; A. Orford, "Muscular Humanitarianism: Reading the Narratives of the New Interventionism", *European Journal of International Law*, 1999, pp. 679–711; J. Michael Glennon, "The New Interventionism. The Search for a Just International Law", *Foreign Affairs*, 1999, pp. 2–7; J. Michael Glennon, "The Limitations of Traditional Rules and Institutions Relating to the Use of Force", in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford, Oxford University Press, 2015, pp. 79–95; Michael W. Doyle, "The New Interventionism", *Metaphilosophy*, 2001, pp. 212–235; R. Müllerson, "*Jus Ad Bellum*: Plus Ça Change (Le Monde) Plus C'Est La Même Chose (Le Droit)?", *Journal of Conflict and Security Law*, 2002, pp. 149–190; D. Brown, "Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses", *Cardozo Journal of International and Comparative Law*, 2003–2004, pp. 1–54; J. Brunnée and S.J. Toope, "The Use of Force: International Law after Iraq", *International and Comparative Law Quarterly*, 2004, pp. 785–806; M.C. Wood, "Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction", in N. Blokker and N. Schrijver (eds.), *The Security Council and the Use of Force. Theory and Reality – A Need for Change?*, Leiden, Martinus Nijhoff, 2005, pp. 75–90.

[6] In particular, "reserved domain" or matters relating to the internal affairs of the State, "intervention", "coercion", etc.

on racial discrimination[7] and apartheid,[8] and the principles of democratic legitimacy,[9] the rule of law[10] and the imperative of protecting human rights. Even more significant in this respect is the development of the doctrine of the responsibility to protect.[11]

10. There is nonetheless a system of international rights and obligations inherent in the enshrinement of the principle in question in international relations. The manipulation of this system to suit the subjective interests at stake raises, in turn, the question of legal certainty, predictability and enforceability when the principle is invoked in a particular case.

11. The Commission could also consider the possibility of analysing the notion of coercion in treaty-making, insofar as it seems likely to constitute another form of unlawful intervention in the internal affairs of a State.[12] The Commission could thus help to define and clarify the parameters of this principle in the light of recent developments in international relations.

II. Issues to be addressed in the study on non-intervention in international law

12. Determining what is and what is not permissible under the principle of non-intervention in international law basically entails defining the concept of intervention

[7] Security Council resolution 217 (1965) of 20 November 1965; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965; Ben Achour, R., "Changements Anticonstitutionnels de Gouvernement et Droit International", in *Collected Courses of the Hague Academy of International Law*, vol. 379, Brill-Nijhoff, Leiden-Boston, 2016, pp. 397–548, at pp. 438 *ff*.

[8] General Assembly resolutions 395 (V) of 2 December 1950 and 511 (VI) of 12 January 1952; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973; P. Pierson-Mathy, "L'Action des Nations Unies contre l'Apartheid", in *Belgian Review of International Law*, 1970, vol. 1, pp. 203–245.

[9] L.-A. Sicilianos, *L'ONU et la démocratisation de l'État*, Paris, Pedone, 2000; Guarino, G., "Autodétermination des peuples, respect de la volonté populaire et Charte africaine de la démocratie", in R. Ben Achour (ed.), *Les changements anticonstitutionnels de gouvernement*. *Approches de droit constitutionnel et de droit international*, international symposium held in Tunis on 4 and 5 April 2013, *Les Cahiers de l'Institut Louis-Favoreu*, No. 3, Presses universitaires d'Aix-Marseille, 2014, pp. 134 *ff*.

[10] General Assembly resolution 62/7, 2007. J. Chevallier, *L'État de droit*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, Coll.: Clefs, 2023, 168 pp.

[11] Report of the International Commission on Intervention and State Sovereignty on the Responsibility to Protect, December 2001; report of the Secretary-General on implementing the responsibility to protect (A/63/677), 12 January 2009.

[12] United Nations Conference on the Law of Treaties, first session, Vienna, 26 March–24 May 1968, *Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 1969; see also second session, Vienna, 9 April–22 May 1969, *Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 1970; first and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records, Documents of the Conference* (A/CONF.39/11/Add.2), 1971; United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. I, Vienna, 18 February–21 March 1986, *Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.129/16), 1995; vol. II, Vienna, 18 February–21 March 1986, *Official Records, Documents of the Conference* (A/CONF.129/16/Add.1), 1995. See also G. Tenekides, "Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969", in *Annuaire français de droit international*, 1974, vol. 20, pp. 79–102; International Court of Justice, *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 14, para. 24. See also O. Corten and P. Klein (eds.), *Les conventions de Vienne sur le droit des traités*, Brussels, Bruylant, 2006 (3 volumes), 3024 pp., in particular the commentaries on articles 51 (Giovanni Distefano) and 52 (Olivier Corten). See also the English version edited by the same authors, *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford, Oxford University Press, 2011, 1128 pp.; T. Garcia and L. Chan-Tung, *La Convention de Vienne sur le droit des traités: bilan et perspectives 50 ans après son adoption*, Paris, Pedone, 2019, 204 pp.

more precisely. This is a daunting task, because the concept is long-standing, vague and in constant evolution.[13] In a contemporary international context marked by uncertainty and complexity in the relations between subjects of law, in the wake of numerous conceptual and structural changes in the international legal order, taking stock of established State practices and attitudes and of State conduct in relation to the invocation of this principle appears essential for determining its exact legal import and its concrete effects in contemporary international relations.

A. Title of the proposed topic

13. The title chosen, "The principle of non-intervention in international law", is intended to delimit the scope of the study, which will not cover the implications of invoking this principle from the perspective of international relations in general. In terms of content, the topic is focused on specific considerations relating to the "legal discourse on non-intervention and international practice", to echo the title of the proceedings of the seventh Reims colloquium, held in 1986.[14]

14. The relevant international practice to be referenced involves both States and other subjects of international law capable of intervening in the internal affairs of States through various legal procedures.

15. The wording suggested for this principle may potentially encompass actors on the international scene other than States and international organizations. International financial institutions and multinational corporations, in particular, have emerged as having the capacity and the power to play an active and often insidious role in reorienting whole swathes of States' domestic policies by imposing conditionalities that ultimately turn out to be veiled measures of coercion.[15] United Nations reports have established the responsibility of multinational corporations as perpetrators of economic crimes that can destabilize national Governments.

B. Content and significance of the principle of non-intervention in international law

16. The Charter of the United Nations established the principle of non-intervention in the internal affairs of other States. General Assembly resolution 2625 (XXV) subsequently addressed it in detail.[16] The legal meaning of the principle in State practice nevertheless remains shrouded in uncertainty, which explains its fluidity. International law experts and

[13] E. David, "Portée et Limite du Principe de Non-Intervention", in *Belgian Review of International Law*, 1990, vol. 2, Éditions Bruylant, Brussels, p. 350.

[14] *Réalités du droit international contemporain*, proceedings of the seventh Reims colloquium on "Le discours juridique sur la non-intervention et la pratique internationale", 2 and 3 June 1986.

[15] F. Polet, "Que devient la conditionnalité néolibérale?", in B. Duterme (ed.), *Économies du Sud: toujours sous conditions néolibérales?*, Éditions Syllepse, Coll.: Alternatives Sud, 2022, pp. 7–24. Some studies have challenged conditionalities such as those imposed by the International Monetary Fund: https://www.imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality; https://www.csogffhub.org/resources/unhealthy-conditions-imf-loan-conditionality-and-its-impact-on-health-financing/; https://publicservices.international/resources/news/les-conditionnalits-du-fmi-ont-des-consquences-nfastes-sur-la-sant--rapport-eurodad?id=9958&lang=en; and by the World Bank: "Conditionnalités de la Banque mondiale aux Philippines et en Indonésie", in B. Duterme (ed.), *Économies du Sud: toujours sous conditions néolibérales?*, Éditions Syllepse, Coll.: Alternatives Sud, 2022, pp. 29–46.

[16] General Assembly resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970. See also General Assembly resolutions 2131 (XX), Declaration on the Inadmissibilitý of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965; 2225 (XXI), Status of the implementation of the Declaration on the Inadmissibilitý of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 19 December 1966; and 36/103, Declaration on the Inadmissibilitý of Intervention and Interference in the Internal Affairs of States, 9 December 1981.

State representatives are generally able to perceive what the principle of non-intervention looks like in spirit, while remaining deeply divided as to its implications and scope.[17] State practice in this area is obviously abundant. It is, however, contradictory and has developed in all directions, depending on the spatial and temporal context in which it is invoked.

17. The political, ideological or geostrategic interests and motives underlying the actions and reactions of the players involved in each specific case do not help to clarify the matter. The many expressions and guises in which the principle is embodied further obscure its meaning.

III. Invocation of the principle in international practice

A. Treaty practice of States

1. Treaty practice at the universal level

18. The treaty practice of States, as reflected in universal treaties referring to or including the principle of non-intervention in international law, such as the Charter of the United Nations and other agreements of this nature, will be analysed as part of the study. In the same vein, the Commission will examine constituent and other legal instruments of specialized agencies of the United Nations system in particular, insofar as they establish the principle of non-intervention. One example is the Constitution of the United Nations Educational, Scientific and Cultural Organization. Its article I (3) provides that "the Organization is prohibited from intervening in matters which are essentially within [the] domestic jurisdiction" of its member States. Provisions of this kind are also found in the Articles of Agreement of the International Monetary Fund[18] and the Articles of Agreement of the International Bank for Reconstruction and Development.[19]

2. Treaty practice at the regional level

19. Reference will also be made to the constituent instruments of regional organizations and other relevant legal texts that establish the principle of non-intervention in the relations between States in the regions concerned or, at the very least, the principle of non-interference, whose relationship with the principle of non-intervention will need to be explored.

20. In the case of Africa, article 4 (g) of the Constitutive Act of the African Union refers to the principle of "non-interference by any Member State in the internal affairs of another".[20] The Protocol relating to the Establishment of the Peace and Security Council of the African Union refers to this principle in identical terms.[21] It is also alluded to in the Pact on Security, Stability and Development in the Great Lakes Region, whereby "[m]ember States undertake to base their relations on respect for the principles ... of non-interference in the internal affairs of other Member States".[22]

21. For Europe, the principle of non-intervention appears in the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe. Title V of the Treaty on European Union, "General provisions on the Union's external action and specific provisions on the Common Foreign and Security Policy", makes implicit reference to the principle.[23] The same is true of the 1990 Charter of Paris for a New Europe, adopted at the Meeting of Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe.

---

[17] B. Conforti, "Chapitre XXII: Le principe de non-intervention", in M. Bedjaoui (ed.), *Droit international: bilan et perspectives*, vol. 2, Paris, Pedone, 1991, pp. 489–500.

[18] Art. IV, sect. 3 (b).

[19] Art. IV, sect. 10.

[20] Constitutive Act of the African Union, Lomé, 11 July 2000.

[21] Protocol relating to the Establishment of the Peace and Security Council of the African Union, Durban, 9 July 2002.

[22] Pact on Security, Stability and Development in the Great Lakes Region, Nairobi, 15 December 2006.

[23] See art. 21.

22. Although the Treaty on European Union and the Charter of Paris do not refer directly to the principle of non-intervention, they refer explicitly to the principles of the Helsinki Final Act, including the principle of non-intervention.

23. For the Americas, this principle is set out in article 8 of the Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States and signed at Montevideo on 26 December 1933. In 1936, the States Parties to this Convention "resolved to reaffirm this principle through the negotiation" of the Additional Protocol Relative to Non-Intervention, adopted at the Inter-American Conference for the Maintenance of Peace.[24] The Charter of the Organization of American States, signed in Bogotá on 30 April 1948, also enshrines the principle of non-intervention in the internal affairs of States.[25]

24. For Asia, the Charter of the Islamic Conference, adopted in Jeddah on 4 March 1972 by the Third Islamic Conference of Foreign Ministers, establishes respect for "the right of self-determination and non-interference in the domestic affairs" of member States.[26]

3. Treaty practice at the bilateral level

25. For the purposes of the present study, it is important for the Commission to also take into consideration bilateral treaty practice between States, between States and international organizations and between international organizations when such practice involves this principle. Such treaties could include headquarters agreements between States and international organizations or other bilateral agreements between States.

[24] See art. 1.
[25] See arts. 15 and 16.
[26] Preamble and art. 1 (3).

B. Practice in international organizations

1. Situations in which the principle of non-intervention has been invoked in the practice of United Nations organs

26. The principle of non-intervention has been invoked in many situations dealt with by United Nations organs. The subject matter spans a variety of areas or issues in the relations between Members of the United Nations or between them and the Organization. These situations have been dealt with essentially by the General Assembly,[27] the General Assembly and the Economic and Social Council,[28] the Security Council[29] and the International Court of Justice.[30]

2. Positions taken by States in United Nations organs

27. The relevant practice to which it is important to refer in this context also concerns the positions that States have adopted or expressed in debates within the organs of international

---

[27] Before the General Assembly, see, in particular, *Case No. 1*: Relations of Member States with Spain; *Case No. 2*: Treatment of people of Indian origin in the Union of South Africa; *Case No. 3*: The question of convening conferences of representatives of Non-Self-Governing Territories; *Case No. 4*: The question of the establishment of committees on information transmitted under Article 73 *e*; *Case No. 5*: The question of the competence of the General Assembly to determine the Territories to which Article 73 *e* applies; *Case No. 6*: Threats to the political independence and territorial integrity of Greece; *Case No. 7*: Observance of human rights in the Union of Soviet Socialist Republics; *Case No. 8*: Observance of human rights in Bulgaria, Hungary and Romania; *Case No. 9*: The question of Morocco; *Case No. 10*: The Tunisian question; *Case No. 11*: The question of race conflict in the Union of South Africa; *Case No. 24*: The question of Cyprus; *Case No. 25*: The question of West Irian; *Case No. 26*: Complaint of detention and imprisonment of United Nations military personnel in violation of the Korean Armistice Agreement; *Case No. 27*: The question of Algeria; *Case No. 30*: The question of Hungary; *Case No. 34*: The policies of apartheid of the Government of the Republic of South Africa; *Case No. 35*: The question of Tibet; *Case No. 36*: The question of Oman; *Case No. 37*: The question of Southern Rhodesia; *Case No. 38*: The status of the German-speaking element in the Province of Bolzano (Bozen); *Case No. 39*: The situation in Angola; *Case No. 40*: The situation in Aden; *Case No. 41*: Consideration of principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations; *Case No. 42*: Declaration on the Inadmissibilitý of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (resolution 2131 (XX)); *Case No. 52*: The Korean question; *Case No. 54*: The question of the Comorian island of Mayotte; *Case No. 55*: The colonial case of Puerto Rico; *Case No. 56*: The question of Palestine refugees in the Near East; *Case No. 57*: The question of Cambodia; *Case No. 61*: The situation in Kampuchea; *Case No. 62*: Question of the islands of Glorieuses, Juan de Nova, Europa and Bassas da India; *Case No. 64*: The situation in Afghanistan and its implications for international peace and security; and many other cases: The question of the Comorian island of Mayotte; Human rights situations and reports of special rapporteurs and representatives; Enhancing the effectiveness of the principle of periodic and genuine elections; Consideration of the exceptional situation of the Republic of China in Taiwan in the international context, based on the principle of universality and in accordance with the established model of parallel representation of divided countries at the United Nations; The situation of human rights in Kosovo; The situation of human rights in Iraq; Consideration of the exceptional situation of the Republic of China on Taiwan in the international context; Promotion and protection of human rights: moratorium on the use of the death penalty; The situation of human rights in Myanmar; Human rights and State sovereignty, in *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954); vol. 1, *Supplement No. 1* (1954–1955); *Supplement No. 2* (1955–1959); *Supplement No. 3* (1959–1966); *Supplement No. 4* (1966–1969); *Supplement No. 5* (1970–1978); *Supplement No. 6* (1979–1984).

[28] Before the General Assembly and the Economic and Social Council, see, in particular, *Case No. 12*: Draft International Covenants on Human Rights; *Case No. 13*: Recommendations concerning international respect for the self-determination of peoples; *Case No. 58*: The question of Greece, in *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954); vol. 1, *Supplement No. 1* (1954–1955); *Supplement No. 2* (1955–1959); *Supplement No. 3* (1959–1966); *Supplement No. 4* (1966–1969); *Supplement No. 5* (1970–1978); *Supplement No. 6* (1979–1984).

[29] Before the Security Council, see, in particular, *Case No. 14*: The Spanish question; *Case No. 15*: The Greek question (I); *Case No. 16*: The Greek question (II); *Case No. 17*: The Indonesian question; *Case No. 18*: The Czechoslovak question; *Case No. 19*: The Greek question (III); *Case No. 20*: The

organizations on the principle of non-intervention. The *Repertory of Practice of United Nations Organs* provides a representative sample of the conduct of States in this regard. This practice is taken up in section IV below, "Legal aspects to be considered by the Commission". It is drawn essentially from the part of the *Repertory of Practice* on Article 2, paragraph 7, of the Charter.

3. Resolutions of United Nations organs

28. In the practice of United Nations organs, the principle of non-intervention has been addressed in an impressive number of resolutions, decisions, instruments and declarations.

29. The General Assembly has adopted many resolutions, decisions and declarations relating to this principle. Some of them reflect customary international law on the subject. Several texts can be cited in this regard, in particular resolutions 2131 (XX) on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,[31] 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[32] and 36/103 on the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.[33] Other landmark texts that primarily concern other matters are sometimes mentioned as involving the issue of non-intervention in the internal affairs of States.[34]

30. A number of other resolutions are noteworthy in this connection. For example, a series of resolutions have been adopted under the title "Non-interference in the internal affairs of

Anglo-Iranian Oil Company question; *Case No. 21*: The question of Morocco; *Case No. 28*: The question of Algeria; *Case No. 31*: The question of Hungary; *Case No. 32*: The question of Oman; *Case No. 43*: The situation in the Republic of the Congo; *Case No. 44*: The question of race conflict in South Africa (I); *Case No. 45*: The question of race conflict in South Africa (II); *Case No. 46*: The situation in Angola (I); *Case No. 47*: The situation in Angola (II); *Case No. 48*: The situation in Southern Rhodesia; *Case No. 49*: The situation in the Dominican Republic; *Case No. 53*: The situation in Northern Ireland; *Case No. 59*: The situation in Chile; *Case No. 60*: Complaint by Democratic Kampuchea; *Case No. 63*: The Afghanistan situation; and many other cases: The situation in the Middle East; The question of South Africa; The situation in Namibia; The situation between Iraq and Kuwait; The situation in Iraq; The question of the membership of the Republic of Korea in the United Nations; The situation in Yugoslavia; The situation in the Republic of Yemen; The situation in the Democratic Republic of Korea; The situation in Liberia; The situation between Iraq and Kuwait; Protection of civilians in armed conflict; Situation in Kosovo, Federal Republic of Yugoslavia; The situation in Myanmar; The situation between Iraq and Kuwait; Protection of civilians in armed conflict; The maintenance of international peace and security; Prevention of armed conflicts, in *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954); vol. 1, *Supplement No. 1* (1954–1955); *Supplement No. 2* (1955–1959); *Supplement No. 3* (1959–1966); *Supplement No. 4* (1966–1969); *Supplement No. 5* (1970-1978); *Supplement No. 6* (1979–1984).

[30] International Court of Justice, *Anglo-Iranian Oil Co. case (United Kingdom v. Iran), Preliminary Objection, Judgment of 22 July 1952, I.C.J. Reports 1952*; *Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment of 21 March 1959, I.C.J. Reports 1959; Case concerning Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment of 12 April 1960*; *Nottebohm case (Liechtenstein v. Guatemala) (second phase), Judgment of 6 April 1955*; *Case of Certain Norwegian Loans (France v. Norway), Judgment of 6 July 1957*; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, 15 December 1989; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, 30 March 1950.
Case No. 22: Interpretation of peace treaties with Bulgaria, Hungary and Romania; *Case No. 23*: The Anglo-Iranian Oil Company case; *Case No. 29*: The Nottebohm case; *Case No. 33*: The case of certain Norwegian loans; *Case No. 50*: The Interhandel case; *Case No. 51*: The case concerning right of passage over Indian territory; Advisory Opinion on the Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations.

[31] Adopted on 21 December 1965.

[32] Adopted on 24 October 1970.

[33] Adopted on 9 December 1981.

[34] General Assembly resolution 1514 (XV) of 14 December 1960.

States".[35] Others in the same vein have been adopted under various titles but include the question of non-intervention.[36]

31. It should also be noted that a number of resolutions relating to the principle of non-intervention in various fields of international law refer to the subject matter of the present study. For example, the General Assembly has adopted many resolutions on the specific theme of "economic measures as a means of political and economic coercion against developing countries".[37] It has also adopted many others on non-intervention in the field of elections under the title "Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes".[38] This theme has evolved to include the phrase "as an important element for the promotion ["*défense*" in French] and protection of human rights"[39] or "as an important element for the promotion ["*promotion*" in French] and protection of human rights".[40] Other resolutions in the field of elections include those on "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization"[41] and on "Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization".[42]

32. A number of other resolutions relating to the principle of non-intervention have been adopted on the "use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination".[43] Still others have been adopted on "human rights and unilateral coercive measures".[44]

---

[35] General Assembly resolutions 31/91 of 14 December 1976; 32/153 of 19 December 1977; 33/74 of 15 December 1978; 34/101 of 14 December 1979; 35/159 of 12 December 1980.

[36] General Assembly resolutions 40/9, "Solemn appeal to States in conflict to cease armed action forthwith and to settle disputes between them through negotiations, and to States Members of the United Nations to undertake to solve situations of tension and conflict and existing disputes by political means and to refrain from the threat or use of force and from any intervention in the internal affairs of other States", 8 November 1985; 55/2, "United Nations Millennium Declaration", 8 September 2000; 60/1, "2005 World Summit Outcome", 16 September 2005; 3171 (XXVIII), "Permanent sovereignty over natural resources", 17 December 1973; 3201 (S-VI), "Declaration on the Establishment of a New International Economic Order", 1 May 1974; 3281 (XXIX), "Charter of Economic Rights and Duties of States", 12 December 1974.

[37] General Assembly resolutions 39/210 of 18 December 1984, 40/185 of 17 December 1985, 41/165 of 5 December 1986, 42/173 of 11 December 1987, 44/215 of 22 December 1989, 46/210 of 20 December 1991, 48/168 of 21 December 1993, 52/181 of 18 December 1997, 54/200 of 22 December 1999, 56/179 of 21 December 2001, 58/198 of 23 December 2003, 60/185 of 22 December 2005, 62/183 of 19 December 2007, 64/189 of 21 December 2009, 66/186 of 22 December 2011, 68/200 of 20 December 2013, 70/185 of 22 December 2015, 72/201 of 20 December 2017, 74/200 of 19 December 2019, 76/191 of 17 December 2021.

[38] General Assembly resolutions 44/147 of 15 December 1989, 45/151 of 18 December 1990, 46/130 of 17 December 1991, 47/130 of 18 December 1992, 48/124 of 20 December 1993, 50/172 of 22 December 1995, 52/119 of 12 December 1997, 54/168 of 17 December 1999.

[39] General Assembly resolution 56/154 of 19 December 2001.

[40] General Assembly resolutions 58/189 of 22 December 2003 and 60/164 of 16 December 2005.

[41] General Assembly resolution 62/150 of 18 December 2007.

[42] General Assembly resolutions 64/155 of 18 December 2009, 66/163 of 19 December 2011, 68/164 of 18 December 2013, 70/168 of 17 December 2015, 72/164 of 19 December 2017, 74/158 of 18 December 2019, 76/164 of 16 December 2021.

[43] General Assembly resolutions 64/151 of 18 December 2009, 65/203 of 21 December 2010, 66/147 of 19 December 2011, 67/159 of 20 December 2012, 68/152 of 18 December 2013, 69/163 of 18 December 2014, 70/142 of 17 December 2015, 71/182 of 19 December 2016, 72/158 of 19 December 2017, 73/159 of 17 December 2018, 74/138 of 18 December 2019, 75/171 of 16 December 2020, 76/151 of 16 December 2021, 77/206 of 15 December 2022.

[44] General Assembly resolutions 51/103 of 12 December 1996, 52/120 of 12 December 1997, 53/141 of 9 December 1998, 54/172 of 17 December 1999, 55/110 of 4 December 2000, 56/148 of 19 December 2001, 57/222 of 18 December 2002, 58/171 of 22 December 2003, 59/188 of 20 December 2004, 60/155 of 16 December 2005, 61/170 of 19 December 2006, 62/162 of 18 December 2007, 63/179 of 18 December 2008, 64/170 of 18 December 2009, 65/217 of 21 December 2010, 66/156 of 19 December 2011, 67/170 of 20 December 2012, 68/162 of 18 December 2013, 69/180 of 18 December 2014, 70/151 of 17 December 2015, 71/193 of 19 December 2016, 72/168 of 19 December 2017, 73/167 of 17 December 2018, 74/154 of

33. Also included in the scope of this study are resolutions adopted following the debates on the situations listed in the part of the *Repertory of Practice of United Nations Organs* concerning Article 2, paragraph 7, of the Charter of the United Nations.

4. Practice in regional organizations

34. General Assembly resolution 2131 (XX) of 21 December 1965 provides an important overview of regional practice by noting, in particular, that the principle of non-intervention was "affirmed at the conferences held at Montevideo, Buenos Aires, Chapultepec and Bogotá, as well as in the decisions of the Asian-African Conference at Bandung, the First Conference of Heads of State or Government of Non-Aligned Countries at Belgrade, in the Programme for Peace and International Cooperation adopted at the end of the Second Conference of Heads of State or Government of Non-Aligned Countries at Cairo, and in the declaration on subversion adopted at Accra by the Heads of State and Government of the African States".

35. More recent resolutions, declarations and decisions of regional organizations that reflect their practice on the principle of non-intervention in international relations will also be analysed.

C. International practice of States

36. The principle of non-intervention can also be found in the unilateral practice of States under international law. In this regard, reference will be made essentially to optional declarations of acceptance of the compulsory jurisdiction of the International Court of Justice. The declarations considered will be those that are still in force, while others may be mentioned for historical reasons. Their relevance lies in the fact that they reflect the position of States on matters relating to the principle of non-intervention in international law.

D. National practice of States

37. The national practice of States will be examined as well. The analysis will encompass all relevant State practice, whether legislative, executive, judicial or other, in connection with the issue of non-intervention. The pragmatic usefulness of such practice stems from the light that it sheds on States' perception of the principle of non-intervention, which is likely to explain their attitudes and conduct under international law in relation to this issue.

E. International legal practice

38. The abundant international case law on the question of non-intervention is worthy of consideration. The Commission will focus in particular on the legal practice of the Permanent Court of International Justice, which issued judgments and advisory opinions[45] dealing with the principle of non-intervention. In particular, the Court ruled on the meaning of one of the constituent elements of the principle of non-intervention.[46]

18 December 2019, 75/181 of 16 December 2020, 76/161 of 16 December 2021, 77/214 of 15 December 2022.

[45] Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion No. 4*, 7 February 1923, Series B.

[46] Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco, op. cit.*, pp. 23 and 24.

39. Subsequently, the International Court of Justice also issued a number of judgments[47] and advisory opinions[48] of practical relevance to the present topic.[49] As its predecessor had done, the International Court of Justice has ruled on the question of non-intervention in international law with regard to the actors involved in the practice on this principle, the form of such practice and the subject matter of the intervention.[50] It has also ruled on the criterion of unlawfulness of the intervention and on a number of typical examples of acts constituting interventions prohibited under international law.[51]

40. In addition, the Court has ruled on aspects of this principle in other cases, both contentious and advisory.[52] Its decisions have involved, in particular, determining the scope of one of the constituent elements of non-intervention, in this case the reserved domain of the State or the matters forming part of it.[53]

IV. Legal aspects to be considered by the Commission

41. The legal questions raised by the principle of non-intervention mainly concern the definition of its meaning and significance, in the light of the practice identified.

42. International case law generally recognizes two essential conditions for determining the existence of an unlawful intervention in the internal affairs of a State. On the one hand, the act by the intervening State must concern matters pertaining to the internal affairs of another State; on the other, it must represent coercion against the victim State with regard to matters over which that State is recognized, under international law, as having freedom of action and freedom of choice.[54]

[47] International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986,* paras. 259 *ff*.; *Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment, 21 March 1959, I.C.J. Reports 1959*, p. 23; *Case concerning Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment of 12 April 1960*, p. 31; *Nottebohm case (Liechtenstein v. Guatemala) (second phase), judgment of 6 April 1955*, p. 21; *Case of Certain Norwegian Loans (France v. Norway), Judgment of 6 July 1957*, pp. 8, 21 and 22; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*; *Anglo-Iranian Oil Co. case (United Kingdom v. Iran), Preliminary Objection, Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 10.

[48] International Court of Justice: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, 30 March 1950, pp. 9 and 10; *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, para. 94; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, 15 December 1989.

[49] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, p. 24, para. 48.

[50] International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, p. 108, para. 205; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment of 16 December 2015, I.C.J. Reports 2015*, p. 738, para. 223.

[51] International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, p. 108, para. 205; *Certain Activities Carried Out by Nicaragua in the Border Area*, *op. cit.*, p. 738, para. 223.

[52] International Court of Justice, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *op. cit*. See also the separate opinion of Judge Shahabuddeen attached to this advisory opinion, p. 43.

[53] International Court of Justice: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *op. cit.*, pp. 9 and 10; *Interhandel Case*, *op. cit*., pp. 24 *ff*.; *Case concerning Right of Passage over Indian Territory*, *op. cit*., p. 33.

[54] International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua*, *op. cit*., p. 108, para. 205; *Certain Activities Carried Out by Nicaragua in the Border Area*, *op. cit.*, and *Construction of a Road in Costa Rica along the San Juan River*, *op. cit*., p. 738, para. 223.

A. Intervention and unlawfulness of intervention

1. Definition of "intervention"

43. The term "intervention" is one of the key elements of the principle of non-intervention in international law. During debates within United Nations organs, "[s]ome representatives held that 'intervention' was a technical term traditionally defined in international law as 'dictatorial interference', and that that definition was applicable to Article 2 (7).[55]"[56]

44. According to this practice, intervention prohibited under international law was said to be characterized by "dictatorial interference" with the State subjected to it. Moreover, it was understood that "[t]he term 'to intervene' denoted interference of an imperative character".[57] Obviously, this remained a question to be assessed *in concreto* on a case-by-case basis, given that "the question of whether action by a United Nations organ had the imperative element important to the notion of 'intervention' could be answered only by reference to the language of the relevant resolution and to the attendant circumstances".[58]

45. It should be noted, however, that in the practice of United Nations organs, "[n]o decision has been found containing a general definition of intervention in the sense of Article 2 (7)".[59] This conclusion has not changed over time, as "[n]o decision appears to have been taken containing a general definition of the term".[60] On the other hand, in the absence of a general definition, the term "intervention" has been considered in relation to certain categories of measures. The question to be determined was whether, in a given situation, these measures amounted to intervention in the internal affairs of a State whose situation was under consideration by a United Nations organ. One such question was whether the inclusion of an item in the agenda[61] of a United Nations organ and/or its discussion[62,63] constituted intervention.[64] This trend has continued over the years.[65,66] Some States answer this question in the affirmative, while others take the opposite view, reflecting a lack of consensus in the practice of United Nations organs.[67]

---

[55] *Case No. 2*: G A (III/1), Plen., 146th mtg., p. 226; G A (III/2), 1st Com., 267th mtg., p. 308; G A (VIII), Suppl. No. 16, paras. 139–141 … (G A (V), *Ad Hoc* Pol. Com., 42nd mtg., para. 57; 43rd mtg., para. 8; 45th mtg., para. 10). *Case No. 11*: G A (VII), *Ad Hoc* Pol. Com., 18th mtg., para. 19; G A (VIII), *Ad Hoc* Pol. Com., 36th mtg., para. 30.

[56] *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954), para. 342.

[57] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 3* (1959–1966), para. 279.

[58] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 3* (1959–1966), para. 279.

[59] *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954), para. 344.

[60] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 1* (1954–1955), para. 120.

[61] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 5* (1970–1978), para. 53. See G A (28), Gen. Com., 212th mtg., para. 67.

[62] *Case No. 2*: G A (VI), Plen., 341st mtg., para. 37. *Case No 11*: G A (VII), Plen., 381st mtg., paras. 21–28; G A (VIII), Plen., 435th mtg., para. 32. *Case No. 18*: S C, 3rd yr., Nos. 36–51, 268th mtg., pp. 90–97. *Case No 20*: S C, 6th yr., 559th mtg., para. 4.

[63] See *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954), para. 347.

[64] *Case No. 2*: G A (VI), Plen., 341st mtg., para. 33; G A (VII), Plen., 380th mtg., paras. 130 *et seqq.*; G A (VIII), Plen., 435th mtg., paras. 6 *et seqq*. *Case No. 7*: G A (III/1), General Com., 43rd mtg., pp. 10 and 11; Plen., 142nd mtg., pp. 97, 98 and 108. *Case No. 8*: G A (III/2), Plen., 190th mtg., pp. 20–29; G A (V), Plen., vol. I, 284th mtg., paras. 137–157. *Case No. 9*: G A (VII), General Com., 79th mtg., para. 18. *Case No. 10*: G A (VII), General Com., 79th mtg., para. 18. *Case No. 11*: G A (VII), Plen., 381st mtg., paras. 1–67; G A (VIII), Plen., 435th mtg., paras. 19–48. *Case No. 15*: S C, 1st yr., 2nd Series, No. 7, 59th mtg., p. 196. *Case No. 18*: S C, 3rd yr., Nos. 36–51, 268th mtg., pp. 90, 91 and 96. *Case No. 19*: S C, 5th yr., No. 35, 493rd mtg., pp. 22 and 23. *Case No. 20*: S C, 6th yr., 559th mtg., paras. 3, 4 and 9–12. *Case No. 21*: S C, 8th yr., 619th mtg., paras. 25–31; 620th mtg., paras. 16–24; 623rd mtg., para. 29.

[65] *Case No. 54*: see footnote 3 above. *Case No. 55*: see footnote 13 above. *Case No. 60*: see footnote 47 above. *Case No. 61*: see footnotes 16–17 above. *Case No. 62*: see footnote 26 above. *Case No. 63*: see footnote 57 above. *Case No. 64*: see footnote 36 above.

[66] See *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 6* (1979–1984), para. 67.

[67] *Case No. 2*: G A (VII), Plen., 380th mtg., para. 137. *Case No. 7*: G A (III/1), General Com., 43rd mtg., pp. 10 and 11. *Case No. 8*: G A (III/2), Plen., 190th mtg., pp. 24 and 28; G A (V), Plen., vol. I, 284th mtg., para. 159. See *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954),

46. Nevertheless, intervention has not always been defined as having a "dictatorial" or "imperative" character, according to some teachings. It is argued in this connection that even when intervention is not "dictatorial" or "coercive", it can still be considered interference in matters which are essentially within the domestic jurisdiction of a State and is therefore prohibited under international law.[68]

47. Accordingly, the Commission could consider the definition of both the content and the parameters of the concept of "intervention". It would focus in particular on the types of acts and facts of the subjects and actors of international law that should be considered to fall within the scope of this concept, including new phenomena that are not covered by the existing criteria concerning the principle of non-intervention. In fact, recent State practice includes examples of actions by one State against another that *prima facie* seem to fall outside the legal framework applicable to this principle. For instance, actions in cyberspace can raise relevant substantive issues.[69]

2. The nature of prohibited intervention

48. The Charter of the United Nations does not specify the type of intervention prohibited under international law, whereas other instruments expressly do so. For example, the 1975 Final Act of the Conference on Security and Co-operation in Europe prohibits "any form of armed intervention or threat of such intervention against another participating State", but also

---

para. 349. See also *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954), para. 350. See *Case No. 2*: G A (III/1), Plen., 146th mtg., p. 226. *Case No. 8*: G A (III/2), Plen., 189th mtg., p. 12. *Case No. 11*: G A (VII), Plen., 381st mtg., para. 102. Also: *Case No. 55*: G A (37), Plen., 4th mtg., a.i. 8: Cuba, para. 25; Gen. Comm., 2nd mtg.: Cuba, paras. 52–54; Libyan Arab Jamahiriya, para. 57; Nicaragua, para. 59; USSR, para. 65; Poland, para. 66. *Case No. 60*: S C (34), 2108th mtg., paras. 17–22. *Case No. 61*: G A (34), Gen. Comm., 2nd mtg.: Thailand, para. 18; Costa Rica, para. 31; Singapore, para. 37; United States, para. 38; United Kingdom, para. 40; Papua New Guinea, para. 41; G A (35), Gen. Comm., 1st mtg.: China, para. 39; Malaysia, para. 41; Thailand, para. 42; G A (36), Gen. Comm., 1st mtg.: Philippines, para. 29; China, para. 30; G A (37), Gen. Comm., 1st mtg.: China, para. 30; G A (38), Gen. Comm., 1st mtg.: Thailand, para. 46; China, para. 47; G A (39), Gen. Comm., 1st mtg.: Malaysia, paras. 31–32; China, para. 35. *Case No. 62*: G A (34), Gen. Comm., 5th mtg.: Madagascar, paras. 5, 7; Mozambique, para. 11; Libyan Arab Jamahiriya, para. 16. *Case No. 63*: S C (35), 2185th mtg., paras. 35 and 37. *Case No. 64*: G A (35), Plen., 3rd mtg., paras. 82, 84–86, 90, 92 and 96; Gen. Comm., 1st mtg.: Pakistan, para. 113; Madagascar, para. 119; G A (36), Plen., 4th mtg., a.i. 8: Pakistan, 6th and 7th paras.; Australia, 3rd para.; and China, 2nd para.; Gen. Comm., 1st mtg., paras. 44 and 46; G A (37), Plen., 4th mtg., a.i. 8: Pakistan, 1st and 2nd paras., and China, 1st and 3rd paras.; Gen. Comm., 1st mtg., paras. 57–59 and 62; G A (39), Gen. Comm., 1st mtg.: Pakistan, para. 50; China, paras. 55 and 57. See also *Case No. 55*: G A (37), Plen., 4th mtg., a.i. 8: Cuba, para. 25; Gen. Comm., 2nd mtg.: Cuba, paras. 52–54; Libyan Arab Jamahiriya, para. 57; Nicaragua, para. 59; USSR, para. 65; Poland, para. 66. *Case No. 60*: S C (34), 2108th mtg., paras. 17–22. *Case No. 61*: G A (34), Gen. Comm., 2nd mtg.: Thailand, para. 18; Costa Rica, para. 31; Singapore, para. 37; United States, para. 38; United Kingdom, para. 40; Papua New Guinea, para. 41; G A (35), Gen. Comm., 1st mtg.: China, para. 39; Malaysia, para. 41; Thailand, para. 42; G A (36), Gen. Comm., 1st mtg.: Philippines, para. 29; China, para. 30; G A (37), Gen. Comm., 1st mtg.: China, para. 30; G A (38), Gen. Comm., 1st mtg.: Thailand, para. 46; China, para. 47; G A (39), Gen. Comm., 1st mtg.: Malaysia, paras. 31–32; China, para. 35. *Case No. 62*: G A (34), Gen. Comm., 5th mtg.: Madagascar, paras. 5, 7; Mozambique, para. 11; Libyan Arab Jamahiriya, para. 16. *Case No. 63*: S C (35), 2185th mtg., paras. 35 and 37. *Case No. 64*: G A (35), Plen., 3rd mtg., paras. 82, 84–86, 90, 92 and 96; Gen. Comm., 1st mtg.: Pakistan, para. 113; Madagascar, para. 119; G A (36), Plen., 4th mtg., a.i. 8: Pakistan, 6th and 7th paras.; Australia, 3rd para.; and China, 2nd para.; Gen. Comm., 1st mtg., paras. 44 and 46; G A (37), Plen., 4th mtg., a.i. 8: Pakistan, 1st and 2nd paras., and China, 1st and 3rd paras.; Gen. Comm., 1st mtg., paras. 57–59 and 62; G A (39), Gen. Comm., 1st mtg.: Pakistan, para. 50; China, paras. 55 and 57. *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 6* (1979–1984), para. 67.

[68] H. Rolin, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, submitted by Charles Rousseau (Second Commission), in *Yearbook of the Institute of International Law*, issue 44, vol. I, 1952, p. 175.

[69] *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge, Cambridge University Press, 2017. See also the critical study by B. Karine, "'Rien que la *lex lata*'? Étude critique du Manuel de Tallinn 2.0 sur le droit international applicable aux cyber-opérations", in *Annuaire français de droit international*, vol. 63, 2017, pp. 121–160.

"any other act of military, or of political, economic or other coercion". The Charter of the Organization of American States "prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements". Article 20 of the Charter provides that "[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind".

49. Resolutions adopted by United Nations organs contain similar provisions. The principal General Assembly resolutions on the question refer to various types of intervention, whether armed, political and/or economic or in any other way incompatible with the Charter of the United Nations. General Assembly resolutions 2131 (XX) on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, [70] 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[71] and 36/103 on the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States [72] are somewhat more specific in this regard.

50. It is nonetheless true that State practice concerning the nature of the measures that amount to intervention prohibited under international law is not very clear. Armed activities are consistently recognized as typifying the kinds of actions prohibited by this principle. This is true of both the threat and the use of armed force against a State. Other measures generally referred to include those whereby a State encourages unlawful activities by non-State actors against another State or allows such actors to use its territory to carry out such acts against another State. International case law and teachings also recognize this category in international practice. The nature of prohibited intervention has not received sufficient attention in the practice of United Nations organs.

51. Conversely, economic measures do not seem to be similarly accepted in State practice as constituting or potentially constituting acts of prohibited intervention. An analysis of this practice shows that some economic measures are still widely tolerated among States. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice did not rule out such measures as a matter of principle, but noted that it was "unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention".[73]

52. The Secretary-General of the United Nations has also recognized that "(a) [t]here is no clear consensus in international law as to when coercive economic measures are improper, despite relevant treaties, declarations and resolutions adopted in international organizations which try to develop norms limiting the use of such measures ...; (d) [t]he United Nations should establish a capacity to deal with coercive economic measures. The designated entity should strive to develop the concept and related criteria, in close consultation with Member States".[74]

53. It is necessary to identify these different categories of measures in order to decide whether or not they are lawful under the principle of non-intervention in international law. It will also be important to take into account the practice of the Security Council on the adoption and use of economic measures to maintain or restore peace. Under the Charter of the United Nations, this organ "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions".[75]

[70] Adopted on 21 December 1965.
[71] Adopted on 24 October 1970.
[72] Adopted on 9 December 1981.
[73] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua, Merits*, *op. cit*., para. 245.
[74] Note by the Secretary-General on economic measures as a means of political and economic coercion against developing countries (A/48/535), 25 October 1993.
[75] Article 41 of the Charter of the United Nations.

3. Forms of intervention covered by the principle of non-intervention in international law

54. The international legal instruments and resolutions of United Nations organs referred to above prohibit "direct" or "indirect", "individual" or "collective" intervention in "internal" or "external" affairs which are essentially within the domestic jurisdiction of a State.

55. It has sometimes been argued that non-intervention in international law has a much broader meaning and cannot be confined solely to Article 2 (7) of the Charter. An analysis of the practice of United Nations organs shows that, "on the question of the relation between Article 2 (7) and the principle of 'non-intervention' ... although there existed a tendency to use the term 'non-intervention' to cover non-intervention in matters within the national jurisdiction of a State, as embodied in Article 2 (7) of the Charter, that was only one aspect of non-intervention, which, in that restricted sense, should more accurately be referred to as non-interference (*non-ingérance*), for the concept of intervention in international law covered a much wider field than 'immixtion' in the internal affairs of another State, including also the unlawful use of force against another State, which was prohibited under Article 2 (4) of the Charter".[76]

56. In some cases, Article 2 (7) of the Charter has been invoked in connection with the maintenance of international peace and security.[77] It has also been invoked in various other fields of international law, although it has not been clear what precise content was being referred to in each instance. In respect of the invocation of so-called democratic values, the relationship between the principle of rejecting governments said to be "undemocratic" or "unconstitutional" and the principle of non-intervention in the internal affairs of a State, which recalls the principle of constitutional autonomy,[78] should also be analysed and clarified, given that each State or people has the right freely to determine its political organization.[79] The same applies to the question of foreign State funding of non-governmental organizations under the jurisdiction or competence of other States, given that

[76] G A (XXII), 6th Com., 1001st mtg., para. 34. See *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 4* (1966–1969), para. 126.

[77] *Case No. 60*: S C (34), 2108th mtg.: China, para. 107; 2109th mtg.: Norway, para. 17; France, para. 43; and Bolivia, para. 55; 2110th mtg.: Gabon, para. 15; Portugal, para. 25; United Kingdom, para. 63; and United States, para. 72; 2111th mtg.: Japan, para. 15; Philippines, paras. 96–98. *Case No. 61*: G A (34), Plen., 62nd mtg.: Viet Nam, para. 61; Democratic Kampuchea, paras. 89 and 90–93; G A (35), Plen., 36th mtg.: Malaysia, para. 94; 37th mtg.: China, para. 23; 38th mtg.: Samoa, paras. 99–100; 39th mtg.: Canada, para. 43; 40th mtg.: Nepal, paras. 7–8; G A (36), Plen., 36th mtg.: Philippines, paras. 3 and 4; 37th mtg.: Pakistan, para. 51; Chile, paras. 80 and 82; and China, 2nd penultimate para.; G A (37), Plen., 47th mtg.: Pakistan, paras. 1 and 4; and United States, paras. 14 and 44; G A (38), Plen., 37th mtg.: Sudan, para. 88. *Case No. 62*: G A (34), Gen. Comm., 5th mtg.: paras. 3–8. *Case No. 63*: S C (35), 2185th mtg.: Bangladesh, para. 35; China, para. 37; and Egypt, para. 126; 2186th mtg.: China, para. 35; United Kingdom, paras. 52 and 54; Democratic Kampuchea, para. 105; Saudi Arabia, paras. 109–110; and New Zealand, para. 132; 2187th mtg.: United States, paras. 8, 20 and 25; Australia, para. 30; Singapore, para. 44; Norway, para. 52; Spain, para. 62; Somalia, para. 73; Malaysia, para. 86; Liberia, paras. 115 and 116; 2188th mtg.: Portugal, paras. 24 and 26; Venezuela, para. 37; Netherlands, paras. 55 and 56; and Jamaica, para. 98; 2189th mtg.: Bangladesh, para. 46; Niger, para. 56; Federal Republic of Germany, para. 63; and Yugoslavia, para. 80; 2190th mtg.: Panama, paras. 19 and 21; Zaire, para. 39; Canada, para. 63; Chile, paras. 77–79 and 84; and France, para. 127. *Case No. 64*: G A (ES-6), Plen., 2nd mtg.: Canada, paras. 14–15; Sweden, para. 51; Ecuador, paras. 95 and 96; Nigeria, para. 120; Spain, paras. 154 and 155; 3rd mtg.: Albania, para. 4; Austria, para. 25; Venezuela, paras. 81, 94 and 96; and France, para. 105; 4th mtg.: United States, paras. 78–80; Federal Republic of Germany, paras. 120 and 123; Turkey, paras. 130 and 131; 5th mtg.: Egypt, paras. 27 and 28; Zaire, paras. 56–66; New Zealand, para. 88; USSR, paras. 8 and 93; Chile, paras. 98, 102 and 109; Singapore, para. 185; 6th mtg.: Democratic Kampuchea, paras. 52 and 53; and 7th mtg.: Sierra Leone, para. 49; G A (35), Plen., 65th mtg.: Pakistan, paras. 22 and 23; 67th mtg.: Saudi Arabia, paras. 52 and 53; 68th mtg.: Bangladesh, paras. 60 and 61; G A (36), Plen., 58th mtg.: Malaysia, paras. 78 and 88.

[78] M. Kamto, "Constitution et principe de l'autonomie constitutionnelle", in *Constitution et droit international*, International Academy of Constitutional Law, *Recueil des cours*, No. 8, Tunis, CPU, 2000.

[79] International Covenant on Civil and Political Rights, art. 1 (1).

the territorial States generally regard such activities as unlawful intervention in their internal affairs.

57. In the field of human rights, the resurgence of certain obsolete principles such as humanitarian intervention or humanitarian interference, particularly under the guise of the responsibility to protect, should also be analysed in terms of their relationship with the principle of non-intervention in international law. The Libyan crisis of 2011 provides a particularly relevant illustration. The same applies to interventions deemed unlawful by the States in which they occur, particularly under the guise of protecting ethnic and religious minorities, whenever such interventions involve the use of some form of coercion against a State in an area where it is recognized under international law as having freedom of action or freedom of choice.

B. The question of which matters are essentially within the domestic jurisdiction of States

58. The ever-increasing material expansion of international law into almost all areas of State activity is likely to undermine certainties about the so-called "reserved domain" of the State, the existence of which affects the affirmation of the principle of non-intervention, as well as its observance or violation.[80] At its session of Aix-en-Provence on this issue, the Institute of International Law stated that the "reserved domain" is "the domain of State activities in which the jurisdiction of the State is not bound by international law". But it added that "[t]he extent of this domain depends on international law and varies according to its development".[81]

59. The Commission can accordingly focus on determining the precise content and scope of what should constitute the reserved domain of the State, and thus the matters pertaining to its internal and external affairs. A few examples may serve to illustrate the point. But the Commission could also consider establishing a general definition in principle. In part, this raises the question of the methodology to be followed.

1. Normative content of matters which are reserved to State jurisdiction

60. The question of which matters are essentially within a State's domestic jurisdiction is regularly discussed in the practice of United Nations organs. It emerges that "[t]here appears to be no decision of any United Nations organ containing a general definition of the domestic jurisdiction clause",[82] nor has it been possible to determine its content *a priori* and *in abstracto*.

61. The Institute of International Law noted, in its report on the determination of matters that are essentially within the domestic jurisdiction of States, that defining the exact scope of this domain is an impossible task for the jurist.[83] The report also notes that the various replies received by the Rapporteur expressed the same opinion in this respect, namely that it is impossible to define in advance the matters reserved to domestic jurisdiction.[84] It further

[80] Institute of International Law, *La détermination du domaine réservé et ses effets* [Determination of the "reserved domain" and its effects], Session of Aix-en-Provence, 1954; R. Kolb, "Du domaine réservé: réflexions sur la théorie de la compétence nationale", in *Revue générale de droit international public*, 2006, No. 3, pp. 597–646; B. Jouzier, "Déclin et persistance de la théorie du domaine réservé: le constat d'un rôle de 'transition' du domaine réservé", in *Revue québécoise de droit international*, 2020, 33 (2), pp. 53–75.

[81] Institute of International Law, "Determination of the 'reserved domain' and its effects", Session of Aix-en-Provence, 1954 [English text available in *American Journal of International Law*, vol. 49 (1955), p. 82].

[82] *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954), para. 389.

[83] Report and draft final resolutions on "La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats" [Determination of matters which are essentially within the domestic jurisdiction of States], submitted by Charles Rousseau (Second Commission), in *Yearbook of the Institute of International Law*, issue 44, vol. I, 1952, point 2, p. 157.

[84] Report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit.*, point 2, pp. 157–158: "Pour l'instant, il est impossible d'en

notes that any attempt to draw up a list of such matters would imperil the development of international law.[85]

62. To soften this assertion, it has been said that the reserved domain is not legally indeterminable at a given point in time, as that would dangerously preclude the possibility that an international court could rule on the matter; rather, it is indeterminable *in abstracto* because it is constantly evolving.[86]

63. In the absence of a general definition, various criteria are generally used, both in the practice of United Nations organs and in case law and teachings. During debates in United Nations organs, some States "held that a matter was essentially within the domestic jurisdiction of a State only if it was not regulated by international law or if it was not capable of regulation by international law".[87] The Institute of International Law proposed a similar criterion in its report on the subject.[88]

64. In addition to the criteria of absence of international regulation[89] or control, it is sometimes suggested that matters are outside a State's domestic jurisdiction when there is at least a recognition of the interest of third States or of the community.[90] Other proposals are to leave it to international case law and practice to determine these matters[91] or to define them "by reference to political considerations, and legal considerations could even be ignored".[92]

2. Scope of matters which are essentially within the domestic jurisdiction of States

65. It is generally accepted, as shown by the practice described above, that the scope of the domain reserved to the domestic jurisdiction of States is, or should be, determined by international law and its evolution. International case law has enshrined this principle, which was recalled by the Permanent Court of International Justice in the case of the *Nationality Decrees Issued in Tunis and Morocco*.[93] The greater the encroachment or "invasion" of international law into matters which are reserved to the domestic jurisdiction of States, the smaller the scope of the latter will become. In practice, this question must be analysed on a case-by-case basis, limiting the scope of the intervention to the part of the matter affected. The International Court of Justice took a similar approach when it concluded that "[a] State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law".[94] Even in its approach to resolving differences between States on this issue, the International Court of Justice examines whether the point at issue concerns a question of international law[95] or whether its resolution requires the

---

dresser une liste qui soit complète et limitative. Toute définition ne peut être qu'empirique et *a posteriori*" [For the moment, it is impossible to draw up a complete and exhaustive list. Any definition cannot but be empirical and *a posteriori*].

85 E. Hambro, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., point 2, p. 166.

86 H. Rolin, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., art. 2, p. 173.

87 *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 1* (1954–1955), para. 133.

88 Report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., point. 2, p. 157. See also art. 1, p. 162.

89 See A. Verdross, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., 2nd para., p. 179.

90 H. Rolin, comments on the report and draft final resolutions, *op. cit.*, 2nd para., p. 174.

91 Report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., point 3, p. 158.

92 *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 3* (1959–1966), para. 315.

93 Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco*, *op. cit*., pp. 23 and 24.

94 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua*, *op. cit*., p. 131, para. 258.

95 International Court of Justice: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *op. cit*., pp. 9 and 10; *Case concerning Right of Passage over Indian Territory, Merits*, *op. cit.*, 12 April 1960, p. 31.

interpretation or application of international law.[96] The same is true in cases where the Court has upheld an objection based on the invocation of reserved domain.[97]

66. The majority of internationalist writers share this approach. Hans Kelsen, for example, has acknowledged that:

> Any matter may become the object of an international treaty and thus cease to be solely within the domestic jurisdiction of the contracting States. A matter is "solely" within the domestic jurisdiction of a State only so long as it is not subject to a norm of customary or conventional international law.[98]

Thus, a distinction can only be drawn between matters that are already regulated by public or private international law and those not yet governed by it, which for this reason still fall within the domestic jurisdiction of the State.

67. It is sometimes noted that:

> Matters of domestic jurisdiction are not those which are unregulated by international law, but are those which are left by international law for regulation by states. There are, therefore, no matters which are domestic by their "nature". All are susceptible of international legal regulation, and may become the subjects of new rules of customary law or of treaty obligations.[99]

68. An overview of the practice of United Nations organs in relation to Article 2 (7) of the Charter shows that the international law criterion determines both the scope of the reserved domain and the competence of such organs to deal with a conflict on this issue in each instance.[100]

69. The Institute of International Law has recognized that the domain reserved to the domestic jurisdiction of States depends on international law and varies according to the development of international relations. It is of an evolving nature and cannot be defined in a general, abstract way.[101] This limitation of the extent of the domain reserved to the domestic jurisdiction of States also applies in particular when States conclude international agreements on matters that fall within this domain, thereby necessarily removing from such jurisdiction "any question relating to the interpretation or application of such agreement".[102] This approach is not universally supported, however; a different trend can also be discerned. It considers that the realm of international law and that of national jurisdiction coexist without being mutually exclusive,[103] given that the international commitments of States should be understood as exceptions that can never encompass the entire sphere of a State's autonomy.[104]

---

[96] International Court of Justice, *Interhandel Case*, *op. cit*., p. 23.

[97] International Court of Justice, *Case of Certain Norwegian Loans (France v. Norway), Judgment of 6 July 1957*, pp. 21 and 27.

[98] H. Kelsen, *Peace Through Law*, Chapel Hill, The University of North Carolina Press, 1944, p. 33.

[99] L. Preuss, "Article 2, paragraph 7 of the Charter of the United Nations and matters of domestic jurisdiction", in *Collected Courses of the Hague Academy of International Law*, 1949, vol. 74, p. 568.

[100] G. Arangio-Ruiz, "Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne", in *Collected Courses of the Hague Academy of International Law*, vol. 225, 1990, p. 9, at p. 33. See also *Repertory of Practice of United Nations Organs*, vol. 1 (1945–1954); vol. 1, *Supplement No. 1* (1954–1955); vol. 1, *Supplement No. 2* (1955–1959); vol. 1, *Supplement No. 3* (1959–1966); vol. 1, *Supplement No. 4* (1966–1969); vol. 1, *Supplement No. 5* (1970–1978); vol. 1, *Supplement No. 6* (1979–1984); vol. 1, *Supplement No. 7* (1985–1988); vol. 1, *Supplement No. 8* (1989–1994); vol. 1, *Supplement No. 9* (1995–1999); vol. 1, *Supplement No. 10* (2000–2009).

[101] Report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit.*, art. 2, p. 162 [English text of final resolution available in *American Journal of International Law*, vol. 49 (1955), p. 82].

[102] Report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit.*, art. 3, p. 163 [English text of final resolution available in *American Journal of International Law*, vol. 49 (1955), p. 82].

[103] E. Hambro, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., point 3, pp. 166 and 167.

[104] A. Verdross, comments on the report and draft final resolutions on the determination of matters which are essentially within the domestic jurisdiction of States, *op. cit*., p. 177.

C. Coercion against a State subjected to intervention

70. The question of coercion raises almost the same concerns as those relating to the concept of "intervention". The considerations described above are thus recalled in this connection.

71. The Commission did not clearly define the concept of coercion referred to in article 18 of its 2001 draft articles on responsibility of States for internationally wrongful acts. It should nevertheless be noted that, according to the Commission, most cases of coercion will be unlawful, e.g.

> because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. ... However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.[105]

72. The Commission may wish to examine the international practice outlined above to define the nature and forms of expression of the term "coercion". There is no longer any doubt that certain activities, albeit of a non-coercive nature, may have the effect or the avowed or unavowed aim of coercing another State to do or refrain from doing a particular act. Where the intervention does not *prima facie* consist in obliging the targeted State to act or refrain from acting in a certain way, a breach of the principle of non-intervention may be difficult to establish.

73. The Commission could thus determine to what extent an activity's influence on State action would or would not constitute a breach of the principle of non-intervention. The Commission could also seek to identify factors that can shed light on the issue and help to fill the gap left by the absence of substantive rules in this area.

D. State consent to intervention

74. Consent is generally invoked, in particular, to refute the argument that the principle of non-intervention has been violated in a given situation, whether the intervention has been carried out by the United Nations or by States. For example, "[i]n the debates in case No. 52, on the Korean question, some representatives opposed the contention that the United Nations was debarred by Article 2 (7) from intervening in Korea by observing that the United Nations was doing so at the invitation of the Korean Government".[106] Similar situations can be seen in the cases of Southern Rhodesia[107] and the Republic of the Congo.[108] In some cases, intervention in a State has been deemed legitimate because it took place "at the express request of that State, in accordance with special treaty provisions".[109,110]

---

[105] Draft articles on responsibility of States for internationally wrongful acts, in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), p. 70, para. (3).

[106] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 4* (1966–1969), para. 102.

[107] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 4* (1966–1969), para. 103.

[108] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 3* (1959–1966), para. 280.

[109] *Case No. 60*: S C (34), 2108th mtg.: para. 126. *Case No. 61*: G A (34), Plen., 62nd mtg.: Viet Nam, paras. 53–55; G A (36), Plen., 37th mtg.: Viet Nam, para. 27. *Case No. 63*: S C (35), 2185th mtg.: USSR, paras. 16–17; 2186th mtg.: Poland, para. 120; 2187th mtg.: Hungary, para. 142; 2188th mtg.: German Democratic Republic, para. 11; and Viet Nam, para. 79; 2189th mtg.: Mongolia, para. 33; and Lao People's Democratic Republic, para. 110; 2190th mtg.: Afghanistan, para. 89; and USSR, para. 110. *Case No. 64*: G A (ES-6), Plen., 1st mtg.: Afghanistan, paras. 19 and 50; Mongolia, para. 28; 2nd mtg.: USSR, paras. 75–78; German Democratic Republic, para. 109; 4th mtg.: Lao People's Democratic Republic, para. 62; 5th mtg.: Ukrainian SSR, para. 16; G A (35), Plen., 65th mtg.: USSR, para. 151; G A (36), Plen., Afghanistan, 19th penultimate para.; G A (37), Plen., 80th mtg.: Ukrainian SSR, para. 124.

[110] *Repertory of Practice of United Nations Organs*, vol. 1, *Supplement No. 6* (1979–1984), para. 78.

75. The Commission will examine the question of consent[111] to determine the conditions of its validity, in particular when it is given by a State that might, for example, find itself in conditions that are such as to give it no choice but to act in the manner desired by the intervening State. Furthermore, under international law as interpreted by the Institute of International Law,[112] intervention by third States in internal armed conflicts is prohibited whether it is in support of the rebels or in support of the Government.[113]

V. Consistency of the proposed topic with the criteria for selecting new topics

A. The topic reflects the needs of States

76. The proposed topic reflects the needs of States in respect of the codification and/or progressive development of international law. The likelihood that a State could find itself the victim of unlawful intervention is no longer merely theoretical. Moreover, this is no longer a practice that only so-called weak States need fear, while so-called powerful States remain indifferent. The deliberate or inadvertent misinterpretation of the principle of non-intervention creates distortions and tensions in international relations that often lead to international crises with sometimes tragic consequences. International cooperation is no less affected in such situations of interpretative cacophony. Disregard for the obligations arising from the principle of non-intervention has given rise to calamities ranging from humanitarian disasters to civil or international wars, resulting in massive and serious violations of international humanitarian law and international human rights law. The question of responsibility, and therefore of reparation, also arises in this context.

77. The purpose of providing a clear and precise definition of the content and scope of this principle at the present time is to establish or specify a unified, predictable legal framework both for recourse to it and for the reactions of States that might feel aggrieved in one way or another by the sometimes unwarranted invocation of this principle by other States. This outcome will facilitate the analysis of the justiciable nature of the victim State's action before international courts and the work of the courts themselves in terms of both the invocability of the international responsibility of the State having committed the wrongful act and the provision of reparation to the victim State.

78. Lastly, the Commission may wish to consider the normative strength of the practice analysed, depending on whether the outcome of the work consists of codification or the progressive development of international law.

B. The topic is sufficiently advanced in terms of State and judicial practice

79. As noted above, the practice in respect of characteristic situations of unlawful intervention is abundant and flourishing, both over time and across regions. The Commission can draw on the practice reflected in the *Repertory of Practice of United Nations Organs*. There is also practice of regional international organizations in the management of crises linked to the interpretation and application of the principle of non-intervention in

[111] D. Kritsiotis, "Intervention and the Problematisation of Consent", in D. Kritsiotis, O. Corten and G.H. Fox (eds.), *Armed Intervention and Consent*, Cambridge, Cambridge University Press, 2023, pp. 26–100; in the same volume: O. Corten, "Intervention by Invitation: The Expanding Role of the UN Security Council", pp. 101–178; G.H. Fox, "Invitations to Intervene after the Cold War: Towards a New Collective Model", pp. 179–318.

[112] Institute of International Law, resolution on the principle of non-intervention in civil wars, Eighth Commission, Session of Wiesbaden, 14 August 1975. See also L. Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government", *British Yearbook of International Law*, 1985, p. 251; O. Corten, *Le droit contre la guerre*, 2nd ed., Paris, Pedone, 2014, pp. 472–512; K. Bannelier and T. Christakis, "*Volenti non fit injuria*? Les effets du consentement à l'intervention militaire", *Annuaire français de droit international*, 2004, pp. 113 *ff.*

[113] O. Corten and A. Verdebout, "Les interventions militaires récentes en territoire étranger...", *op. cit.*, p. 142.

international law. The Commission could also focus on conventional and unilateral practice, as well as the national practice of States, and on the work of legal scholars[114] and learned societies[115] in this field.

80. In the area of judicial practice, the International Court of Justice has issued more than one decision in which it has established the meaning of this principle and applied it to the case in question. The principle of non-intervention runs through the Court's case law, from its first judgment in the *Corfu Channel* case[116] to its more recent judgments on the use of force, including the judgments on the merits in the *Armed Activities on the Territory of the Congo* cases brought by the Democratic Republic of the Congo against Rwanda[117] and Uganda,[118] in addition to the landmark 1986 case concerning *Military and Paramilitary Activities in and against Nicaragua*.[119]

81. An analysis of this abundant practice would undoubtedly enable the Commission to define the legal meaning of this principle more precisely and to systematize the norms it comprises or includes.

C. The topic is concrete and feasible for consideration and development

82. The proposed topic is concrete and lends itself to analysis by the Commission. The abundant practice of States, international organizations and international courts and tribunals, as well as the relevance of its content, would enable the Commission to carry out an in-depth analysis of the precise legal meaning of this principle and of best practices and applications resulting from its rational implementation in international law. The proposed topic is undoubtedly a delicate, sensitive and laborious one, particularly in view of the eminently political character of the issues addressed and the abundance of relevant practice. The fact remains, however, that the Commission, as a panel of experts and a technical body of the General Assembly, seems particularly well suited and equipped to transcend these political obstacles and produce a useful outcome in international law on this issue.

83. The corpus of international practice on which the Commission can draw is such as to facilitate its exploration of this topic and its achievement of the goals it may set in this regard.

D. Originality of the proposed topic

84. Various episodes in current international relations have highlighted the need to determine specifically and systematically the extent and significance of the principle of non-intervention. It is important to define precisely the legal rule embodying this principle strictly from the point of view of international law, so as to systematize the rules derived from the practice of States and of international courts and tribunals in this field. The need is felt in particular because unlawful interventions in the internal affairs of States are currently taking various forms that no longer fit the traditional understanding of this concept.

---

[114] J. Noël, *Le principe de non-intervention : théorie et pratique dans les relations inter-américaines*, Brussels, Éditions de l'Université de Bruxelles – Éditions Émile Bruylant, 1981, 253 pp.; O. Corten and P. Klein, *Droit d'ingérence ou obligation de réaction? – Les possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, 2nd ed., Brussels, Bruylant, 2004, 309 pp.; M. Roscini, *International Law and the Principle of Non-Intervention ...*, *op. cit.*

[115] Institute of International Law, resolution on the principle of non-intervention in civil wars, *op. cit.*

[116] International Court of Justice, *Corfu Channel case (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, I.C.J. Reports 1949*.

[117] International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*.

[118] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*.

[119] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua*, *op. cit*.

VI. Past work of the Commission on the issue of non-intervention

85. It seems that the Commission has not yet had the opportunity to examine in depth the legal framework and the issues of international law pertaining to the invocation of the principle of non-intervention, which has been analysed as an incidental question in the context of its work on other topics. For example, the question was raised incidentally during the analysis of the topic "Protection of persons in the event of disasters". In particular, reference is made to the principle of non-intervention in the commentaries to draft articles 9 and 10.[120]

86. The working paper prepared by the Secretariat entitled "Long-term programme of work: Review of the list of topics established in 1996 in the light of subsequent developments" (A/CN.4/679) refers to the principle of non-intervention on two occasions.[121] The section "Subjects of international law" includes, as a possible future topic, "Non-intervention and human rights", proposed in 1998.[122] Under the heading "Law of armed conflicts/disarmament", it is noted that one Member State proposed, among others, the topics "The legal consequences arising out of the involvement of multilateral corporations in internal conflicts" and "The legal consequences arising out of the involvement of security agencies in internal conflicts".[123]

87. Needless to say, reflection and discussion on the relevance of this topic have not been expressly included in the Commission's agenda. The Commission would thus be well advised to consider the matter.

VII. Possible form of the Commission's work on the proposed topic

88. Given the non-binding nature of the Commission's work on this topic, draft guidelines would seem to be an appropriate outcome. However, the Commission could always recommend a different type of outcome that it deems more appropriate in the light of States' expectations, just as States themselves may decide otherwise during the debates in the Sixth Committee.

---

[120] *Yearbook of the International Law Commission*, report of the Commission to the General Assembly on the work of its sixty-eighth session (A/CN.4/SER.A/2016/Add.1 (Part 2)), 2016, vol. II (Part Two), chap. IV: Protection of persons in the event of disasters, para. (4) of the commentary to draft article 9, p. 41, and para. (2) of the commentary to draft article 10, p. 45. See also the reports of the Special Rapporteur for this topic: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598 (preliminary report); *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 and Corr.1 (second report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629 (third report); *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643 and Corr.1 (fourth report); *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/652 (fifth report); *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/662 (sixth report); and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/668 and Corr.1 and Add.1 (seventh report).

[121] International Law Commission, sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, "Long-term programme of work: Review of the list of topics established in 1996 in the light of subsequent developments. Working paper prepared by the Secretariat" (A/CN.4/679), 5 March 2015.

[122] International Law Commission, sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, *op. cit.*, pp. 8 and 9, sect. B (2), para. 20.

[123] International Law Commission, sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, *op. cit.*, p. 23, sect. L (1), para. 52. The Commission's document refers to two Sixth Committee records: the summary record of the 19th meeting of the Sixth Committee, held on 3 November 2006, on the report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/C.6/61/SR.19), 17 November 2006, p. 13, para. 72; and the summary record of the 24th meeting of the Sixth Committee, held on 2 November 2007, on the report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/C.6/62/SR.24), 13 December 2007, p. 17, para. 100.

VIII. Select bibliography

A. Instruments juridiques internationaux

Convention internationale sur l'élimination de toutes les formes de discrimination raciale du 21 décembre 1965.

Convention sur l'élimination et la répression du crime d'apartheid du 30 novembre 1973.

Pacte international relatif aux droits civils et politiques, 1966.

Pacte sur la sécurité, la stabilité et le développement dans la Région des Grands Lacs, Nairobi (Kenya), 15 décembre 2006.

Protocole relatif à la création du Conseil de paix et de sécurité de l'Union africaine, Durban, le 9 juillet 2002.

Charte des Nations Unies, San Francisco, 24 octobre 1945.

Acte constitutif de l'Union africaine, Lomé (Togo), le 11 juillet 2000.

B. Jurisprudence internationale

CIJ, *Activités armées sur le territoire du Congo (nouvelle requête : 2002), (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*.

CIJ, *Activités armées sur le territoire du Congo, (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*.

CIJ, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, (Nicaragua c. États-Unis d'Amérique), *arrêt, fond, C.I.J. Recueil 1986*.

CIJ, *Affaire de l'Anglo-Iranian Oil Co. (Royaume-Uni c. Iran)*, arrêt, exception préliminaire, 22 juillet 1952, *CIJ Recueil 1952*.

CIJ, *Affaire de l'Interhandel (Suisse c. États-Unis d'Amérique)*, arrêt, exceptions préliminaires, 21 mars 1959, *CIJ Rec. 1959*.

CIJ, *Affaire du droit de passage sur territoire indien (Portugal c. Inde)*, arrêt, fond, 12 avril 1960.

CIJ, *Affaire Nottebohm (Liechtenstein c. Guatemala)*, deuxième phase, arrêt, 6 avril 1955.

CIJ, *Affaire relative à certains emprunts norvégiens (France c. Norvège)*, arrêt, 6 juillet 1957.

CIJ, *Applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations unies*, avis consultatif, *CIJ Recueil 1989*, 15 décembre 1989.

CIJ, *Certaines activités menées par le Nicaragua dans la région frontalière* (Costa Rica c. Nicaragua) et *Construction d'une route au Costa Rica le long du fleuve San Juan* (Nicaragua c. Costa Rica), arrêt, 16 décembre 2016, *C.I.J. Recueil 2015*.

CIJ, *Compétence en matière de pêcheries*, (Royaume-Uni c. Islande), compétence de la Cour, arrêt, *C.I.J. Recueil 1973*.

CIJ, *Détroit de Corfou, (Royaume-Uni c. Albanie), arrêt, fond, 9 avril 1949, C.I.J. Recueil 1949*.

CIJ, *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, avis consultatif, CIJ Recueil 1950*, 30 mars 1950, pp. 9–10.

CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires*, avis consultatif, 8 juillet 1996.

CIJ, *Sahara occidental*, avis consultatif, 16 octobre 1975, *CIJ Rec. 1975*.

CPJI, *Décrets de nationalité promulgués en Tunisie et au Maroc*, Avis consultatif No 4, 7 février 1923, Série B.

CPJI, *Décrets de nationalité promulgués en Tunisie et au Maroc, avis consultatif 1923, C.P.J.I. Série B n° 4*.

C. Doctrine

A. ORFORD, « Muscular humanitarianism: reading the narratives of new interventionism », *E.J.I.L.*, 1999.

A. VERDROSS, *Observations* au *Rapport et projet de résolutions définitifs* sur *La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats* présenté par Charles Rousseau (Deuxième Commission), in *Annuaire de l'Institut de droit international*, t. 44, vol. I, 1952.

B. CONFORTI, « Chapitre XXII : Le principe de non-intervention », in M. BEDJAOUI, (dir.), *Droit international : bilan et perspectives*, t. 2, Paris, Pedone, 1991.

B. JOUZIER, « Déclin et persistance de la théorie du domaine réservé : le constat d'un rôle de "transition" du domaine réservé, in *Revue québécoise de droit international*, 2020, 33(2).

B. TCHIKAYA, *Le droit de l'Union africaine. Principes, institutions et jurisprudences*, Paris, LGDJ, Coll. « Droits africains », 2019.

Banque mondiale : « Conditionnalités de la Banque mondiale aux Philippines et en Indonésie », in B. DUTERME, (dir.), *Économies du Sud : toujours sous conditions néolibérales ?*, Éditions Syllepse, Coll. : Alternatives Sud, 2022.

BEN ACHOUR (R.), « Changements anticonstitutionnels en droit international », in *Recueil des cours de l'Académie de droit international de La Haye*, volume 379, Brill-Nijhoff, Leiden-Boston, 2016.

D. BROWN, « Use of Force against Terrorism after September 11th State Responsibility, Self-Defense and Other Responses », *Cardozo Journal of International & Comparative Law*, 2003–2004.

D. KRITSIOTIS, "Intervention and the Problematisation of Consent", in D. KRITSIOTIS, O. CORTEN, and G. H. FOX, (eds), *Armed Intervention and Consent*, Camvridge, Cambridge University Press, 2023.

D. W. BOWETT, and *alii*, *United Nations Forces. A legal Study of United Nations Practice*, London, Stevens & Sons, 1964, 579 p.

E. DAVID, « Portée et limite du principe de non-intervention », in *Revue belge de droit international*, 1990/2, Éditions Bruylant, Bruxelles.

E. HAMBRO, *Observations* au *Rapport et projet de résolutions définitifs* sur *La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats* présenté par Charles Rousseau (Deuxième Commission), in *Annuaire de l'Institut de droit international*, t. 44, vol. I, 1952.

F. LAFOUASSE, « L'espionnage en droit international », in *Annuaire français de droit international*, vol. 47, 2001.

F. POLET, « Que devient la conditionnalité néolibérale ? », in B. DUTERME, (dir.), *Économies du Sud : toujours sous conditions néolibérales ?* Éditions Syllepse, Coll. : Alternatives Sud, 2022.

G. ARANGIO-RUIZ, « Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne », in *RCADI*, vol. 225, 1990, 9, 33.

G. GIANCARLO, « Autodétermination des peuples, respect de la volonté populaire et charte africaine de la démocratie », dans R. BEN ACHOUR (dir. publ.), *Les changements anticonstitutionnels de gouvernement. Approches de droit constitutionnel et de droit international*, Colloque international organisé les 4 et 5 avril 2013 à Tunis, Les Cahiers de l'Institut Louis-Favoreu, no 3, Presses universitaires d'Aix-Marseille, 2014.

G. GUILLAUME, « Article 2, §7 », in J.-P. COT, A. PELLET et M. FORTEAU, *La Charte des Nations Unies. Commentaire article par article*, 3è éd., Paris, Economica, 2005, pp. 485–509.

G. GUILLAUME, « Article 2, §7 », in J.-P. COT, A. PELLET et M. FORTEAU, *La Charte des Nations Unies. Commentaire article par article*, 2è éd., Paris, Economica, 1991, pp. 141–160.

G. H. FOX, "Invitations to Intervene after the Cold War: Towards a New Collective Model".

G. NOLTE, « Article 2, §7 », in S. BRUNO, D.-E. KHAN, G. NOLTE and A. PAULUS, *The Charter of the United Nations. A Commentary*, 4th ed., Oxford, OUP, 2024, pp. 421–455.

G. TENEKIDES, « Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969 », in *Annuaire français de droit international*, 1974, vol. 20.

H. KELSEN, *Peace Through Law*, Chapel Hill, The University of North Carolina Press, 1944.

J. BRUNNÉE & S. J. TOOPE, « The Use of Force: International Law After Iraq », *I.C.L.Q.*, 2004.

J. CHEVALLIER, *L'État de droit*, 7è éd., Paris, LGDJ, Coll. : Clefs, 2023.

J. KAZADI MPIANA, « L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement », in *Revue québécoise de droit international*, 2012.

J. KEUTCHEU, « L'"ingérence démocratique" en Afrique comme institution, dispositif et scène. *Études internationales*, *45*(3), (2014), pp. 425–451. Voy. ég. *Rapport sur l'ingérence étrangère dans l'ensemble des processus démocratiques de l'Union européenne, y compris la désinformation*, 2023.

J. MICHAEL GLENNON, « The Limitations of Traditional Rules and Institutions Relating to the Use of Force », *in* M. WELLER (ed.), *The Oxford Handbook on the Use of Force*, Oxford, O.U.P., 2015.

J. MICHAEL GLENNON, « The New Interventionism. The Search for Just International Law», *Foreign Affairs*, 1999.

J. NOËL. *Le principe de non-intervention : théorie et pratique dans les relations interaméricaines*, Bruxelles, Éditions de l'Université de Bruxelles – Éditions Émile Bruylant, 1981.

J. STONE, "Legal problems of espionage in conditions of modern conflict", in R. J. STANGER R. J., (s/d), *Essays on espionnage and international law*, Ohio State University Press.

K. BANELIER, « "Rien que la *lex lata*" ? Étude critique du Manuel de Tallinn 2.0 sur le droit international applicable aux cyber-opérations », in *Annuaire français de droit international*, vol. 63, 2017.

K. BANNELIER and Th. CHRISTAKIS, « *Volenti non fit injuria* ? Les effets du consentement à l'intervention militaire », *A.F.D.I.*, 2004.

K. BANNELIER-CHRISTAKI, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, Leiden Journal of International Law, 2016.

L. DOSWALD-BECK, « The Legal Validity of Military Intervention by Invitation of the Government », *B.Y.B.I.L.*

L. PREUSS, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction", in *Collected Courses of the Hague Academy of International Law*, 1949, vol. 74.

L.-A. SICILIANOS, *L'ONU et la démocratisation de l'Etat*, Paris, Pedone, 2000.

M. C. WOOD, « Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism and WMD », *in* N. BLOKKER & N. SCHRIJVER (eds.), *The Security Council and the Use of Force. Theory and Reality – A Need for Change?*, Leiden, Martinus Nijhoff, 2005.

M. KAMTO, « Constitution et principe de l'autonomie constitutionnelle », in *Constitution et droit international*, Académie internationale de droit constitutionnel, *Recueil des cours*, n° 8, Tunis, CPU, 2000.

M. SHAHABUDDEN, *Opinion individuelle* jointe à l'arrêt en l'affaire CIJ, *Applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations unies*, avis consultatif, *CIJ Recueil 1989*, 15 décembre 1989.

Note du Secrétaire général sur la question relative aux *Mesures économiques utilisées pour exercer une pression politique et économique sur les pays en développement*, Résolution A/48/535, 25 octobre 1993.

O. CORTEN et A. VERDEBOUT, « Les interventions militaires récentes en territoire étranger : vers une remise en cause du *jus contra bellum* ? », in *Annuaire français de droit international*, volume 60, 2014.

O. CORTEN et P. KLEIN (dir.), *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford, Oxford University Press, 2011.

O. CORTEN et P. KLEIN, (dir.), *Les conventions de Vienne sur le droit des traités*, Bruxelles, Bruylant, 2006.

O. CORTEN et P. KLEIN, *Droit d'ingérence ou obligation de réaction ? - Les possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, 2è éd., Bruxelles, Bruylant, 2004.

O. CORTEN, "Intervention by Invitation: The Expanding Role of the UN Security Council", pp. 101–178.

O. CORTEN, *Le discours du droit international. Pour un positivisme critique*, Paris, Pedone, 2009.

O. CORTEN, *Le droit contre la guerre*, 2è éd., Paris, Pedone, 2014.

P. PIERSON-MATHY, « L'action des Nations Unies contre l'apartheid », in *Revue belge de droit international*, 1970, vol. 1.

P. WEIL, « Le droit international public en quête de son identité. Cours général de droit international public », in *RCADI*, tome 237 (1992-VI), Martinus Nijhoff Publishers, 1996.

R. HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London, Oxford University Press for Royal Institute of International Affairs, 1963. pp. xvii+402 p.

R. KOLB, « Du domaine réservé : réflexions sur la théorie de la compétence nationale », in *Revue générale de droit international public*, 2006, n° 3.

R. MÜLLERSON, « Jus ad bellum: plus ça change (le monde), plus c'est la même chose (le droit) ? », *J.C.S.L.*, 2002.

Réalités du droit international contemporain, Actes de la septième rencontre de Reims sur « Le discours juridique sur la non-intervention et la pratique internationale », 2–3 juin 1986.

S. DOUMBE-BILLE, « Chapitre 3 : L'union africaine : objectifs et principes », in A. ABDULQAWI YUSUF et FATSAH OUGUERGOUZ, *L'Union Africaine : cadre juridique et institutionnel. Manuel sur l'Organisation panafricaine*, Paris, Pedone, 2013.

Th. GARCIA et L. CHAN-TUNG, *La Convention de Vienne sur le droit des traités : bilan et perspectives 50 ans après son adoption*, Paris, Pedone, 2019.

W. MICHAEL DOYLE, « The New Interventionism », *Metaphilosophy*, 2001.

D. Répertoire de la pratique suivie par les organes des Nations Unies

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, *Supplément n° 2*, (1955–1959).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, *Supplément n° 3*, (1959–1966).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, (1945–1954).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, *Supplément n° 5*, (1970–1978).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, *Supplément n° 6* (1979–1984).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1, *Supplément n° 4* (1966–1969).

Répertoire de la pratique suivie par les organes des Nations Unies, vol. 1 (1945–1954); vol. 1, *Supplément n° 1*, (1954–1955).

E. Assemblée générale des Nations Unies

Résolution 1514 (XV), *Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux*, 14 décembre 1960.

Résolution 2131 (XX), *Déclaration sur l'inadmissibilité de l'intervention dans les affaires intérieures des Etats et la protection de leur indépendance et de leur souveraineté*, adoptée par l'Assemblée générale des Nations Unies, 21 décembre 1965.

Résolution 2225 (XXI), *Déclaration sur l'inadmissibilité de l'intervention dans les affaires intérieures des Etats*, adoptée par l'Assemblée générale des Nations Unies, 19 décembre 1966.

Résolution 2625, *Déclaration relative aux principes du droit international concernant les relations amicales et la coopération entre Etats*, adoptée par l'Assemblée générale des Nations Unies, le 24 octobre 1970.

Résolution 36/103, *Déclaration sur l'inadmissibilitéé de l'intervention et de l'ingérence dans les affaires intérieures des États*, adoptée par l'Assemblée générale des Nations Unies, le 09 décembre 1981.

Résolution 62/7 de l'Assemblée générale, 2007.

Résolution A/395 (V) du 2 décembre 1950.

Résolution A/511 (VI) du 12 janvier 1952.

Résolution A/RES/40/9 : A*ppel solennel aux États en conflit à cesser sans délai les actions armées et à résoudre leurs différends par la voie des négociations et aux États Membres de l'Organisation des Nations Unies à s'engager à régler les situations de tension et de conflit et les différends existants par la voie politique, et à s'abstenir de recourir à la menace ou à l'emploi de la force, et de toute intervention dans les affaires intérieures d'autres États*, 8 novembre 1985.

Résolution A/RES/53/70, *Les progrès de la téléinformatique dans le contexte de la sécurité internationale*.

Résolution A/RES/55/2 : *Déclaration du millénaire*, 8 septembre 2000 ; résolution A/RES/60/1, *Document final du Sommet mondial de 2005*, 16 septembre 2005.

Compte-rendu analytique de la 19è séance du 3 novembre 2006 de la Sixième Commission de l'Assemblée générale des Nations Unies sur le *Rapport de la Commission du droit international sur les travaux de sa cinquante-huitième session (suite)*, A/C.6/61/SR.19, 6 février 2007.

Compte rendu analytique de la 24è séance du 2 novembre 2007 de la Sixième Commission de l'Assemblée générale des Nations Unies sur le *Rapport de la Commission du droit international sur les travaux de sa cinquante-neuvième session (suite)*, A/C.6/62/SR.24, 14 février 2008.

Compte-rendu analytique de la 19è séance du 3 novembre 2006 de la Sixième Commission de l'Assemblée générale des Nations Unies sur le *Rapport de la Commission du droit international sur les travaux de sa cinquante-huitième session (suite)*, A/C.6/61/SR.19, 6 février 2007.

Compte rendu analytique de la 24è séance du 2 novembre 2007 de la Sixième Commission de l'Assemblée générale des Nations Unies sur le *Rapport de la Commission du droit international sur les travaux de sa cinquante-neuvième session (suite)*, A/C.6/62/SR.24, 14 février 2008.

F. Secrétaire général des Nations Unies

Rapport du Secrétaire général sur la mise en œuvre de la responsabilité de protéger, Résolution A/63/677, 12 janvier 2009, Soixante-troisième session de l'Assemblée générale des Nations Unies.

Rapport du Secrétaire général sur le sujet relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/65/154, 22 juillet 2010.

Rapport du Secrétaire général sur le sujet relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/66/152, 15 juillet 2011 ; et son additif A/66/152/Add.1, 16 septembre 2011.

Rapport du Secrétaire général sur le sujet relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/67/167, 23 juillet 2012.

Rapport du Secrétaire général sur le sujet relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/68/156, 16 juillet 2013, et son additif A/68/156/Add.1, 09 septembre 2013.

Rapport du Secrétaire général sur le sujet relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/69/112, 30 juin 2014, et son additif A/69/112/Add.1, 19 septembre 2014.

Rapport du Secrétaire général sur relatif aux *Progrès de l'informatique et des télécommunications et sécurité internationale*, A/70/172, 22 juillet 2015.

G. Commission du droit international

ACDI 2008, vol. II (1ère partie), Document A/CN.4/598 (Rapport préliminaire).

ACDI 2009, vol. II (1ère partie), Document A/CN.4/615 et Corr.1 (Deuxième rapport).

ACDI 2010, vol. II (1ère partie), Document A/CN.4/629 (Troisième rapport).

ACDI 2011, vol. II (1ère partie), Document A/CN.4/643 et Corr.1 (Quatrième rapport).

ACDI 2012, vol. II (1ère partie), Document A/CN.4/652 (Cinquième rapport).

ACDI 2013, vol. II (1ère partie), Document A/CN.4/662 (Sixième rapport).

ACDI 2014, vol. II (1ère partie), Document A/CN.4/668 et Corr.1 et Add.1 (Septième rapport).

ACDI, *Rapport de la Commission à l'Assemblée générale sur les travaux de sa soixante-huitième session*, A/CN.4/SER.A/2016/Add.1 (Part 2), 2016, Vol. II (2è Partie), Ch. IV : Protection des personnes en cas de catastrophe.

ILC, *The work of the International Law Commission*, 10th ed., vol. I, 2023, p. 49.

Statut de la Commission du droit international, article 15 ; ILC, *The work of the International Law Commission*, 10th ed., vol. I, 2023.

H. Institut de droit international

Annexe au *Rapport et projet de résolutions définitifs* sur *La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats* présenté par Charles Rousseau (Deuxième Commission), in *Annuaire de l'Institut de droit international*, t. 44, vol. I, 1952.

CDI, *Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, in *ACDI*, 2001, vol. II.

H. ROLIN, *Observations* au *Rapport et projet de résolutions définitifs* sur *La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats* présenté par Charles Rousseau (Deuxième Commission), in *Annuaire de l'Institut de droit international*, t. 44, vol. I, 1952.

IDI, *La détermination du domaine réservé et ses effets*, Session d'Aix-en-Provence, 1954.

IDI, *La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des États*, Huitième Commission, Session de Saint-Jacques-de-Compostelle 1989.

IDI, Résolution sur *Le principe de non-intervention dans les guerres civiles*, Huitième Commission, Session de Wiesbaden.

Rapport et projet de résolutions définitifs sur *La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats* présenté par Charles Rousseau (Deuxième Commission), in *Annuaire de l'Institut de droit international*, t. 44, vol. I, 1952.

I. Conférences des Nations Unies sur le droit des traités

Conférence des Nations Unies sur le droit des traités entre États et organisations internationales, Volume I, Vienne, 18 février–21 mars 1986, *Documents officiels*, *Comptes rendus analytiques des séances plénières et des séances de la commission plénière*, A/CONF. 129/16, 1986 ; Conférence des Nations Unies sur le droit des traités entre États et organisations internationales, Volume II, Vienne, 18 février–21 mars 1986.

Conférence des Nations Unies sur le droit des traités, Deuxième Session, Vienne, 9 avril–22 mai 1969, *Documents officiels*, *Comptes rendus analytiques des séances plénières et des séances de la commission plénière*, A/CONF.39/11/Add.1, 1970.

Conférence des Nations Unies sur le droit des traités, Première Session, Vienne, 26 mars–24 mai 1968, *Documents officiels*, *Comptes rendus analytiques des séances plénières et des séances de la commission plénière*, A/CONF.39/11,1969.

Conférence des Nations Unies sur le droit des traités, Première Session et Deuxième Session, Vienne, 26 mars-24 mai 1968 et 9 avril-22 mai 1969, *Documents officiels*, *Documents de la Conférence*, A/CONF.39/11/Add.2, 1971.

Documents officiels, *Documents de la Conférence*, A/CONF. 129/16, Add.1, 1986.

J. Autres documents et rapports divers

Rapport de la Commission internationale de l'intervention et de la souveraineté des États sur la responsabilité de protéger, Décembre 2001.

Rapport de la Commission pour le développement progressif du droit international et sa codification, *Documents officiels de l'Assemblée générale*, deuxième session, Sixième Commission, Annexe 1.

Rapport du Groupe d'experts gouvernementaux chargé d'examiner les progrès de l'informatique et des télécommunications dans le contexte de la sécurité internationale, A/70/174, 22 juillet 2015.

Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, 2nd ed., Cambridge, Cambridge University Press, 2017.

Annex III

Identification and legal consequences of obligations e*rga omnes* in international law

New Topic proposed by Masahiko Asada

I. Introduction

1. It is proposed that the topic "Identification and Legal Consequences of Obligations *Erga Omnes*[1] in International Law" be included in the International Law Commission's ("Commission" or "ILC") long-term programme of work.

2. Alongside other developments in the international community, two notions have emerged: fundamental values which cannot be derogated from by agreement between States, and common interests of the international community as a whole. As a result, peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* respectively were discussed and codified as concepts under international law.

3. Peremptory norms of general international law (*jus cogens*) are referred to in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. These articles provide for the nullity of a treaty in conflict with a peremptory norm of general international law and the termination of any existing treaty in conflict with a newly emerged peremptory norm. Moreover, although not a treaty, Article 41 of the Commission's "Articles on Responsibility of States for Internationally Wrongful Acts" ("Articles on State Responsibility") of 2001 covers particular consequences of a serious breach of an obligation arising under a peremptory norm. The Commission in 2022 also adopted the "Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)" ("Draft Conclusions on Peremptory Norms").

4. With respect to judicial decisions, a finding that a rule is a peremptory norm has been made in a number of cases, including by the International Court of Justice ("Court" or

[1] In this proposal, the term "obligations *erga omnes*" is used to cover both obligations *erga omnes (stricto sensu)* and obligations *erga omnes partes* unless otherwise indicated.

"ICJ").[2] However, there have been few cases[3] declaring that a given treaty is void due to its conflict with a peremptory norm.[4]

5. By contrast, obligations *erga omnes* have not been explicitly referenced in any treaty of universal character. However, the concept has been incorporated in other instruments, such as Article 48(1) of the Articles on State Responsibility[5] and Article 49(1) and (2) of the Articles on the Responsibility of International Organizations. The concept is also explicitly mentioned in Conclusion 17(1) of the Draft Conclusions on Peremptory Norms.

6. With regard to judicial decisions, the finding that certain obligations are of an *erga omnes* character has been made in a number of judgments and advisory opinions, including by the ICJ starting with its *Barcelona Traction* case in 1970.[6]

7. The recognition of standing (*locus standi*) for States other than the injured State ("non-injured States") has been pointed out as one of the most important legal consequences

---

[2] Cases in which a rule is acknowledged by the ICJ as a peremptory norm of international law include *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (*DRC v. Rwanda (New Application)*, Jurisdiction and Admissibility) (genocide), ICJ Reports 2006, para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (*Bosnia Genocide*) (genocide), ICJ Reports 2007, para. 161; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment (*Belgium v. Senegal*) (torture), ICJ Reports 2012, para. 99; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment (*Croatia Genocide*) (genocide), ICJ Reports 2015, para. 87; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (*Occupied Palestinian Territory*) (self-determination in cases of foreign occupation), ICJ Reports 2024, para. 233.

In the International Criminal Tribunal for the former Yugoslavia (ICTY), ICTY (Trial Chamber), *Prosecutor v. Anto Furundzija*, Judgment (*Furundzija*) (Case No. IT-95-17/1-T) (torture), 10 December 1998, para. 153.

In the European Court of Justice (ECJ), ECJ (Court of First Instance), *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment (universal protection of human rights), 21 September 2005, para. 231.

In the European Court of Human Rights (ECtHR), ECtHR, *Al-Adsani v. the United Kingdom*, Judgment (Application No. 35763/97) (torture), 21 November 2001, para. 61.

In the Inter-American Court of Human Rights (IACtHR), IACtHR, *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Judgment (slavery), 10 September 1993, para. 57; *Gómez-Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs, Judgment (extra-legal executions, torture, etc.), 8 July 2004, paras. 76, 112, 128; *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment (forced disappearance, torture, etc.), 22 September 2006, paras. 84, 93, 128, 131.

[3] There are cases in which the voidness of a treaty was argued on a hypothetical basis in a judgment. See IACtHR, *Aloeboetoe et al. v. Suriname*, Reparations and Costs, para. 57. There are also cases where an invalidity claim was made based on a conflict with peremptory norms. See Christian Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP, 2005), pp. 142–143, n. 113.

[4] For possible reasons for this, see Erika de Wet, "*Jus Cogens* and Obligations *Erga Omnes*", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), p. 548.

[5] Article 48(1) of the Articles on State Responsibility provides: "Any State other than an injured State" is entitled to invoke the responsibility of another State if "(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole".

[6] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (*Barcelona Traction*), ICJ Reports 1970, para. 33. In addition to the cases in which standing is recognized for non-injured States (see below), cases in which a rule is acknowledged by the ICJ as an obligation *erga omnes*, albeit in *obiter dicta*, include *Barcelona Traction* (aggression, genocide, slavery and racial discrimination), ICJ Reports 1970, paras. 33-34; *East Timor (Portugal v. Australia)*, Judgment (*East Timor*) (self-determination, as a right *erga omnes*, though jurisdiction was denied as a result of the application of the *Monetary Gold* principle), ICJ Reports 1995, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment (*Bosnia Genocide*, Preliminary Objections) (genocide, as rights and obligations *erga omnes)*, ICJ Reports 1996, para. 31; *DRC v. Rwanda (New Application)*, Jurisdiction and Admissibility (genocide, as rights and

of obligations *erga omnes*. Such standing for non-injured States has in fact been accepted by the ICJ in the *Belgium v. Senegal* and The *Gambia v. Myanmar* (*Rohingya)* cases in 2012 and in 2022 respectively.[7] More recently, additional cases have been filed with the ICJ by non-injured States alleging breaches of obligations *erga omnes*.[8] In some of them, standing was, *prima facie*, recognized by the Court.[9] In this sense, from a practical point of view, it

obligations *erga omnes*, though jurisdiction was denied for lack of consent to jurisdiction), ICJ Reports 2006, para. 64; *Croatia Genocide* (genocide), ICJ Reports 2015, para. 87.
In the Advisory proceedings, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (*Wall*) (self-determination and certain international humanitarian law obligations), ICJ Reports 2004, paras. 155-157; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (*Chagos*) (self-determination), ICJ Reports 2019, para. 180; *Occupied Palestinian Territory* (self-determination, use of force to acquire territory, certain international humanitarian law obligations, certain international human rights law obligations), ICJ Reports 2024, paras. 96, 232, 274.

In the ICTY, ICTY (Trial Chamber), *Furundzija* (torture), para. 151; ICTY (Appeals Chamber), *Prosecutor v. Tihomir Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (*Blaskic*) (Case No. IT-95-14-AR108bis) (co-operation and judicial assistance), 29 October 1997, para. 26.

In the International Criminal Tribunal for Rwanda (ICTR), ICTR (Trial Chamber I), *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana (*Nahimana*) (Case No. ICTR-99-52-T) (cooperation and judicial assistance), 5 June 2003, para. 9; ICTR (Trial Chamber III), *Prosecutor v. Callixte Nzabonimana*, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal (*Nzabonimana*) (Case No. ICTR-98-44D-T) (cooperation and judicial assistance), 4 March 2010, para. 29.

In the International Criminal Court (ICC), ICC (Appeals Chamber), *Jordan Referral re Al-Bashir Appeal*, Judgment (*Jordan Referral*) (Case No. ICC-02/05-01/09 OA2) (obligation to prevent, investigate and punish the relevant crimes), 6 May 2019, para. 123.

In the Special Court for Sierra Leone (SCSL), SCSL (Appeals Chamber), *Morris Kallon and Brima Bazzy Kamara* (Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (obligation to protect human dignity), 13 March 2004, para. 71.

In the International Tribunal for the Law of the Sea (ITLOS), ITLOS (Seabed Disputes Chamber), *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion (*Activities in the Area*) (preservation of environment), ITLOS Reports 2011, para. 180.

In the ECJ, ECJ (Grand Chamber), *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Judgment (Case C-104/16 P) (self-determination as a right *erga omnes*), 21 December 2016, para. 88.

[7] *Belgium v. Senegal* (Articles 6(2) and 7(1) of the Convention against Torture), ICJ Reports 2012, paras. 68-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment (*Rohingya)* (genocide), ICJ Reports 2022, para. 108. The *Whaling in the Antarctic* judgment of 2014 may be seen as another example. See below.

[8] *Canada and the Netherlands v. Syria* (*Syria Torture*) in 2023; *South Africa v. Israel* (*Gaza*) in 2023; *Nicaragua v. Germany* in 2024. Additionally, Australia, Canada, Germany and the Netherlands have announced their intention to file a case with the ICJ against Afghanistan based on the alleged breaches of the Convention on the Elimination of All Forms of Discrimination against Women. Kyra Wigard, "A Groundbreaking Move: Challenging Gender Persecution in Afghanistan at the ICJ", *EJIL Talk!*, 30 September 2024. The *Nuclear Disarmament Obligation* cases filed by the Marshall Islands (dismissed due to the absence of dispute) may appear similar to cases brought by non-injured States. However, according to Article 42(b)(ii) of the Articles on State Responsibility and commentary thereto, disarmament obligations under a disarmament treaty are classified as interdependent obligations whose breach would make all the other States Parties to it "injured States" (Articles on State Responsibility (ASR), Article 42, Commentary, para. 13). The Marshall Islands itself brought the cases to the ICJ as both an injured and non-injured State. *Nuclear Disarmament Obligations (Marshall Islands v. United Kingdom)*, Memorial of the Marshall Islands, 16 March 2015, paras. 103–110.

[9] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Provisional Measures, Order (*Syria Torture*), ICJ Reports 2023, paras. 48–51; *Application of the Convention on the Prevention and*

may even be said that the need for clarification on the concept and legal consequences is greater for obligations *erga omnes* than for peremptory norms.

8. Despite the significance of obligations *erga omnes*, many questions remain unanswered, such as: which obligations are of an *erga omnes* character; what the criteria are for identification; how to identify them; how they relate to peremptory norms; what legal consequences can result from a breach of an obligation *erga omnes*; and what are the "rights" *erga omnes* that are sometimes mentioned alongside obligations *erga omnes* in ICJ jurisprudence. As some commentators put it, "[t]he notion of *erga omnes* effects is mysterious, but significant".[10]

9. Even with this uncertainty, there has been a great deal of discussion on the concept in the Commission, at the ICJ and other international judicial and quasi-judicial institutions, as well as in the academic literature more broadly. As a result, the work of clarifying, codifying and progressively developing international law in this field is not only necessary but also currently ripe for exploration by the Commission.

10. Work on this topic would also extend and further develop the previous work of the Commission, including Article 48 of the Articles on State Responsibility and Article 49 of the Articles on the Responsibility of International Organizations as well as some conclusions of the Draft Conclusions on Peremptory Norms.

II. Potential Issues to be Addressed

11. The specific issues to be addressed in this topic can be divided into two groups of questions. First, the clarification of the concept of obligations *erga omnes*, including the methods and criteria for their identification; and second, the question of legal consequences of a breach of such an obligation.

A. Clarification of the concept

12. There is general consensus that obligations *erga omnes* (literally meaning obligations towards all) are "the obligations of a State towards the international community as a whole" and that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[11] Beyond these statements, uncertainty remains as to the scope of these obligations.

(1) Relationship with peremptory norms

13. As noted above, the concept of obligations *erga omnes* has arisen with values and interests similar to those of peremptory norms, but the relationship between these two kinds of obligations and norms is not always clear.[12]

14. The close relationship between the two can be seen in the drafting history of Articles 40 and 41 of the Articles on State Responsibility.[13] The history shows that the original concept of an "international crime", which was defined as a breach of an obligation

Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order (26 January 2024) (*Gaza*), ICJ Reports 2024, paras. 33–34.

[10] Christian J. Tams and Alexandre Belle, "Erga Omnes Effects of Judicial Decisions: International Adjudication", in *Max Planck Encyclopedias of International Law* (Oxford Public International Law, 2021), para. 1, available at <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3733.013.3733/law-mpeipro-e3733?rskey=TsLXWO&result=4&prd=OPIL&print>.

[11] *Barcelona Traction*, ICJ Reports 1970, para. 33. See also, e.g., *Belgium v. Senegal*, ICJ Reports 2012, para. 68; *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 107; ASR, Article 48(1); Draft Conclusions on Peremptory Norms, Conclusion 17(1).

[12] See, e.g., de Wet, "*Jus Cogens* and Obligations *Erga Omnes*", pp. 541–561; Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (Clarendon Press, 1997), pp. 189–214.

[13] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002), pp. 35–38.

"essential for the protection of fundamental interests of the international community"[14] and for which "all other States" were injured States[15] (a notion consonant to an obligation *erga omnes*) on first reading in 1996, changed to the concept of "a serious breach of an obligation owed to the international community as a whole"[16] (the same concept as that of obligations *erga omnes*) on second reading in 2000, and ultimately resulted in the provisions of a serious breach of an obligation arising under a "peremptory norm" in Articles 40 and 41 in 2001.

15. Moreover, the Commentaries to the Articles on State Responsibility (Part Two, Chapter III, which includes Articles 40 and 41) state as follows:

> "Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least *substantial overlap* between them"[17] (emphasis added).

16. Then they add:

> "But there is at least a *difference in emphasis*. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance"[18] (emphasis added).

17. While both of the above-quoted passages are subtle in their expressions, they could be read as stating that peremptory norms and obligations *erga omnes* are just two sides of the same coin, but they do not say so categorically.[19]

18. On the other hand, the Draft Conclusions on Peremptory Norms state in the Commentary to Conclusion 17[20] that:

> "Although all peremptory norms of general international law (*jus cogens)* give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*)".[21]

Thus, they acknowledge the existence of obligations *erga omnes* that are not peremptory norms, and cite as examples certain rules relating to common heritage regimes.[22] An

---

[14] ASR (first reading), Article 19 (2).

[15] ASR (first reading), Article 40 (3). See also Article 53, which provided:

"An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;

(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime."

[16] "State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading", *Yearbook of the International Law Commission, 2000*, Vol. II, Pt. 2, p. 69, Articles 41, 42.

[17] ASR, Part Two, Chapter III, Commentary, para. 7. It continues to state: "The examples which ICJ has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise, the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole".

[18] ASR, Part Two, Chapter III, Commentary, para. 7.

[19] However, it seems that during the debate on the draft articles on State responsibility, the Commission reached "general agreement" that the scope of *jus cogens* is narrower than that of *erga omnes* obligations. *Yearbook of the International Law Commission, 1998*, Vol. II, Pt. 2, p. 76, para. 326.

[20] Conclusion 17(1) provides: "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest".

[21] Draft Conclusions on Peremptory Norms, Conclusion 17, Commentary, para. 3.

[22] *Ibid*., para. 3.

analogous understanding can be found in the Report of the ILC's Study Group on the Fragmentation of International Law.[23]

19. There are similar differences of opinion in the academic literature,[24] and it is important to clarify the relationship between the two concepts.

(2) Relationship with interdependent obligations

20. In the Articles on State Responsibility, Article 42 addresses the invocation of responsibility by the "injured State" in relation to a breach of obligations *in general*, while Article 48 covers the invocation of responsibility by "non-injured States" in relation to a breach of "obligations *erga omnes*". However, it is not always clear what the relationship is between obligations set out in Article 42 and Article 48, and in particular between so-called interdependent obligations set out in Article 42(b)(ii)[25] and obligations *erga omnes* in Article 48(1).

21. One of the difficulties is that the Commentaries to the Articles on State Responsibility list the same type of obligations as examples for both of these provisions. For example, they mention obligations contained in nuclear-free zone treaties both in relation to Article 42(b)(ii)[26] and in relation to Article 48(1)(a).[27] Hence, some commentators have even

---

[23] *Yearbook of the International Law Commission, 2006*, Vol. II, Pt. 2, p. 183, para. 251(38). See also UN. Doc. A/CN.4/L.682 and Add.1, 13 April 2006, para. 404.

[24] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des Cours*, Vol. 250 (1994), p. 300, paras. 59–60 ("do all obligations *erga omnes* flow from rules *jus cogens*? In my view, this is not necessary the case. … In practice, however, it is hard to think of an example of an obligation *erga omnes* which is not at the same time to be considered to derive from *jus cogens*. ... Therefore, *jus cogens* and obligations *erga omnes* are but two sides of one and the same coin"); Antonio Cassese, "The Character of the Violated Obligation", in James Crawford et al. (eds.), *The Law of International Responsibility* (OUP, 2010), p. 417 ("the two categories inextricably coincide: every peremptory norm imposes obligation *erga omnes* and, vice-versa, every obligation *erga omnes* proper is laid down in a peremptory norm").

On the other hand, others argue that there can be obligations *erga omnes* that are not peremptory norms. See, e.g., Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", *European Journal of International Law*, Vol. 13 No. 5 (2002), p. 1137 ("it may be hard to admit …that all obligations *erga omnes* result from *jus cogens* norms. … Obligations *erga omnes* and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second."); Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Presses universitaires de France, 2005), pp. 106–107 ("L'image désormais classique employée pour décrire la relation entre les obligations *erga omnes* et le *jus cogens* est celle de deux cercles concentriques: la catégorie des normes imposant des obligations *erga omnes* constituerait un ensemble plus grand qui contiendrait toutes les normes impératives mais ne se reduirait pas à elles."); Yuji Iwasawa, *International Law* (in Japanese), 2nd ed. (University of Tokyo Press, 2023), p. 21. Within the framework of the Institut de droit international (IDI), Gaja proposed a provision stating that "[w]hile peremptory norms always impose obligation *erga omnes*, these obligations are not necessarily established by peremptory norms" (Article C). *Institut de droit international (IDI), Annuaire*, Vol. 71, Pt. II (2005), pp. 84, 86 (Article C); *ibid*., Vol. 71, Pt. I (2005), p. 192 (Proposition C). See also Paolo Picone, "The Distinction between *Jus Cogens* and Obligations *Erga Omnes*", in Enzo Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (OUP, 2011), pp. 414–416.

[25] Article 42(b)(ii) provides: "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to … (b) a group of States including that State, or the international community as a whole, and the breach of the obligation … (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".

[26] ASR, Article 42, Commentary, para. 13.

[27] ASR, Article 48, Commentary, para. 7. The Special Rapporteur's (James Crawford) original idea concerning the relationship between interdependent and *erga omnes* obligations is found in his Third Report. See *Yearbook of the International Law Commission, 2000*, Vol. II, Pt. 1, pp. 34–35, para. 106, esp. n. 199 ("Integral [i.e., interdependent] obligations, as defined in article 60, paragraph 2(c) of the 1969 Vienna Convention, are a subcategory of obligations *erga omnes partes*. In the case of an integral obligation any breach undermines the position of all the other States parties, to an extent that justifies treating each State party as individually injured.").

suggested that the Commentaries are incorrect because Article 42(b)(ii) and Article 48(1) deal with different kinds of obligations as noted above.[28] Others have countered that disarmament obligations, which are typical of interdependent obligations, can also be classified as obligations *erga omnes*.[29]

22. In view of the differences between the legal consequences of breaches of interdependent obligations and obligations *erga omnes*,[30] it is imperative to elucidate the relationship between the two.[31]

(3) Identification of obligations *erga omnes*

23. The foregoing is a relatively abstract discussion on the scope and meaning of obligations *erga omnes* at a conceptual level. From a practical point of view, it may be sufficient if one can identify specifically which obligations are of an *erga omnes* character.

24. However, while the *definitions* of obligations *erga omnes* can be found in Article 48(1) of the Articles on State Responsibility or in Conclusion 17(1) of the Draft Conclusions on Peremptory Norms, in addition to the ICJ's dictum in the *Barcelona Traction* case, these definitions alone do not elicit specifically which obligations are of an *erga omnes* character.

25. As will be discussed below, the legal consequences of a breach of an obligation *erga omnes* can be wide-ranging and profound (it may lead to a public interest litigation or countermeasures by any State[32]). International relations could even destabilize if it remains unclear which obligations are those that can have such legal consequences.

26. Therefore, it is imperative to discuss the methods and criteria for identifying obligations *erga omnes*, i.e., what aspects to look into and how to determine whether a certain obligation is of an *erga omnes* character in accordance with some criteria.

27. One methodology could include the extraction of commonalities from a series of examples of such obligations mentioned by the ICJ and other international judicial and quasi-judicial institutions as well as the Commission.[33] On the other hand, any list attempting to exhaustively specify which obligations are of an erga omnes character would be difficult. Such a catalogue should eventually be developed based on State practice and in light of the decisions of international courts and tribunals.

28. There are obligations that have been identified by the ICJ and other international courts and tribunals as obligations *erga omnes* (e.g., prohibition of aggression, prohibition of genocide, prohibition of slavery, prohibition of racial discrimination, prohibition of torture, obligation to respect the right to self-determination, and certain obligations[34] under international humanitarian and human rights law, as well as some related procedural

---

[28] Iwasawa, *International Law* (in Japanese), 2nd ed., pp. 19–20.

[29] See, e.g., Masahiko Asada, "Legal Justification of UN and Non-UN Sanctions: Supremacy of UN Obligations and Countermeasures against Breaches of Interdependent or *Erga Omnes* Obligations", in Chia-Jui Cheng (ed.), *New Trends in International Law: Festschrift in Honour of Judge Hisashi Owada* (Brill, 2024), pp. 88-89; Pierre d'Argent, "Obligations internationales", *Recueil des Cours*, Vol. 417 (2021), pp. 85-87; Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?", *European Journal of International Law*, Vol. 14, No. 5 (2003), p. 923.

[30] The fact that Article 42(b)(ii) on interdependent obligations provides for the invocation of responsibility by an "injured State", while Article 48 on obligations *erga omnes* provides for the invocation of responsibility by a "State other than an injured State", as well as the fact that Article 49 provides that "[a]n injured State" may take countermeasures, suggest that there are differences between the two types of obligations and the legal consequences of their breaches.

[31] See, generally, Priya Urs, "The Elusiveness of 'Interdependent Obligations' and the Invocation of Responsibility for Their Breach", *British Yearbook of International Law*, forthcoming.

[32] As will be discussed below, it is unclear whether every State can resort to countermeasures in cases of a breach of an obligation *erga omnes*.

[33] It may also be worth examining whether the criteria and methodologies could be different for obligations *erga omnes (stricto sensu)* and obligations *erga omnes partes*.

[34] It is important to know which specific obligations fall under this category of obligations.

obligations[35])[36]. However, producing a list solely comprising those obligations may lead to an erroneous perception that there are no other obligations *erga omnes*. Conversely, expanding the list to obligations not adequately recognized as such could also lead to adverse results. It would be more important to present criteria and methodologies for identifying obligations *erga omnes* than to produce an incomplete list of relevant obligations.

B. Clarification of legal consequences

29. The second set of questions to be addressed in this topic concerns the legal consequences of breaches of obligations *erga omnes*: more specifically, what actions or measures a State may take in response to such breaches.

30. Since obligations *erga omnes* are owed to the international community as a whole and for which all States have a legal interest in compliance, a logical consequence is that all States other than the wrongdoing State may address any breach of such an obligation and invoke the responsibility of the latter State.[37]

31. The question, therefore, is what *actions or measures* can be taken by any other State and what are the *conditions* for taking such actions or measures. In light of the doctrine and State practice, the actions and measures that could be considered in this respect include the invocation of responsibility[38] such as through judicial proceedings, and countermeasures to be taken against the responsible State.[39]

(1) Invocation of responsibility

(a) Standing (*locus standi*)

32. The first question to be addressed in the event of a breach of an obligation *erga omnes* is whether any State can bring the case to a competent international court, such as the ICJ, as a means to invoke responsibility of the defaulting State.[40] In other words, the question is

---

[35] In the *Belgium v. Senegal* case, the ICJ found an *erga omnes partes* character in the obligations to make a preliminary inquiry into the facts (Article 6(2)) and to extradite or prosecute (Article 7(1)) as set out in the Convention against Torture. ICJ Reports 2012, para. 69.
Also, in the *Blaskic* case, the ICTY held that Article 29 of the ICTY Statute (obligation to co-operate with the Tribunal in the investigation and prosecution of the accused persons) imposes an obligation *erga omnes partes*. ICTY (Appeals Chamber), *Blaskic*, para. 26.

In the *Nzabonimana* case, the ICTR in referring to Article 28 of the ICTR Statute (obligation to cooperate with the Tribunal in the investigation and prosecution of the accused persons) recalled that the ICTY in the *Blaskic* case held as above concerning Article 29 of the ICTY Statute. ICTR (Trial Chamber III), *Nzabonimana*, para. 29. Cf. ICTR (Trial Chamber I), *Nahimana,* para. 9 (though the understanding of the concept obligations *erga omnes* is somewhat different).

Furthermore, the ICC in the *Jordan Referral* case held that the obligation to cooperate with the Court reinforces the "obligation *erga omnes* to prevent, investigate and punish crimes" under its jurisdiction. ICC (Appeals Chamber), *Jordan Referral*, para. 123.

[36] In light of the ICJ's hearings in the *Whaling in the Antarctic* case held in 2013, it can also be said that certain obligations to protect environment may be viewed as being of an *erga omnes* character. See ICJ, Verbatim Record CR 2013/13, 3 July 2013, p. 73 (Judge Bhandari); CR 2013/18, 9 July 2013, p. 28, para. 19 (Mr. Burmester of Australia), pp. 33–34, paras. 19–20 (Mme Boisson de Chazournes).

[37] ASR, Article 48(1).

[38] In the Articles on State Responsibility, the term "invocation" of responsibility means taking measures such as the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. ASR, Article 42, Commentary, para. 2.

[39] See, e.g., Tams, *Enforcing Obligations* Erga Omnes *in International Law*, pp. 5–12, 19; Yoshifumi Tanaka, "The Legal Consequences of Obligations *Erga Omnes* in International Law", *Netherlands International Law Review*, Vol. 68, No. 1 (2021), pp. 16–28.

[40] It is said that in the *Barcelona Traction* case, where the concept of obligations *erga omnes* was first literally pronounced, the Court did not specifically touch on the question of standing. *Gaza*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2024, para. 4. See also *Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 15, 16; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Declaration of Judge Xue, ICJ Reports 2016, para. 8;

whether all other States have standing (*locus standi*)[41] to be a litigant in a court for a breach of an obligation *erga omnes*, irrespective of the existence of individual and special injury.

33. While there still exists an argument drawing a distinction between the right to invoke responsibility and standing before the ICJ, meaning that only specially affected States (i.e., "injured" States)[42] would have standing to bring a claim,[43] this point seems to have already been clarified to the contrary in practice. At least as far as the breach of obligations *erga omnes partes* is concerned, public interest litigation seems to be allowed under international law, due to developments since the ICJ's rejection of an "*actio popularis*"[44] under international law in the *South West Africa* cases (second phase) of 1966[45] and, in particular, more recent developments in ICJ jurisprudence.[46] They can be considered as an application of Article 48 of the Articles on State Responsibility,[47] although no explicit reference has been

Rohingya, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 33. See, however, *Barcelona Traction*, ICJ Reports 1970, para. 91.

41 The term "standing" (sometimes referred to as "standing to sue") means a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Black's Law Dictionary*, 11th ed. (Thomson Reuters, 2019), p. 1695. However, the same term has sometimes been used also to signify the general capacity to appear before the court as an applicant or a respondent. See, e.g., UN Doc. A/CN.4/766, 1 March 2024, paras. 90, 91, 97, 133, 219. This proposal uses the term in the former sense. For a broader notion of standing, covering both judicial proceedings and countermeasures, as well as the difference between "rights" and "legal interest", see Tams, *Enforcing Obligations* Erga Omnes *in International Law*, pp. 25–40.

42 Precisely speaking, it may be debatable if an "injured State" and a "specially affected State" are synonyms, considering that injured States in the case of a breach of interdependent obligations may not be specially affected.

43 Myanmar's argument in *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 94. Cf. Senegal's argument in *Belgium v. Senegal*, ICJ Reports 2012, para. 64. See also dissenting opinions or declarations of Judge Xue in several cases (e.g., *Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 17–18; *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 38; *Syria Torture*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2023, para. 5). Judge Xue's dissenting opinions include an argument to the effect that the permissibility of reservations to the compromissory clauses of the Torture and of the Genocide Conventions means that there is no universal standing arising from a breach of an obligation *erga omnes* (*Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 22–23; *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 29). However, this point seems to have already been addressed by the Court in the *East Timor* judgment. In relation to the provisional measures order in the *Gaza* case, the same judge accepted the standing of a non-injured State. *Gaza*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2024, para. 4. For an argument somewhat similar to that of Judge Xue in the *Belgium v. Senegal* case, see *Belgium v. Senegal*, Dissenting Opinion of Judge *ad hoc* Sur, ICJ Reports 2012, paras. 26–46.

44 For a critical view against the use of this term, see Tams, *Enforcing Obligations* Erga Omnes *in International Law*, pp. 161-162; Giorgio Gaja, "The Protection of General Interests in the International Community", *Recueil des Cours*, Vol. 364 (2012), pp. 110–112.

45 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, ICJ Reports 1966, para. 88.

46 See *Belgium v. Senegal*, ICJ Reports 2012, paras. 68-70; *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 108. At the Provisional Measures stage, the ICJ also recognized prima facie jurisdiction and standing in the following cases. *Syria Torture*, ICJ Reports 2023, paras. 48–51; *Gaza*, ICJ Reports 2024, paras. 33-34. While the Articles on State Responsibility do not explicitly address the issue of standing in Article 48, the IDI Resolution of 2005 entitled "Obligations *Erga Omnes* in International Law" ("IDI Resolution of 2005") does so in Article 3 ("In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligations is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation"). *IDI, Annuaire*, Vol. 71, Pt. II (2005), pp. 286–289.

47 See James Crawford, "Overview of Part Three of the Articles on State Responsibility", in Crawford et al. (eds.), *The Law of International Responsibility*, p.934; idem, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts", in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011), p. 227.

made to that Article by the Court.[48] It should also be noted that invocation of responsibility for a breach of obligations *erga omnes (partes)* has been made in other international courts and tribunals.[49]

34. A connected question is the relationship between standing of a non-injured State and its jurisdictional basis to refer a case to the ICJ. As jurisdictional questions arise before admissibility questions, standing, which is an admissibility question, would be granted only if the existence of a jurisdictional basis is confirmed in a given case. Thus, the ICJ cannot act without a jurisdictional basis even if the allegation concerns a breach of an obligation *erga omnes*.[50] The Court confirmed this understanding in the *East Timor* case of 1995,[51] the *Democratic Republic of the Congo (DRC) v. Rwanda (New Application)* case (jurisdiction and admissibility) of 2006[52] and the *Azerbaijan v. Armenia* case (preliminary objections) of 2024.[53]

(b) Parallel or successive proceedings and scope of claims

35. Assuming that non-injured States are entitled to standing before the Court or other judicial institutions in accordance with Article 48(1) of the Articles on State Responsibility, the question remains what *conditions and procedures* should dictate States' claims to standing, as it is envisaged that more than one States, whether injured or non-injured, may institute proceedings before such institutions.

36. In this regard, it is convenient to distinguish between cases where there is an injured State and cases where there is no such State. If there *exists* an injured State in the breach of an obligation *erga omnes* (e.g., aggression), the question would be whether any other State can invoke responsibility even if the injured State has made it clear that it will *not* invoke the responsibility of the wrongdoing State[54] or has lost its right to invoke responsibility by waiver[55]; conversely, whether other States can invoke responsibility only when the injured State, while entitled, is not in a position to do so for jurisdictional or other reasons[56]; and, furthermore, whether any other State can invoke responsibility even after the injured State has invoked responsibility (and received a satisfactory remedy from the wrongdoing State or

[48] On the other hand, the ITLOS in its Advisory Opinion in the *Activities in the Area* case recognizes the possibility for each State Party to the UNCLOS to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area, and in that context explicitly refers to Article 48 of the Articles on State Responsibility (para. 180).

[49] See, e.g., UNCLOS Annex VII Arbitral Tribunal, *The Arctic Sunrise Arbitration (The Netherlands v. Russia)*, Award on the Merits (PCA Case No. 2014-02), 14 August 2015, paras. 157(iv), 180–186. The Netherlands' standing was recognized on different grounds.

[50] Similar issues may arise in relation to the declaration of, or application for, intervention by a State in a case involving alleged violations of obligations *erga omnes* where the intervening State has made a reservation to the compromissory clause of the relevant treaty. See United States, Declaration of Intervention, 2022, para. 9; United States, Observations on the Admissibility of the US Declaration of Intervention, 2023, paras. 22–28; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Admissibility of the Declarations of Intervention, Order, ICJ Reports 2023, paras. 90–98.

[51] ICJ Reports 1995, para. 29.

[52] ICJ Reports 2006, paras. 64, 125.

[53] ICJ Reports 2024, paras. 41, 48.

[54] There were some related discussions on this question in *Rohingya*, Preliminary Objections, ICJ Reports 2022, paras. 105, 113. See also *ibid*., Declaration of Judge *ad hoc* Kress, paras. 26–30.

[55] See ASR, Article 45.

[56] Such a situation may arise when the injured State has made a reservation to the compromissory clause of the relevant treaty. There is a converse argument to the effect that if the injured State does not have the right to litigate because of its reservation to the compromisssory clause, "non-injured" State would also be barred from bringing a case before the Court. See *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 99. For a similar argument, see Jan-Phillip Graf, "Erga Omnes Partes Standing and Procedural Issues in South Africa v. Israel", *EJIL Talk!*, 1 February 2024.

failed to secure some or all of the remedies sought[57]). In general, the question is whether the right of non-injured State is subsidiary to, or independent from, the right of the injured State.[58]

37. In the *absence* of an injured State, a separate question would arise as to whether a second State can further invoke the responsibility following the invocation by an initial State.[59] The joint application by Canada and the Netherlands against Syria concerning the alleged breaches by the latter of the Convention against Torture suggests this possibility as they may have been able to institute proceedings separately and successively rather than jointly.[60] In such a case, a question may arise on the applicability (or not) of the principle of *res judicata* where the same remedies are sought by *different* States in successive cases.[61] This issue may also arise in cases where there exists an injured State.

38. A further complication may arise from the consideration of different forms of invocation of responsibility (i.e., contents of claims). Under Article 48(2) of the Articles on State Responsibility, it may be necessary to distinguish between claims for cessation of the internationally wrongful acts and assurances of non-repetition on the one hand and those for performance of the obligation of reparation on the other.[62] For example, complications may arise from questions such as: if the first State to invoke the responsibility only claims cessation,[63] can another State subsequently claim restitution as a form of reparation?[64] If the first State only seeks cessation of the breach and restitution, can another State subsequently claim compensation, and so on? This issue may also arise in cases where there exists an injured State.

39. More generally, it may be important to consider whether Article 48(2) of the Articles on State Responsibility, providing for the scope of claims to be made by non-injured States, is now reflective of customary international law.[65] It may also be important to prescribe how the non-injured State litigant should deal with any compensation it obtains as a result of litigation (e.g., providing it to the injured State or the beneficiaries of the obligation breached), which is not clearly provided for in Article 48(2) or the commentary thereto.[66]

(c) Third-party intervention

40. In a similar vein,[67] a breach of an obligation *erga omnes* may also give rise to the question of third-party intervention in proceedings as a way of invoking responsibility under

[57] The principle of *res judicata* might come into play, even if the parties are different.

[58] See Priya Urs, "Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice", *Leiden Journal of International Law*, Vol. 34, No. 2 (2021), pp. 520–522. See also *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 139 and n. 66.

[59] A related issue was raised by Judge Xue in the *Rohingya* case in relation to the finality in adjudication of disputes. *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 11.

[60] In the *South West Africa* cases, the two separately instituted proceedings by Ethiopia and Liberia were joined by the Court. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 321.

[61] See *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, para. 54; Niccolò Ridi, "Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case", *Leiden Journal of International Law*, Vol. 31, No. 2 (2018), pp. 385–386; Urs, "Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice", p. 522.

[62] See *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 139.

[63] See ASR, Article 48(2)(a).

[64] See ASR, Article 48(2)(b).

[65] The Commentary to Article 48(2)(b) states that it involves a measure of progressive development of international law. ASR, Article 48, Commentary, para. 12. Of the two kinds of claims listed in Article 48(2)(a), the IDI Resolution of 2005 refers only to cessation of the international wrongful act (Art. 2(a)).

[66] This is a consideration similar to what is provided for in Article 19(c) of the Articles on Diplomatic Protection of 2006. The ICJ seems to have had this provision in mind in delivering the *Diallo* judgment (compensation). See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, para. 57.

[67] The IDI Resolution of 2005 also deals with this question alongside that of standing in its Articles 3 and 4. *IDI, Annuaire*, Vol. 71, Pt. II (2005), pp. 288, 289. It is sometimes also said that "third party

Article 48(1) of the Articles on State Responsibility.[68] Of the two types of intervention in proceedings before the ICJ, the one at issue here is Article 62 of the ICJ Statute:[69] a State considering that "it has an *interest of a legal nature* which may be affected by the decision in the case" (emphasis added) may submit a request to the Court to be permitted to intervene. Thus, for one thing,[70] whether the "interest of a legal nature" in Article 62 includes the "legal interest" that all States have in compliance with an obligation *erga omnes*[71] will determine the admissibility of Article 62 intervention in cases of a breach of such an obligation. To date, the ICJ has not clarified this point, nor has it granted this form of intervention in any case.

41. Furthermore, academic opinion is divided on this topic.[72] Some scholars argue that "[w]hatever 'interest of a legal nature' is required in Article 62 of the [ICJ] Statute, it cannot be higher than the one that justifies bringing a claim before the Court".[73] Others counterargue that there is "no clear basis to analogize between customary requirements for the admissibility of applications instituting proceedings and statutory requirements for the admissibility of incidental proceedings, such as non-party intervention".[74] There is a need to clarify this point.[75]

42. In practice, the Court recently received a few submissions requesting intervention in different proceedings under Article 62 of the ICJ Statute.[76] They are all based on an alleged

---

intervention is a logical extension of … Article 48 of [the Articles on State Responsibility]". Craig Eggett and Sarah Thin, "Third-Party Intervention before the International Court of Justice: A Tool for Litigation in the Public Interest?", in Justine Bendel and Yusra Suedi (eds.), *Public Interest Litigation in International Law* (Routledge, 2024), p. 87.

68 For previous examples of application for and admission of intervention under Article 62 of the Statute, see Robert Kolb, *The International Court of Justice* (Hart, 2013), pp. 703-730; Alina Miron and Christine Chinkin, "Article 62", in Andreas Zimmermann and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (OUP, 2019), pp. 1691–1693.

69 To date, there are only three cases in which the Court permitted intervention under Article 62: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* in 1990, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* in 1999, and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* in 2011. In none of them was the intervening State permitted to intervene as a party.

70 This is one of the requirements for an Article 62 intervention to be admitted. Another is whether such an interest "may be affected by the decision in the case". See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Application by Consta Rica for Permission to Intervene, Judgment, ICJ Reports 2011, paras. 26, 67.

71 See, e.g., *Belgium v. Senegal*, ICJ Reports 2012, para. 68 ("These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case"); *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 107. See also ASR, Part Two, Chapter III, Commentary, para. 7 ("the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance").

72 Benjamin Salas Kantor and Massimo Lando, "Intervention and Obligations *Erga Omnes* at the International Court of Justice", NUS Centre for International Law, 20 April 2023.

73 Gaja, "The Protection of General Interests in the International Community", p. 119; Palestine, Request for Intervention and Declaration of Intervention, 2024, para. 25; Poland, Application for Intervention, 2024, para. 14. See also Dai Tamada, "War in Ukraine and the International Court of Justice: Provisional Measures and the Third-Party Right to Intervene in Proceedings", *International Community Law Review*, Vol. 26, Nos. 1–2 (2024), pp. 55–56.

74 Brian McGarry, "Mass Intervention?: The Joint Statement of 41 States on Ukraine v. Russia", *EJIL Talk!*, 30 May 2022; idem, "Obligations *Erga Omnes (Partes)* and the Participation of the Third States in Inter-State Litigation", *The Law and Practice of International Courts and Tribunals*, Vol. 22, No. 2 (2023), pp. 282, 298–299. See also Matina Papadaki, "Substantive and Procedural Rules in International Adjudication: Exploring their Interaction in Intervention before the International Court of Justice", in Hélène Ruiz Fabri (ed.), *International Law and Litigation: A Look into Procedure* (Nomos, 2019), pp. 61–63.

75 The IDI Resolution of 2005 in Article 4 provides: "The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation". See also Gaja, The Protection of General Interests in the International Community", pp. 121–122.

76 In January 2024, Nicaragua submitted a request for intervention *as a party* under Article 62 in the *Gaza* case. Nicaragua, Application for Intervention, 2024, paras. 21, 22, 25. It stated that South Africa

breach of obligations *erga omnes partes* in the respective cases.[77] Among these submissions, it may be important to distinguish between interventions as a party and interventions as a non-party. From the perspective of invoking responsibility, the more relevant mode of interventions would be those as a party under Article 62.

(d) Inter-State communications to human rights treaty bodies

43. Apart from judicial courts and tribunals, various human rights treaties provide for an inter-State communications mechanism to examine whether there has been a breach of treaty obligations, at least some of which are likely of an *erga omnes* character.[78] Here, too, the possibility of referral by "non-injured States" to the treaty bodies needs to be considered, similar to the filing of a case with the ICJ by a non-injured State.

44. In fact, inter-State communications systems under UN human rights treaties do not rule out the possibility of communications by non-injured States.[79] However, there have been no cases so far where this has occurred, in part due to the dearth of inter-State communications generally.[80]

45. The situation appears somewhat different in regional human rights treaties. While the number is limited, a few examples of inter-State referrals by non-injured States can be found in relation to the European Convention on Human Rights.[81] No comparable cases seem to be

---

is not acting as the sole representative of the international community, and its Application has not excluded the intervention of other parties to the Genocide Convention. *Ibid*., para. 17. Nicaragua, however, withdrew this application for intervention in April 2025. ICJ, Press Release, No. 2025/15, 3 April 2025.

In May 2024, the State of Palestine, along with a declaration accepting the competence of the ICJ, submitted a request for intervention under Articles 62 (presumably *as a non-party*) and 63 in the *Gaza* case. Palestine, Request for Intervention and Declaration of Intervention, 2024, paras. 1–2, 27–28. This represents an unprecedented situation where the specially affected State (the injured State) requested a permission to intervene in the proceedings instituted by a non-injured State. *Ibid*., para. 31.

In July 2024, Poland submitted a request for intervention under Articles 62 (*as a non-party*) and 63 in the *Allegations of Genocide* case. Poland, Application for Intervention, 2024, para. 45; idem, Declaration of Intervention, 2024, para. 57.

In January 2025, Belize submitted a request for intervention under Articles 62 (*as a non-party*) and 63 in the *Gaza* case. Belize, Application for Intervention and Declaration of Intervention, 2025, paras. 34–38, 43, 92.

[77] Nicaragua, Application for Intervention, paras. 18, 21(d); Palestine, Request for Intervention and Declaration of Intervention, paras. 24-25; Poland, Application for Intervention, para. 16; Belize, Application for Intervention and Declaration of Intervention, paras. 34–38, 92.

[78] The ICJ in the *Barcelona Traction* case referred to "the principles and rules concerning the basic rights of the human person" as examples of contemporary international law from which obligations *erga omnes* derive. ICJ Reports 1970, para. 34. See also IDI, "Resolution: The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", Saint Jacques de Compostelle, 1989, Article 1.

[79] See, e.g., Human Rights Committee, General Comment No. 31, para. 2.

[80] A few UN human rights treaties include provisions for an "inquiry" procedure, allowing the relevant treaty body to be informed of serious or systematic violations of the convention in a State party. While the entities eligible to submit such information are not explicitly defined, non-governmental organizations (NGOs) are primarily expected to do so. To date, no State party has ever made such a submission.

[81] Most typical such cases can be found in the filing of multiple applications against Greece in the 1960s and against Turkey in the 1980s. European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 3321/67 (*Denmark v. Greece*), No. 3322/67 (*Norway v. Greece*), No. 3323/67 (*Sweden v. Greece*), No. 3344/67 (*The Netherlands v. Greece*), 24 January 1968, *Yearbook of the European Convention on Human Rights*, Vol. 11 (1968), p. 690; European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 9940/82 (*France v. Turkey*), No. 9941/82 (*Norway v. Turkey*), No. 9942/82 (*Denmark v. Turkey*), No. 9943/82 (*Sweden v. Turkey*), and No. 9944/82 (*The Netherlands v. Turkey*), 6 December 1983, *Yearbook of the European Convention on Human Rights*, Vol. 26 (1983), p. 1. Other cases are not necessarily genuine examples of States acting in the interest of a collective

found in relation to other regional treaties, including the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. The advisory proceedings of the Inter-American Court of Human Rights are sometimes utilized as a substitute for inter-State communications. But they have not been initiated by non-injured States or States without direct interest.

46. Quite separate from the issues of a referral by a non-injured State, a further point that has been discussed in relation to obligations *erga omnes* in an inter-State communication is whether the *erga omnes* character of the obligation involved can trump the lack of treaty relations (a question somewhat similar to the one discussed in relation to the lack of jurisdictional basis above). This question was dealt with in the Committee on the Elimination of Racial Discrimination (CERD) established under the International Convention on the Elimination of All Forms of Racial Discrimination.

47. In an inter-State communication submitted by Palestine against Israel to the CERD, Israel contended that because it had objected to the accession of Palestine to the Convention, no treaty relations existed between Israel and Palestine in the context of the Convention. Consequently, Israel argued that the Committee lacked jurisdiction.[82] In response, the Committee confirmed that it had jurisdiction to hear the communication because of the non-synallagmatic character of the obligations of the Convention and the *erga omnes* nature of its core provisions.[83] It is worth noting that the UN Office of Legal Affairs (OLA) had offered a different view in response to the request for advice from the CERD.[84]

48. Another question having arisen in the above case was whether the *erga omnes* character of the obligation involved justifies the extension of the temporal scope of jurisdiction in the inter-State communication. The CERD found that the inter-State mechanism is not limited to breaches that have occurred after the ratification of the Convention by the initiating State.[85] On the other hand, the ICJ in a different case did not accept a similar contention employing the above CERD finding by pointing out the difference in nature between the inter-State communications procedure and the judicial mechanism in the ICJ.[86]

49. Other conceivable fields of international law, which may be deemed to provide for obligations *erga omnes* and may also offer suggestions concerning their legal consequences,[87] include those covering the environment and WTO. In both fields, the relevant treaties are equipped with quasi-judicial mechanisms supervising the compliance with the obligations by the States Parties. However, they seem to offer few cases worth examining from our perspective.

(2) Countermeasures

50. The second issue concerning the legal consequences of obligations *erga omnes* is whether, in the event of a breach of such obligations, a State other than the injured State can take countermeasures to ensure cessation of the breach and full reparation for the injury. This is a question commonly referred to as third-party countermeasures.[88]

---

interest. See William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015), p. 725.

82 CERD/C/100/3 (12 December 2019), para. 31.

83 CERD/C/100/5 (12 December 2019), para. 67.

84 It stated that (whatever the nature of the core provisions of the Convention may be) the lack of treaty relations which can be effected by a unilateral statement to that effect could be an obstacle to the activation of the inter-State communication mechanism under the Convention. "Transmission of the content of OLA Memorandum at the request of the Committee on the Elimination of Racial Discrimination", Treaty Bodies Secretariat, 23 August 2019, para. 69.

85 CERD/C/100/3, para. 14.

86 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Preliminary Objections, Judgment, ICJ Reports 2024, paras. 53–54.

87 Meaning the fields which are equipped with certain inter-State mechanisms to invoke the responsibility of defaulting States.

88 Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP, 2017).

51. This extremely contentious issue was "resolved" in an ambiguous manner in the Articles on State Responsibility in 2001. In Article 54 thereof, it is provided that:

> "This chapter [on countermeasures] does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take *lawful measures* against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached" (emphasis added).

52. The commentary to the same article states that "the current state of international law on countermeasures taken in the general or collective interest is uncertain".[89] As it specifies, "[a]t present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest".[90] Consequently, "chapter II includes a saving clause [i.e., Article 54] which reserves the position and leaves the resolution of the matter to the further development of international law".[91]

53. While relevant State practice continues to accumulate, it is controversial. Moreover, the question of its legality is increasingly assuming a political dimension. It would therefore be prudent to exclude this issue from the scope of the topic.

(3) Other legal consequences

54. The Draft Conclusions on Peremptory Norms contain a number of provisions on the legal consequences of international legal acts in conflict with peremptory norms.[92]

55. Since "[p]eremptory norms of general international law (*jus cogens)* give rise to obligations owed to the international community as a whole (obligations *erga omnes*)" (Conclusion 17(1)), the relevant conclusions naturally apply to obligations *erga omnes* which are peremptory norms, *as peremptory norms*. Therefore, the issue here is the legal consequence of a breach of obligations *erga omnes* which do *not* have the character of peremptory norms.

56. Most of the conclusions of the Draft Conclusions on Peremptory Norms are directly related to the hierarchical nature of the peremptory norms, and obligations *erga omnes* in and of themselves do not give rise to similar legal consequences from the very fact that they are obligations *erga omnes*.

57. However, the provisions on "[p]articular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)" in Conclusion 19, including non-recognition of the unlawful situation and non-provision of aid or assistance, merit examination for their potential applicability to obligations *erga omnes*.[93] Conclusion 19 is almost a verbatim recapitulation of Article 41 of the Articles on State Responsibility concerning the particular consequences of a serious breach of a peremptory norm – an article closely tied to obligations *erga omnes* as discussed earlier.[94]

---

[89] ASR, Article 54, Commentary, para. 6.

[90] *Ibid*., para. 6.

[91] *Ibid*., para. 6. The ILC's Draft Articles on the Responsibility of International Organizations (DARIO) of 2011 contains a similar provision for similar reasons. DARIO, Article 57, Commentary, para. 2.

[92] They include those on treaties conflicting with a peremptory norm (Conclusions 10–12), customary international law conflicting with a peremptory norm (Conclusion 14), unilateral acts of States conflicting with a peremptory norm (Conclusion 15), resolutions of international organizations conflicting with a peremptory norm (Conclusion 16), reservations to treaty provisions reflecting peremptory norms (Conclusion 13), peremptory norms and circumstances precluding wrongfulness (Conclusion 18), and on particular consequences of serious breaches of peremptory norms (Conclusion 19).

[93] This does not necessarily rule out the possibility of examining other provisions of the Draft Conclusions on Peremptory Norms. Conclusions 13 and 18 might also be candidates. See d'Argent, "Obligations internationales", p. 89; Pok Yin S. Chow, "On Obligations *Erga Omnes Partes*", *Georgetown Journal of International Law*, Vol. 52, No. 2 (2021), p. 497.

[94] See Section II.A.(1) of this proposal. The IDI Resolution of 2005 also contains a similar provision. Article 5(b) provides: "Should a widely acknowledged grave breach of an *erga omnes* obligation

58. Thus, it is necessary to consider whether similar consequences could arise in the case of "serious breaches of obligations *erga omnes*". This is a question on which the ICJ and the ILC seem to have different views[95] and on which clarification is required. The ICJ's recent Advisory Opinion on the *Occupied Palestinian Territory,* along with some minority opinions of individual judges, further attests to this necessity.[96] It is also to be noted that the above consequences are qualitatively different from other consequences discussed earlier (actions and measures that may be *taken by other States*) in that they involve obligations to be *imposed on other States*.

III. Relations with the Commission's Previous Work and Consideration of the Topic by Other Bodies

A. Relations with the Commission's previous work

59. As noted above, the topic "obligations *erga omnes"* is related to some of the previous work of the Commission. In particular, it is an extension of an important part of the Articles on State Responsibility and a clarification of unresolved issues remaining therein.

60. Obligations *erga omnes* are very closely related to peremptory norms. Concerning the latter norms, the Commission adopted the Draft Conclusions on Peremptory Norms in 2022. Therefore, work on obligations *erga omnes* as a concept closely related to peremptory norms would contribute to the continuity of the Commission's work. Additionally, the Draft Conclusions on Peremptory Norms and the process of their drafting could in many respects also serve as a useful reference in the preparation of an outcome document for the proposed topic.[97]

B. Consideration of the topic by other bodies

61. The academic literature on obligations *erga omnes* is vast (see Select Bibliography), but one of the most important among them is the work of the *Institut de droit international* (IDI). The consideration by the IDI of the topic of "Obligations and Rights *Erga Omnes* in International Law", the rapporteur of which was Giorgio Gaja who was also a member of the

occur, all the States to which the obligation is owed … (b) shall not recognize as lawful a situation created by the breach".

95 As the next footnote shows, the ICJ refers to similar consequences in the context of breaches of obligations *erga omnes.*

96 In that Opinion, the ICJ, after observing that "the obligations violated by Israel include certain obligations *erga omnes*", stated that all States are under obligations not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not to render aid or assistance in maintaining such a situation. *Occupied Palestinian Territory*, ICJ Reports 2024, paras. 274, 278–279. These stated obligations hint at a virtual application of Article 41 of the Articles on State Responsibility, which provides for particular consequences of a serious breach of an obligation arising under a peremptory norm of general international law. Judge Tladi criticized the Opinion as "based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations". Declaration of Judge Tladi, ICJ Reports 2024, paras. 28–32, esp. para. 30. See also Separate Opinion of Judge Gómez Robledo, ICJ Reports 2024, para. 22.

Similar divergence of views can be found in relation to the *Wall* and *Chagos* cases. For the *Wall* case, see ICJ Reports 2004, para. 159 (referring to the obligations of all States "not to recognize the illegal situation resulting from the construction of the wall" and "not to render aid or assistance in maintaining the situation created by such construction"); Separate Opinion of Judge Higgins, paras. 37–38; Separate Opinion of Judge Kooijmans, paras. 40–45. For the *Chagos* case, see ICJ Reports 2019, paras. 180, 183(5) (referring to the obligation of all Member States to "co-operate with the United Nations in order to complete the decolonization of Mauritius"); Separate Opinion of Judge Robinson, para. 89. Cf. Separate Opinion of Judge Cançado Trindade, para. 200. See also UN Doc. A/RES/73/295, 22 May 2019, para. 2(e).

97 Dire Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms* (OUP, 2024).

Commission at the time, culminated in the Resolution entitled "Obligations *Erga Omnes* in International Law" at its Krakow Session in 2005 ("IDI Resolution of 2005").

62. Composed of six articles, the Resolution provides for definition (Article 1), breach and invocation of responsibility (Article 2), standing before the ICJ or other international judicial institution (Article 3), participation in proceedings before the ICJ or other international judicial institution (Article 4), cessation of the breach, non-recognition of the situation created by the breach, and countermeasures (Article 5) and a without prejudice clause (Article 6).[98] Not only the Resolution itself but also the discussions in the IDI leading up to the Resolution are highly instructive.

IV. ILC's Criteria for Selecting New Topics

63. Regarding the topic selection, the Commission noted in 1997 the following criteria for the selection of topics for the Commission:

> "(a) The topic should reflect the needs of States in respect of the progressive development and codification of international law;
>
> (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
>
> (c) The topic is concrete and feasible for progressive development and codification".

Furthermore, it was stated that in the selection of new topics, "the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole"[99] (this recommendation is referred to as "(d)" below).

64. The proposed topic of "obligations *erga omnes*" meets all of the above criteria as follows (letters at the end of each sentence correspond to the relevant criterion described above):

- Half a century has passed since the appearance of the concept of obligations *erga omnes* at the ICJ in 1970 (one may even state that a century has passed since the *S.S. "Wimbledon"* case of 1923), during which time it has gained wide acceptance in State practice, international jurisprudence and academic literature = (b);
- Reference to obligations *erga omnes* (or concepts associated with them) is not limited to the ICJ but rather found in a variety of international judicial and quasi-judicial institutions, including in the ICTY (e.g., *Furundzija*; *Blaskic*), the ICTR (e.g., *Nahimana*; *Nzabonimana*), the ICC (e.g., *Jordan Referral*), the SCSL (e.g., *Kallon and Kamara*), the ITLOS (e.g., *Activities in the Area*), the ECJ (e.g., *Council v. Front Polisario*), the CERD (e.g., *Palestine v. Israel*), the European Commission of Human Rights (e.g., *Austria v. Italy*; *Denmark v. Greece; Norway v. Greece; Sweden v. Greece; The Netherlands v. Greece*[100]), and the Inter-American Commission on Human Rights (*Nicaragua v. Costa Rica*[101]) = (b);
- Litigation by non-injured States concerning breaches of obligations *erga omnes* at the ICJ began some 10 years ago in 2012, but similar litigation (filing) has been rapidly

[98] IDI Resolution of 2005.

[99] *Yearbook of the International Law Commission, 1997*, Vol. II, Pt. 2, pp. 71–72, para. 238.

[100] In these cases, obligations *erga omnes* as such were not mentioned, but the concept of "international protection" or "collective guarantee" of human rights was mentioned as something associated with such obligations. See, e.g., European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 788/60 (*Austria v. Italy*), 11 January 1961, *Yearbook of the European Convention on Human Rights*, Vol. 4 (1961), pp. 140, 148, 150.

[101] The Commission did not mention obligations *erga omnes* as such but referred to the Convention system as "a genuine regional public order the preservation of which is in the interests of each and every state party" (para. 197).

increasing and may well increase further in the future,[102] thus sufficient practice in this regard is increasingly accumulating = (b) and (d);

- To the extent that the obligations determined by the ICJ and other international judicial and quasi-judicial institutions to have an *erga omnes* character are relatively limited so far, it is not known until a case is filed whether the alleged breach of the particular obligation can be subject to international litigation by any State; and thus, there should be an interest and need among States for clarification in this regard = (a);
- Draft Conclusions on Peremptory Norms were prepared by the Commission, and it should be sufficiently concrete and feasible to prepare a similar document in relation to the adjacent concept of obligations *erga omnes* = (c);
- The proposed topic has the aspects of clarification of significant uncertainties in the Articles on State Responsibility, also prepared by the Commission = (a);
- A resolution on obligations *erga omnes* has been adopted by the IDI = (c); and
- The concept of obligations *erga omnes* and the legal issues surrounding such obligations reflect relatively new developments in international law for the protection of the common interests of the international community as a whole, especially within the framework of the ICJ = (d).

V. Scope of the Proposed Topic

A. The addressees of obligations *erga omnes* and the holders of the corresponding rights

65. The entities which are bound by an obligation *erga omnes* are not necessarily limited to States; obligations *erga omnes* can also be imposed on subjects other than States. For example, it is possible for a collective defense organization to violate the prohibition of aggression, an obligation *erga omnes*.

66. However, for the sake of simplicity and practicality, it would be appropriate to limit the consideration to situations involving States. In fact, the Commission dealt with the topic of international responsibility in separate documents between responsibility of States and that of international organizations. Also, while not expressly stated, the Draft Conclusions on Peremptory Norms have States primarily in mind for many of its conclusions.[103] The IDI Resolution of 2005 also limited its scope to obligations *erga omnes* incumbent upon States for reasons of simplicity.[104]

67. Similarly, the holders of the rights corresponding to obligations *erga omnes* are not necessarily limited to States. Although obligations *erga omnes* are obligations to the international community as a whole, there is no international legal subject called the "international community". It is basically individual States as members of the international community that have the rights corresponding to obligations *erga omnes*. While the international community is also constituted by entities other than States, not all of those entities have the (procedural) right to respond to the breach of obligations *erga omnes*.[105]

[102] President Donoghue of the ICJ stated at the Sixth Committee of the UN General Assembly in 2023 that: "It has been noted, sometimes with enthusiasm and sometimes with trepidation, that standing based on alleged violations of obligations *erga omnes partes* in certain treaties has the potential, in the future, to expand the range of cases brought before the Court". UN Doc. A/C.6/78/SR.26, 25 October 2023, para. 8.

[103] See Conclusions 17, 18, 19, 21.

[104] IDI Resolution of 2005, Article 1. See also *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 124.

[105] In the *Activities in the Area* opinion, the ITLOS referred to the International Seabed Authority as among possible subjects entitled to claim compensation in cases of damage to the Area. ITLOS Reports 2011, para. 179.

Here as well, for the sake of simplicity, it would be appropriate to limit the consideration to the cases where States respond to the breach of obligations *erga omnes*.[106]

B. Obligations *erga omnes* and obligations *erga omnes partes*

68. Although we have discussed the relevant obligations without necessarily making a distinction among them, there are two types of obligations *erga omnes.* They are obligations *erga omnes* (*stricto sensu*) and obligations *erga omnes partes*. While the former refers to those owed to the international community as a whole, the latter is those owed to a group of States and established for the protection of a collective interest of the group (such as those contained in certain multilateral treaties).[107]

69. As the ICJ's practice (judgments) to date has been only of the latter[108] (although there are several examples of the former in terms of the *filing* of a case[109] and in advisory proceedings[110]), it may be an option to limit the scope of the topic to the latter type of obligations.

70. However, there seems no compelling reason to do so because there is little difference between the two in terms of the basic "character" of the obligations concerned[111] (indeed, an obligation *erga omnes partes* may become an obligation *erga omnes (stricto sensu)* if the

[106] See Draft Conclusions on Peremptory Norms, Conclusions 17, 19, 21; IDI Resolution of 2005, Article 1. See also *IDI, Annuaire,* Vol. 71, Pt. I (2005), pp. 124–127.

[107] See ASR, Article 48(1)(a) and (b).

[108] Phoebe Okowa, "Issues of Admissibility and the Law on International Responsibility", in Malcolm D. Evans (ed.), *International Law*, 6th ed. (OUP, 2024), pp. 487–490. The ICJ introduced the concept "obligations *erga omnes partes*" in the *Belgium v. Senegal* case of 2012 for the first time, while in the ILC the Special Rapporteur (Gaetano Arangio-Ruiz) seems to have done so during the drafting of the Articles on State Responsibility (first reading). *Yearbook of the International Law Commission, 1992*, Vol. II, Pt. 1, p. 34, para. 92; *ibid*., Vol. II, Pt. 2, p. 39, para. 269. Cf. ICTY, *Blaskic*, para. 26.

[109] While the ICJ confirmed its jurisdiction based on the Convention against Torture in the *Belgium v. Senegal* case, the Applicant (Belgium) also requested that the Court declare that Senegal breached an obligation under customary international law to bring criminal proceedings against Mr. Habré for crimes against humanity. However, the Court dismissed it for the reason of absence of dispute. ICJ Reports 2012, paras. 53–55. In the *East Timor* case, Portugal claimed that Australia failed to observe the obligation to respect the right of the people of East Timor to self-determination. However, the Court did not accept the application, based on the *Monetary Gold* principle. ICJ Reports 1995, para. 29. The *Nuclear Disarmament Obligations* case brought by the Marshall Islands against India was based on a claim that India violated its obligations of nuclear disarmament and cessation of the nuclear arms race under customary international law. Marshall Islands, Application (*Marshall Inlands v. India*), 2014, paras. 41, 58–64. However, the Court declared the absence of dispute. ICJ Reports 2016, para. 56(1). The Gambia's Application in the *Rohingya* case explicitly referred to "the *erga omnes* and *erga omnes partes* character of the obligations … under the Genocide Convention". The Gambia, Application, 2019, para. 15. The Court confirmed its jurisdiction based on Article IX of the Genocide Convention. ICJ Reports 2022, para. 115(5). Nicaragua's Application against Germany was based not only on Article IX of the Genocide Convention but also on the declarations accepting the Court's jurisdiction pursuant to Article 36(2) of the ICJ Statute. It stated that there is a dispute between the two States concerning the interpretation and application not only of the Genocide Convention, the Geneva Conventions of 1949 and their Additional Protocols of 1977, but also of "the principles and customary rules of international law", including international humanitarian law and peremptory norms of general international law. Nicaragua, Application, 2024, para. 31. The Court is still to decide on jurisdiction and admissibility in this case.

[110] See the *Wall* case, ICJ Reports 2004, paras. 155 – 157; the *Chagos* case, ICJ Reports 2019, para. 180; and the *Occupied Palestinian Territory* case, paras. 96, 232, 274.

[111] In the *Barcelona Traction* judgment, the ICJ after referring to obligations *erga omnes* stated that "[s]ome of the corresponding rights of protection have entered into the body of *general international law* …; others are conferred by *international instruments* of a universal or quasi-universal character" (emphasis added). It also referred to the European Convention on Human Rights in a similar context. ICJ Reports 1970, paras. 34, 91. For an argument to distinguish between obligations *erga omnes* and obligations *erga omnes partes*, see Sarah Thin, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations* (Edward Elgar, 2024), pp. 119–120.

former enters into the body of customary international law[112] and, conversely, the former may incorporate the latter in drafting a regional convention[113]), and there seems little risk of complicating the Commission's work by covering both. There are also a number of cases (State practice) where the applicant State *invoked* responsibility of the respondent State for the latter's breach of obligations *erga omnes (stricto sensu)*. Additionally, limiting the scope only to obligations *erga omnes partes* looks a half measure. It would therefore be appropriate to consider both obligations *erga omnes* (*stricto sensu*) and obligations *erga omnes partes* in this topic.[114] At the same time, it is important to recognize that these two types of obligations possess distinct features.

C. Obligations *erga omnes* and rights *erga omnes*

71. In ICJ jurisprudence, reference has sometimes been made to "rights" *erga omnes* in addition to "obligations" *erga omnes*. For instance, in the *East Timor* case, the Court described the Portuguese-claimed right of peoples to self-determination as a "right *erga omnes*",[115] but did not elaborate on that concept further. Moreover, the term "rights and obligations *erga omnes*" is used in the *Bosnia Genocide* case (preliminary objections)[116] and in the *DRC v. Rwanda (New Application)* case (jurisdiction and admissibility)[117]. However, its precise meaning was not clearly articulated in either case. It is thus said that the ICJ has never defined the concept of "rights *erga omnes*".[118] Whether the consideration of the proposed topic should cover "rights" *erga omnes* in addition to "obligations" *erga omnes* depends on the content of the former and its relationship with the latter; the question will be decided upon once these points are clarified.[119]

VI. Possible Form of Output

72. Considering the previous work of the Commission pertaining to this area and bearing particularly in mind the most analogous work to the proposed topic in terms of the subject matter (i.e., the Draft Conclusions on Peremptory Norms), it seems appropriate for the outcome document of the proposed topic to take the form of draft conclusions. However, this issue could be revisited as the work on the topic progresses.

VII. Conclusion

73. The proposed topic "Identification and Legal Consequences of Obligations *Erga Omnes* in International Law" is a logical and necessary extension of the previous work of the Commission, including the Articles on State Responsibility of 2001 and the Draft Conclusions on Peremptory Norms of 2022.

---

[112] Cf. d'Argent, "Obligations internationales", p. 74. See also *ibid*., p. 66.

[113] Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", p. 1136.

[114] The IDI Resolution of 2005, whose scope had been intended to be limited to obligations *erga omnes (stricto sensu)* at the initial stage of consideration, was later extended to include obligations *erga omnes partes* (see IDI Resolution of 2005, Article 1) in response to various comments. At the initial stage, the Rapporteur (Gaja) had stated that the existence of special features in the relevant treaties suggests that it would be preferable to concentrate on the more homogenous group of obligations *erga omnes* existing under general international law. *IDI, Annuaire,* Vol. 71, Pt. I (2005), p. 123.

[115] In the *East Timor* case, the Court stated: "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable" and then referred to it as a "right *erga omnes*". ICJ Reports 1995, para. 29.

[116] ICJ Reports 1996, para. 31.

[117] ICJ Reports 2006, para. 64.

[118] *IDI, Annuaire,* Vol. 71, Pt. I (2005), p. 191.

[119] The IDI Resolution of 2005 was initially entitled "Obligations and Rights *Erga Omnes* in International Law", but following various comments, the provision on rights *erga omnes* was deleted and the reference to such rights was eventually removed from the title of the Resolution.

74. It would clarify what was uncertain at the time of adopting these documents or what was not provided in detail in them because of the restraints in the topic concerned. It is important for the Commission to engage in this work to complete those missing points. Otherwise, the general topics of international responsibility and sources of international law will remain incomplete.[120]

75. Moreover, as the number of cases involving obligations *erga omnes* continues to rise in the ICJ and other international judicial and quasi-judicial institutions, the international community seems to be grappling with significant but challenging questions. These include how to strike a balance[121] between promoting the rule of law in the international community through the concept of obligations *erga omnes*, and ensuring the stability and predictability of international relations in the face of increasing proceedings brought by non-injured States.[122] The outcome document of this topic would provide practical guidance and useful clarification to States in this respect.

76. Thus, there is not only sufficient practice on which to build such guidance and clarification but also an urgent and concrete need for States to have them. This topic meets the criteria for selecting new topics for the Commission in every respect, including the element that the topic should reflect new developments in international law.

77. As this topic is a subject of general international law and related to many aspects of international law, the Commission is a perfect place to address it as an organ composed of 34 international law experts from various regions with a variety of expertise.

[120] See UN Doc. A/CN.4/679, 5 March 2015, para. 14.

[121] Cf. *Yearbook of the International Law Commission, 2001*, Vol. II, Pt. 1, p. 11, para. 42 (Crawford's Fourth Report).

[122] See, e.g., *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 39; *Syria Torture*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2023, para. 5, referring to the risks of more States restricting or withdrawing acceptance of the Court's jurisdiction, and of more vague and insubstantial allegations. See also Oscar Schachter, *International Law in Theory and Practice* (Nijhoff, 1991), p. 212.

Select Bibliography

1. International Law Commission Documents

International Law Commission, Report on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996).

International Law Commission, Report on the Work of its Fiftieth Session, UN Doc. A/53/10 (1998).

International Law Commission, Report on the Work of its Fifty-Third Session, UN Doc. A/56/10 (2001).

International Law Commission, Report on the Work of its Sixty-Third Session, UN Doc. A/66/10 (2011).

International Law Commission, Report on the Work of its Seventy-Third Session, UN Doc. A/77/10 (2022).

Roberto Ago (Special Rapporteur for State Responsibility), Fifth Report on State Responsibility, UN Doc. A/CN.4/291 and Add.1 & 2 and Corr.1 (22 March, 14 April and 4 May 1976).

Willem Riphagen (Special Rapporteur for State Responsibility), Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles), UN Doc. A/CN.4/366 and Add.1 (14 and 15 April 1983).

Gaetano Arangio-Ruiz (Special Rapporteur for State Responsibility), Third Report on State Responsibility, UN Doc. A/CN.4/440 and Add.1 (19 July 1991).

Gaetano Arangio-Ruiz (Special Rapporteur for State Responsibility), Fourth Report on State Responsibility, UN Doc. A/CN.4/444 and Add.1-3 (12 and 25 May and 1 and 17 June 1992).

Gaetano Arangio-Ruiz (Special Rapporteur for State Responsibility), Fifth Report on State Responsibility, UN Doc. A/CN.4/453 and Add.1-3 (12 and 28 May and 8 and 24 June 1993).

Gaetano Arangio-Ruiz (Special Rapporteur for State Responsibility), Seventh Report on State Responsibility, UN Doc. A/CN.4/469 and Add.1-2 (9, 24 and 29 May 1995).

James Crawford (Special Rapporteur for State Responsibility), Third Report on State Responsibility, UN Doc. A/CN.4/507 and Add.1-4 (15 March, 15 June, 10 and 18 July and 4 August 2000).

James Crawford (Special Rapporteur for State Responsibility), Fourth Report on State Responsibility, UN Doc. A/CN.4/517 and Add.1 (2 and 3 April 2001).

Giorgio Gaja (Special Rapporteur for Responsibility of International Organizations), Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (1 April 2008).

Dire D. Tladi (Special Rapporteur for Jus Cogens), Second Report on *Jus Cogens*, UN Doc. A/CN.4/706 (14 March 2017).

Dire D. Tladi (Special Rapporteur for Jus Cogens), Third Report on *Jus Cogens*, UN Doc. A/CN.4/714 (12 February 2018).

2. Jurisprudence

PCIJ/ICJ

The S.S. "Wimbledon", PCIJ, Series A, No. 1 (17 August 1923), p. 15.

South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, ICJ Reports 1966, p. 6.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment, ICJ Reports 1970, p. 3.

East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, ICJ Reports 1996, p. 595.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136.

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422.

Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, p. 226.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 2015, p. 3.

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, ICJ Reports 2016, p. 255.

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction and Admissibility, Judgment, ICJ Reports 2016, p. 552.

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, ICJ Reports 2016, p. 833.

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p. 95.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, ICJ Reports 2022, p. 477.

Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic), Provisional Measures, Order, 16 November 2023, ICJ Reports 2023.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order, 26 January 2024, 28 March 2024, 24 May 2024, ICJ Reports 2024.

Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Application, 1 March 2024.

Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024, ICJ Reports 2024.

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Preliminary Objections, Judgment, 12 November 2024, ICJ Reports 2024.

ITLOS

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, ITLOS Reports 2011, p. 10.

Arbitral Tribunals Constituted under Annex VII to the UNCLOS.

The Arctic Sunrise Arbitration (The Netherlands v. Russia), PCA Case No. 2014-02, Award on the Merits, 14 August 2015.

ICTY

ICTY (Appels Chamber), *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

ICTY (Trial Chamber), *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998.

ICTR

ICTR (Trial Chamber I), *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003.

ICTR (Trial Chamber III), *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal, 4 March 2010.

ICC

ICC (Appeals Chamber), *Jordan Referral re Al-Bashir Appeal*, Case No. ICC-02/05-01/09 OA2, Judgment, 6 May 2019.

SCSL

SCSL (Appeals Chamber), *Morris Kallon and Brima Bazzy Kamara*, Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

ECJ

Court of Justice of the European Union (Grand Chamber), *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment, 21 December 2016.

ECHR

Decision of the Commission as to the Admissibility of Application No. 788/60 lodged by *the Government of the Federal Republic of Austria against the Government of the Republic of Italy*, 11 January 1961.

Decision of the Commission as to the Admissibility of Application No. 3321/67 by *the Government of Denmark against the Government of Greece*, Application No. 3322/67 by *the Government of Norway against the Government of Greece*, Application No. 3323/67 by *the Government of Sweden against the Government of Greece*, and Application No. 3344/67 by *the Government of the Netherlands against the Government of Greece*, 24 January 1968.

Decision of the Commission as to the Admissibility of Application No. 9940/82 (*France v. Turkey*), Application No. 9941/82 (*Norway v. Turkey*), Application No. 9942/82 (*Denmark v. Turkey*), Application No. 9943/82 (*Sweden v. Turkey*), and Application No. 9944/82 (*The Netherlands v. Turkey*), 6 December 1983.

IACHR

Inter-American Commission on Human Rights, *Nicaragua v. Costa Rica*, Report No. 11/07, Interstate Case 01/06, 8 March 2007.

IACtHR

Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion requested by the United Mexican States, OC-18/03, 17 September 2003.

Inter-American Court of Human Rights, *The Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, Advisory Opinion requested by Colombia, OC-26/20, 9 November 2020.

CERD

Admissibility of the Inter-State Communication submitted by *Qatar against the United Arab Emirates*, UN Doc. CERD/C/99/4 (27 August 2019).

Inter-State Communication submitted by *the State of Palestine against Israel*, Preliminary Procedural Issues and Referral to the Committee, UN Doc. CERD/C/100/3 (12 December 2019).

Inter-State Communication submitted by *the State of Palestine against Israel*, Decision on Jurisdiction, UN Doc. CERD/C/100/5 (12 December 2019).

3. Literature

(1) Books

Ahmadov, Farid, *The Right of* Actio Popularis *before International Courts and Tribunals*, Brill, 2018.

萬歳寛之 [Banzai, Hiroyuki],『国際違法行為責任の研究』*[Study on the Responsibility for Internationally Wrongful Acts]*, 成文堂 [Seibun-do], 2015.

Bendel, Justine; Suedi, Yusra (eds.), *Public Interest Litigation in International Law*, Routledge, 2024.

Bogdanova, Iryna, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind*, Brill, 2022.

Cançado Trindade, Antônio Augusto, *International Law for Humankind: Towards a New* Jus Gentium, 3rd ed., Brill, 2020.

Cannizzaro, Enzo (ed.), *The Law of Treaties Beyond the Vienna Convention*, OUP, 2011.

Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, CUP, 2002.

Crawford, James, *State Responsibility: The General Part*, CUP, 2013.

Crawford, James; Pellet, Alain; Olleson, Simon (eds.), *The Law of International Responsibility*, OUP, 2010.

Dawidowicz, Martin, *Third-Party Countermeasures in International Law*, CUP, 2017.

de Feyter, Koen, *Globalization and Common Responsibilities of States*, Ashgate, 2013.

de Hoogh, André, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, Kluwer, 1996.

Dias, Talita, *Countermeasures in International Law and Their Role in Cyberspace*, Research Paper, Chatham House, May 2024.

Katselli Proukaki, Elena, *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community*, Routledge, 2011.

Malekian, Farhad; Nordlöf, Kerstin, *Prohibition of Sexual Exploitation of Children Constituting Obligation* Erga Omnes, Cambridge Scholars Publishing, 2013.

Matsushita, Mitsuo; Schoenbaum, Thomas J.; Mavroidis, Petros C., *The World Trade Organization: Law, Practice, and Policy*, 2nd ed., OUP, 2006.

Orakhelashvili, Alexander, *Peremptory Norms in International Law*, OUP, 2008.

Picone, Paolo, *Obblighi reciproci ed obblighi* erga omnes *degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento*, A. Giuffrè, 1983.

Picone, Paolo, *Obblighi "erga omnes" e uso della forza*, Editoriale Scientifica, 2017.

Ragazzi, Maurizio (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Nijhoff, 2005.

Ragazzi, Maurizio, *The Concept of International Obligations* Erga Omnes, Clarendon, 1997.

Ronzitti, Natalino (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, 2016.

Subedi, Surya P. (ed.), *Unilateral Sanctions in International Law*, Hart, 2021.

Tams, Christian J., *Enforcing Obligations* Erga Omnes *in International Law*, CUP, 2005.

Thin, Sarah, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations*, Edward Elgar, 2024.

Thirlway, Hugh W. A., *The Sources of International Law*, 2nd ed., OUP, 2019.

Tladi, Dire (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations*, Brill, 2021.

Tladi, Dire, *The International Law Commission's Draft Conclusions on Peremptory Norms*, OUP, 2024.

Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, Nijhoff, 2006.

Villalpando, Santiago, *L'émergence de la communauté internationale dans la responsabilité des États*, Graduate Institute Publications, 2005.

Voeffray, François, *L'*actio popularis *ou la défense de l'intérêt collectif devant les juridictions internationals*, Presses universitaires de France, 2004.

王秀梅 [Wang, Xiumei], ≪国家对国际社会整体的义务≫ [*The Obligations* Erga Omnes *of States in International Law*], 法律出版社 [Law Press], 2009.

Westra, Laura, *Ecoviolence and the Law: Supranational Normative Foundations of Ecocrime*, Transnational Publishers, 2004.

(2) Book Chapters

Asada, Masahiko, "Legal Justification of UN and Non-UN Sanctions: Supremacy of UN Obligations and Countermeasures against Breaches of Interdependent or *Erga Omnes* Obligations", in Cheng, Chia-Jui (ed.), *New Trends in International Law: Festschrift in Honour of Judge Hisashi Owada*, Brill, 2024, pp. 64–95.

Aust, Anthony, "Special regimes", in Aust, Anthony, *Handbook of International Law*, 2nd ed., CUP, 2010, pp. 327–343.

Bendel, Justine; Suedi, Yusra, "State-to-State Procedures before Environmental Compliance Committees: Still Alive?", in Voigt, Christina; Foster, Caroline (eds.), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation,* CUP, 2024, pp. 121–144.

Cassese, Antonio, "The Character of the Violated Obligation", in Crawford, James, et al. (eds.), *The Law of International Responsibility,* OUP, 2010, pp. 415–420.

Christakis, Thodore, "L'obligation de non-reconnaissance des situations cres par le recours illicite la force ou d'autres actes enfreignant des règles fondamentales", in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 127–166.

Ciobanu, Dan, "Litispendence between the International Court of Justice and the Political Organs of the United Nations", in Gross, Leo; Jessup, Philip Caryl; Hambro, Edvard (eds.), *The Future of the International Court of Justice*, Vol. I, Oceana, 1976, pp. 209–275.

Crawford, James, “The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility”, in Andenas, Mads (ed.), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley*, Kluwer, 2000, pp. 23–43.

Crawford, James, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts”, in Fastenrath, Ulrich; Simma, Bruno (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, OUP, 2011, pp. 224–240.

Czapliński, Władysław, “*Jus Cogens* and the Law of Treaties”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 83–97.

Czapliński, Władysław, “*Jus Cogens*, Obligations *Erga Omnes* and International Criminal Responsibility”, in Doria, José; Gasser, Hans-Peter; Bassiouni, M. Cherif (eds.), *The Legal Regime of the International Criminal Court*, Nijhoff, 2009, pp. 401–420.

d’Argent, Pierre, “Conclusions générales: «Le droit à la vie en tant que *jus cogens* donnant naissance à des obligations *erga omnes*? »“, in Tomuschat, Christian; Lagrange, Evelyne; Oeter, Stefan (eds.), *The Right to Life*, Nijhoff, 2010, pp. 403–414.

de Wet, Erika, “*Jus Cogens* and Obligations *Erga Omnes*”, in Shelton, Dinah (ed.), *The Oxford Handbook of International Human Rights Law*, OUP, 2013, pp. 541–561.

Dominicé, Christian, “A la recherche des droits *erga omnes*”, in Salmon, Jean J. A. (ed.), *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, Bruylant, 2007, pp. 357–371.

Eggett, Craig; Thin, Sarah, “Third-Party Intervention before the International Court of Justice: A Tool for Litigation in the Public Interest?”, in Bendel, Justine; Suedi, Yusra (eds.), *Public Interest Litigation in International Law,* Routledge, 2024, pp. 75–97.

Gaja, Giorgio, “Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts”, in Weiler, Joseph H. H.; Cassese, Antonio; Spinedi, Marina (eds.), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, De Gruyter, 1989, pp. 151–160.

Galvao Teles, Patricia, “Obligations and Rights *Erga Omnes* in the Case-Law of the International Court of Justice”, in Ouazzani Chahdi, Hassan; Guennouni, Naima; Keraouani, Ali; El Haiba, Mahjoub (eds.), *Souveraineté, securité et droits de la personne: Liber amicorum offert en l’honneur du Professeur Mohamed Bennouna*, Editions A. Pedone, 2023, pp. 211–224.

Goodwin-Gill, Guy S., “Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute”, in Goodwin-Gill, Guy S.; Talmon, Stefan (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, OUP, 1999, pp. 199–223.

Grossman, Claudio, “Protecting Human Rights in the Americas: The Continuous Role of the Inter-American Commission on Human Rights”, in von Bogdandy, Armin, et al. (eds.), *The Impact of the Inter-American Human Rights System*, OUP, 2024, pp. 34–48.

Hayashi, Mika; Yamaguchi, Akihiro, “Economic Sanctions against Russia: Questions of Legality and Legitimacy”, in Asada, Masahiko; Tamada, Dai (eds.), *The War in Ukraine and International Law*, Springer, 2024, pp. 109–135.

Hillgruber, Christian, “The Right of Third States to Take Countermeasures”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 265–293.

Hofer, Alexandra, “Unilateral Sanctions as a Challenge to the Law of State Responsibility”, in Beaucillon, Charlotte (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar, 2021, pp. 186–203.

Iovane, Massimo; Rossi, Pierfrancesco, “International Fundamental Values and Obligations *Erga Omnes*”, in Iovane, Massimo; Palombino, Fulvio M.; Amoroso, Daniele; Zarra,

Giovanni (eds.), *The Protection of General Interests in Contemporary International Law*, OUP, 2021, pp. 46–67.

岩沢雄司 [Iwasawa, Yuji],「国際義務の多様性－対世的義務を中心として」["The Diversity of International Obligations: With Special Reference to Obligations *Erga Omnes*], 中川淳司・寺谷広司（編）[Nakagawa, Junji; Teraya, Koji (eds.)],『国際法学の地平』[*The Horizon of International Law*], 東信堂 [Toshindo], 2008, pp. 123–170.

Jørgensen, Nina H. B., "Obligations *Erga Omnes*", in Jørgensen, Nina H. B. (ed), *The Responsibility of States for International Crimes*, OUP, 2000, pp. 93–99.

Kadelbach, Stefan, "*Jus Cogens*, Obligations *Erga Omnes* and Other Rules - The Identification of Fundamental Norms", in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 21–40.

Kawano, Mariko, "The Common Interest of Communities and the International Court of Justice", in Cheng, Chia-Jui (ed.), *New Trends in International Law: Festschrift in Honour of Judge Hisashi Owada*, Brill, 2024, pp. 217–241.

Knoops, Geert-Jan Alexander, "Protection against Miscarriages of Justice within International Criminal Law: An *Erga Omnes* Obligation", in Knoops, Geert-Jan Alexander (ed.), *Redressing Miscarriages of Justice: Practice and Procedure in National and International Criminal Law Cases*, Brill, 2007, pp. 5–15.

李兆杰 [Li, Zhaojie], "国家对国际社会整体所承担的法律义务" ["The Obligation *erga omnes* of States"], 周忠海（编）[Zhou, Zhonghai (eds.)], ≪和平、正义与法≫ [*Peace, Justice and Law*], 中国国际广播出版社 [China International Radio Press], 1993, pp. 210–229.

Lixinski, Lucas; Tzevelekos, Vassilis P, "The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls", in Carstens, Anne-Marie; Varner, Elizabeth (eds.), *Intersections in International Cultural Heritage Law*, OUP, 2020, pp. 247–266.

Miron, Alina, "Intervention in the Collective Interest before the International Court of Justice: The Time Has Finally Come?", in Gattini, Andrea (ed.), *Time and Adjudication: The Temporal Factor in Proceedings before International Courts and Tribunals* (Brill, 2025), pp. 215–235.

Okowa, Phoebe, "Issues of Admissibility and the Law on International Responsibility", in Evans, Malcolm D. (ed.), *International Law*, 6th ed., OUP, 2024, pp. 467–498.

Palchetti, Paolo, "Consequences for Third States as a Result of an Unlawful Use of Force", in Weller, Marc (ed.), *The Oxford Handbook of the Use of Force in International Law*, OUP, 2015, pp. 1224–1238.

Picone, Paolo, "The Distinction between *Jus Cogens* and Obligations *Erga Omnes*", in Cannizzaro, Enzo; Arsanjani, Mahnoush H.; Gaja, Giorgio (eds.), *The Law of Treaties Beyond the Vienna Convention*, OUP, 2011, pp. 411–424.

Ragazzi, Maurizio, "International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions", in Goodwin-Gill, Guy S.; Talmon, Stefan (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, OUP, 1999, pp. 455–477.

Rubin, Alfred P., "*Actio Popularis, Jus Cogens*, and Offenses *Erga Omnes*?", in Carey, John; Dunlap, William V.; Pritchard, R. John (eds.), *International Humanitarian Law: Origins*, Transnational Publishers, 2003, pp. 191–205.

Ruffert, Matthias, "Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order?", in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 295–310.

Salerno, Francesco, "Treaties Establishing Objective Regimes", in Cannizzaro, Enzo; Arsanjani, Mahnoush H.; Gaja, Giorgio (eds.), *The Law of Treaties Beyond the Vienna Convention*, OUP, 2011, pp. 225–243.

Schmahl, Stefanie, “An Example of *Jus Cogens*: the Status of Prisoners of War”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 41–67.

Simma, Bruno, “Human Rights before the International Court of Justice: Community Interest Coming to Life?”, in Tams, Christian J.; Sloan, James (eds.), *The Development of International Law by the International Court of Justice*, OUP, 2013, pp. 301–325.

Sivakumaran, Sandesh, “Impact on the Structure of International Obligations”, in Kamminga, Menno T.; Scheinin, Martin (eds.), *The Impact of Human Rights Law on General International Law*, OUP, 2009, pp. 133–150.

Talmon, Stefan, “The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 99–125.

Tamada, Dai, “Settlement of Disputes before the ICJ: The Case of Public Interest Litigation”, in Gomula, Joanna et al. (eds.), *Research Handbook on International Procedural Law,* Edward Elgar, 2024, pp. 330–349.

Tams, Christian J., “Individual States as Guardians of Community Interests”, in Fastenrath, Ulrich et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, OUP, 2011, pp. 379–405.

Tavernier, Paul, “L’identification des règles fondamentales, Un problème résolu?”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 1–20.

Thin, Sarah, “In Search of Community: Towards a Definition of Community Interest”, in Zyberi, Gentian (ed.), *Protecting Community Interests through International Law*, Intersentia, 2021, pp. 11–29.

Thirlway, Hugh, “Injured and Non-injured States before the International Court of Justice”, in Ragazzi, Maurizio (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Nijhoff, 2005, pp. 311–328.

Thouvenin, Jean-Marc, “La saisine de la Cour internationale de justice en cas de violation des règles fondamentales de l’ordre juridique international”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 311–334.

Tomuschat, Christian; Thouvenin, Jean-Marc, “*Jus Cogens* and the Law of Treaties by W-ADYS-AW CZAPLIN-SKI”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 83–97.

Tomuschat, Christian, “Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* – Concluding Observations”, in Tomuschat, Christian; Thouvenin, Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Brill, 2006, pp. 425–436.

Vidmar, Jure, “Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?”, in De Wet, Erika; Vidmar, Jure (eds.), *Hierarchy in International Law: The Place of Human Rights*, OUP, 2012, pp. 13–41.

Villalpando, Santiago, “Some Archeological Explorations on the Birth of Obligations *Erga Omnes*”, in Kamga, Maurice; Mbengue, Makane Moïse (eds.), *Liber amicorum Raymond Ranjeva: L’Afrique et le droit international: variations sur l’organisation internationale*, Pedone, 2013, pp. 623–637.

Villalpando, Santiago, “Droits *erga omnes*?” in *The International Legal Order in the XXIst Century*, Brill, 2023, pp. 386–404.

(3) Articles

Acosta Estévez, José B., “Normas de *ius cogens*, efecto *erga omnes*, crimen internacional y la teoría de los círculos concéntricos”, *Anuario de derecho internacional*, Vol. 11, 1995, pp. 3–22.

Akehurst, Michael, “Reprisals by Third States”, *British Year Book of International Law*, Vol. 44, 1970, pp. 1–18.

Allain, Jean, “Slavery and Its Obligations *Erga Omnes*”, *Australian Year Book of International Law*, Vol. 36, No. 1, 2018, pp. 83–124.

Annacker, Claudia, “The Legal Régime of *Erga Omnes* Obligations in International Law”, *Austrian Journal of Public and International Law*, Vol. 46, No. 2, 1994, pp. 131–166.

Arnardóttir, Oddný Mjöll, “*Res Interpretata*, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights”, *European Journal of International Law*, Vol. 28, No. 3, 2017, pp. 819–843.

Baine, P. Kerr, “Bridging the Climate and Maritime Legal Regimes: The IOM’s 2018 Climate Strategy as an *Erga Omnes* Obligation”, *Climate Law*, Vol.11, No. 2, 2021, pp. 119–156.

Bassiouni, M. Cherif, “International Crimes: *Jus Cogens* and Obligation *Erga Omnes*”, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, pp. 63–74.

Bekker, Peter H.F.; Szasz, Paul C., “Preliminary Objections of Yugoslavia to Jurisdiction of ICJ and Admissibility of Application of Bosnia-Herzegovina - Jurisdiction Solely on Basis of Article IX of 1948 Genocide Convention - Rights and Obligations *Erga Omnes* under Genocide Convention not Territorially Limited”, *American Journal of International Law*, Vol.91, No. 1, 1997, pp. 121–126.

Benzing, Markus, “Community Interests in the Procedure of International Courts and Tribunals”, *The Law and Practice of International Courts and Tribunals*, Vol. 5, No. 3, 2006, pp. 369–408.

Bills, Amanda, “The Relationship between Third-party Countermeasures and the Security Council’s Chapter VII Powers: Enforcing Obligations *Erga Omnes* in International Law”, *Nordic Journal of International Law*, Vol. 89, No. 1, 2020, pp. 117–141.

Borgia, Fiammetta, “The Responsibility to Protect Doctrine: Between Criticisms and Inconsistencies”, *Journal on the Use of Force and International Law*, Vol. 2, No. 2, 2015, pp. 223–237.

Byers, Michael, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules”, *Nordic Journal of International Law*, Vol. 66, Nos. 2–3, 1997, pp. 211–239.

Carmody, Chios, “WTO Obligations as Collective”, *European Journal of International Law*, Vol. 17, No. 2, 2006, pp. 419–443.

Cassella, Sarah, “L’Union européenne et le Sahara occidental: le rôle du droit européen dans l’effectivité des obligations internationales *erga omnes*”, *Annuaire français de droit international*, Vol. 64, 2018, pp. 81–110.

Cebada Romero, Alicia, “Los conceptos de obligación *erga omnes*, *ius cogens*, y violación grave a la luz del nuevo proyecto de la CDI sobre Responsabilidad de los Estados por hechos ilícitos”, *Revista electrónica de estudios internacionales*, Vol. 4, 2002, pp. 1–14.

Charney, Jonathan, “Third State Remedies in International Law”, *Michigan Journal of International Law*, Vol. 10, No. 1, 1989, pp. 57–101.

Chernichenko, Stanislav Valentinovich, “Vzaimosviaz’ imperativnykh norm mezhdunarodnogo prava (*jus cogens*) i obiazatel’stv *erga omnes*” [“Relationship between Peremptory Norms of International Law (*Jus Cogens*) and Obligations *Erga Omnes*”], *Московский журнал международного права [Moscow Journal of International Law]*, 2012 (3), 2012, pp. 3–17.

Chow, Pok Yin S., “On Obligations *Erga Omnes Partes*”, *Georgetown Journal of International Law*, Vol. 52, No. 2, 2021, pp. 469–504.

Cimiotta, Emanuele, “Parallel Proceedings before the International Court of Justice and the Committee on the Elimination of Racial Discrimination”, *The Law and Practice of International Courts and Tribunals*, Vol. 19, No.3, 2020, pp. 388–416.

Coffman, Peter D., “Obligations *Erga Omnes* and the Absent Third State”, *German Yearbook of International Law*, Vol. 39, 1996, pp. 285–333.

Contesse, Jorge, “Inter-State Disputes under the Inter-American Human Rights System”, *International Human Rights Law Review*, Vol. 13, No. 1, 2024, pp. 74–95.

Crawford, James, “Multilateral Rights and Obligations in International Law”, *Recueil des Cours*, Vol. 319, 2006, pp. 325–482.

Crow, Kevin; Lorenzoni-Escobar, Lina, “From Traction to Treaty-Bound: *Jus Cogens*, *Erga Omnes* and Corporate Subjectivity in International Investment Arbitration”, *Journal of International Dispute Settlement*, Vol. 13, No. 1, 2022, pp. 121–152.

Czapliński, Władysław, “Concepts of *Jus Cogens* and Obligations *Erga Omnes* in International Law in the Light of Recent Developments”, *Polish Yearbook of International Law*, Vol. 23, 1997–1998, pp. 87–97.

d’Argent, Pierre, “Obligations internationales”, *Recueil des Cours*, Vol. 417, 2021, pp. 9–210.

de Hoogh, A.J.J., “Australia and East Timor: Rights *Erga Omnes*, Complicity and Non-recognition”, *Australian International Law Journal*, 1999, pp. 63–90.

de la Rasilla del Moral, Ignacio, “Nihil Novum Sub Sole Since the South West Africa Cases? On *Ius Standi*, the ICJ and Community Interests”, *International Community Law Review*, Vol. 10, No. 2, 2008, pp. 171–197.

de Wet, Erika, “Invoking Obligations *Erga Omnes* in the Twenty-first Century: Progressive Developments since Barcelona Traction”, *South African Yearbook of International Law*, Vol. 38, 2013, pp. 1–19.

de Wet, Erika, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, *Leiden Journal of International Law*, Vol. 19, No. 3, 2006, pp. 611–632.

Echaide, Javier, “Sobre el derecho humano al agua y la fragmentación del derecho internacional: El régimen internacional de protección de inversiones vis-a-vis las obligaciones *erga omnes* en materia de derechos humanos”, *Revista Electrónica del Instituto de Investigaciones Jurídicas y Sociales Ambrosio Lucas Gioja*, Vol. 12, 2014, pp. 140–162.

Fasia, Eirini-Erasmia, “No Provision Left Behind – Law of the Sea Convention’s Dispute Settlement System and Obligations *Erga Omnes*”, *The Law and Practice of International Courts and Tribunals*, Vol. 20, No. 3, 2021, pp. 519–547.

Ferolla, M., “O Esgotamento dos Recursos Internos e a Proteção de Obrigações de Direitos Humanos *Erga Omnes partes* perante a corte international de justiça. Considerações sobre legitimidade processual no julgamento das exceções preliminares em Ucrânia v. Rússia”, *Revista Da Faculdade de Direito Da UERJ*, Vol. 37, 2020, pp. 200–218.

Figueredo Corrales, René, “In the Pursuit of High Purposes: The International Court of Justice, Obligations *Erga Omnes* and the Prohibition of Genocide”, *The Law and Practice of International Courts and Tribunals*, Vol. 22, No. 1, 2023, pp. 62–89.

Frowein, Jochen A., “Reactions by Not Directly Affected States to Breaches of Public International Law”, *Recueil des Cours*, Vol. 248, 1994, pp. 345–437.

Gaja, Giorgio, “Obligations and Rights *Erga Omnes* in International Law: First Report”, *Institut de droit international, Annuaire*, Vol. 71, Pt. I, Session of Krakow, 2005 – First Part, pp. 119–151.

Gaja, Giorgio (Délibérations de l'Institut en séances plénières), "Obligations and Rights *Erga Omnes* in International Law", *Institut de droit international, Annuaire*, Vol. 71, Pt. II, Session of Krakow, 2005 – Second Part, pp. 81–137.

Gaja, Giorgio, "The Protection of General Interests in the International Community", *Recueil des Cours*, Vol. 364, 2012, pp. 9–186.

Galindo, George Rodrigo Bandeira, "O crime compensa? Acerca da viabilidade da noção de crimes internacionais no Direito Internacional" ["Is Crime Worth it?: On the viability of the notion of crimes international law"], *Revista de Informação Legislativa*, a. 37, n. 147, jul./set. 2000, pp. 201–227.

Galvão Teles, Patrícia, "Obligations *Erga Omnes* in International Law", *Revista Jurídica da Associação Académica da Faculdade de Direito de Lisboa*, Vol. 20, 1996, pp. 73–137.

García San José, Daniel, "La humanidad como catalizadora de obligaciones *omnium* et *erga omnes* en la lucha contra el cambio climático", *Revista electrónica de estudios internacionales*, 2022 (43), pp. 1–27.

Garciandia, Rosana; Gauci, Jean-Pierre, "Inter-State Communications before UN Human Rights Treaty Bodies: Testing the Waters for Collective Communications", *International Human Rights Law Review*, Vol. 13, No. 1 (2024), pp. 160–189.

Gareau, Jean-Francois, "Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", *Leiden Journal of International Law*, Vol. 18, No. 3, 2005, pp. 489–521.

Gazzini, Tarcisio, "The Legal Nature of WTO Obligations and the Consequences of their Violation", *European Journal of International Law*, Vol. 17, No. 4, 2006, pp. 723–742.

Gazzini, Tarcisio, "Il contributo della Corte internazionale di giustizia al rispetto degli obblighi *erga omnes* in materia di diritti umani", *Comunità internazionale*, Vol. 55, No. 1, 2000, pp. 19–62.

Gowlland-Debbas, Vera, "Palestine as a Matter of International Community Concern: John Dugard's Work as Special Rapporteur", *South African Journal on Human Rights*, Vol. 26, No. 2, 2010, pp. 246–271.

Hachem, Alaa; Hathaway, Oona A.; Cole, Justin, "A New Tool for Enforcing Human Rights: *Erga Omnes Partes* Standing", *Columbia Journal of Transnational Law*, Vol. 62, No. 2, 2024, pp. 259–330.

Hamid, Abdul Ghafur, "The Rohingya Genocide Case (The Gambia v Myanmar): Breach of Obligations *Erga Omnes Partes* and the Issue of Standing", *IIUM law Journal*, Vol. 29, No. 1, 2021, pp. 29–54.

Hernández, G.I., "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'", *British Year Book of International Law*, Vol. 83, 2012, pp. 13–60.

Huang, Jiefang, "Aviation Safety, ICAO and Obligations *Erga Omnes*", *Chinese Journal of International Law*, Vol. 8, No. 1, 2009, pp. 63–79.

Huesa Vinaixa, Rosario, "Una controversia bilateral con dimensión multilateral: cuestiones de jurisdicción y de *ius standi* en el asunto Gambia c. Myanmar (medidas provisionales)", *Revista electrónica de estudios internacionales*, Vol. 39, 2020, pp. 1–41.

Hutchinson, D.N., "Solidarity and Breaches of Multilateral Treaties", British Year Book of International Law, Vol. 59, 1988, pp. 151–215.

今岡奏帆 [Imaoka, Kanaho],「条約上の共通利益侵害に基づく ICJ 訴訟の焦点」["Possibilities and Limitations of the ICJ Procedure in Promoting Common Interests Protected by Multilateral Treaty Regimes"],『国際関係論研究』[*Studies on International Relations*], Vol. 33, 2018, pp. 1–25.

石塚智佐 [Ishizuka, Chisa],「国際司法裁判所における原告適格拡大の論理構造－管轄権基礎からみた民衆訴訟の可能性－」["Expansion of Standing before the

International Court of Justice: Possibility of *actio popularis* in terms of the Basis of the Court's Jurisdiction"],『世界法年報』[*Yearbook of World Law*], No. 35, 2016, pp. 64–87.

Islam, Md. Rizwanul, "Not an Overreach of the Court's Jurisdiction, Putting *Erga Omnes* into Motion: In Partial Response to Xiao Mao's Comment on the ICJ's Judgment on the Preliminary Objections in *The Gambia v. Myanmar*", *Chinese Journal of International Law*, Vol. 21, No. 3, 2022, pp. 611–616.

Iwasawa, Yuji, "WTO Dispute Settlement as Judicial Supervision", *Journal of International Economic Law*, Vol. 5, No. 2, 2002, pp. 287–306.

Jackson, Miles; Paddeu, Federica I., "The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?", *American Journal of International Law*, Vo. 118, No. 2, 2024, pp. 231–274.

Kattan, Victor, "The Wall, Obligations *Erga Omnes* and Human Rights: The Case for Withdrawing the European Community's Terms of Preferential Trade with Israel", *The Palestine Yearbook of International Law*, Vol. 13, 2004–2005, pp. 71–89.

Kavanagh, Rebecca, "Oil in Troubled Waters: The International Court of Justice and East Timor: *Case Concerning East Timor (Australia v Portugal)*", *The Sydney Law Review*, Vol.18, No. 1, 1996, pp. 87–96.

Kawano, Mariko, "Standing of a State in the Contentious Proceedings of the International Court of Justice", *Japanese Yearbook of International Law*, Vol. 55, 2012, pp. 208–236.

川崎恭治 [Kawasaki, Kyoji],「国際法における *erga omnes* な義務 (1)」["Obligations *Erga Omnes* on International Law (1)"],『一橋研究』[*Hitotsubashi Journal of Social Science*], Vol. 11, No. 4, 1987, pp. 15–27.

Kawasaki, Kyoji, "A Brief Note on the Legal Effects of Jus Cogens in International Law", *Hitotsubashi Journal of Law and Politics*, Vol. 34, 2006, pp. 27–43.

김석현 [Kim Seokhyun], 국가공동체의 근본이익 침해에 대한 국가책임의 추궁 ["Invocation and Implementation of the State Responsibility for Violations of the Fundamental Interests of the International Community"], 국제법학회논총 [*Korean Journal of International Law*], Vol. 63, No. 4, 2018, pp. 157–196.

Kremnev, Petr P., "Generally Recognized Principles and Norms of *Jus Cogens* and *Erga Omnes* Obligations: Legal Nature and Hierarchy in the Russian Legal System", *Vestnik of Saint Petersburg University Law*, Vol. 12, No. 3, 2021, pp. 783–802.

廖雪霞 [Liao, Xuexia], "'对国际社会整体的义务'与国际法院的管辖──以'冈比亚诉缅甸违反《防止及惩治灭绝种族罪公约》案'为切入点" ["'Obligations *Erga Omnes*' and Its Application in Contentious Proceedings before the International Court of Justice"], ≪国际法研究≫ [*Chinese Review of International Law*], Iss. 6, 2020, pp. 26–42.

Lilienthal, Gary; Ahmad, Nehaluddin, "*Communis Opinio* and *Jus Cogens*: A Critical Review on Pro-Torture Law and Policy Argument", *Journal of East Asia and International Law*, Vol. 10, No. 2, 2017, pp. 379–399.

Lim, C.L.; Mitchell, Ryan Martínez, "Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations", *International and Comparative Law Quarterly*, Vol. 72, Pt. 2, 2023, pp. 361–391.

Linderfalk, Ulf, "International Legal Hierarchy Revisited — The Status of Obligations *Erga Omnes*", *Nordic Journal of International Law*, Vol. 80, No. 1, 2011, pp. 1–23.

Longobardo, Marco, "Genocide, Obligations *Erga Omnes*, and the Responsibility to Protect: Remarks on a Complex Convergence", *International Journal of Human Rights*, Vol. 19, No. 8, 2015, pp. 1199–1212.

Longobardo, Marco, "The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*" *Journal of Conflict & Security Law*, Vol. 23, No. 3, 2018, pp. 383–404.

Longobardo, Marco, “The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond”, *International Community Law Review*, Vol. 24, No. 5, 2022, pp. 476–506.

Mao, Xiao, “Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v. Myanmar* Case”, *Chinese Journal of International Law*, Vol. 21, No. 3, 2022, pp. 589–610.

McGarry, Brian, “Obligations *Erga Omnes (Partes)* and the Participation of Third States in Inter-State Litigation”, *The Law and Practice of international Courts and Tribunals*, Vol. 22, No. 2, 2023, pp. 273–300.

Memeti, Ardit; Nuhija, Bekim, “The Concept of *Erga Omnes* Obligations in International Law”, *New Balkan Politics*, Vol. 14, 2013, pp. 31–47.

Moraes, Patricia Almeida de; Britto, Marcella Oldenburg Almeida, “O envolvimento de empresas em violações de Direitos Humanos e o efeito *erga omnes* das decisões da Corte Interamericana de Direitos Humanos”, *Revista brasileira de políticas públicas*, Vol.11, No. 2, 2021, pp. 856–870.

Morelli, Gaetano, “A proposito di norme internazionali cogenti”, *Rivista di diritto internazionale*, Vol. 51, 1968, pp. 108–117.

Naldi, Gino J, “Self-Determination in Light of the International Court of Justice’s Opinion in the *Chagos* Case”, *Groningen Journal of International Law*, Vol. 7, No. 2, 2020, pp. 216–235.

Papa, Maria Irene, “Protezione diplomatica, diritti umani e obblighi *erga omnes*”, *Rivista di diritto internazionale*, Vol. 91, No. 3, 2008, pp. 669–737.

박병도 [Park Byung-do], 국제법상 대세적 의무에 관한 연구 [“A Study on Obligations Erga Omnes in International Law”], 일감법학 [*Ilkam Law Review*], Vol. 40, 2018, pp. 98–128.

Pauwelyn, Joost, “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?”, *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. 907–951.

Payne, Cymie R., “Negotiation and Dispute Prevention in Global Cooperative Institutions: International Community Interests, IUU Fishing, and the Biodiversity Beyond National Jurisdiction Negotiation”, *International Community Law Review*, Vol. 22, Nos. 3–4, 2020, pp. 428–438.

Pegna, Olivia Lopes, “Counter-claims and Obligations *Erga Omnes* before the International Court of Justice”, *European Journal of International Law*, Vol. 9, No. 4, 1998, pp. 724–736.

Perlo, Nicoletta, “L’attribution des effets *erga omnes* aux arrêts de la Cour européenne des droits de l’homme en Italie: la révolution est en marche”, *Revue française de droit constitutionnel*, Vol. 104, No. 4, 2015, pp. 887–910.

Picone, Paolo, “Gli obblighi *erga omnes* tra passato e futuro”, *Rivista di diritto internazionale*, Vol. 98, No. 4, 2015, pp. 1081–1108.

Picone, Paolo, “La distinzione tra norme internazionali di *jus cogens* e norme che producono obblighi *erga omnes*”, *Rivista di diritto internazionale*, Vol. 91, No. 1, 2008, pp. 5–38.

Picone, Paolo, “Obblighi *erga omnes* e codificazione della responsabilità degli Stati”, *Rivista di diritto internazionale*, Vol. 88, No 4, 2005, pp. 893–954.

Piemonte, P., “Fundamento Epistemológico das obrigações *erga omnes* no direito internacional público”, *Revista de Direito Internacional E Globalização Econômica*, Vol. 11, No. 11, 2023, pp. 1–17.

Pratap, Ravindra, “The Role of ICJ Procedure in the Emergence and Evolution of *Erga Omnes* Obligations”, *The Global Community Yearbook of International Law and Jurisprudence*, 2019, 2020, pp. 211–242.

Proulx, Vincent-Joël, “The Marshall Islands Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?”, *AJIL Unbound*, Vol. 111, 2017, pp. 96–101.

Proulx, Vincent-Joël, “The World Court’s Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes”, *Leiden Journal of International Law*, Vol. 30, No. 4, 2017, pp. 925–946.

Quirico, Ottavio, “Environmental Rights and Climate Rights: *Erga Omnes* Obligations in International Law and EU Law?”, *Hungarian Yearbook of International Law and European Law*, Vol.10, 2022, pp. 104–115.

Rana, Prajwol Bickram, “An Analysis of Principle of *Erga Omnes Partes* with Special Reference to the Case of *Belgium v. Senegal*, 2012”, *Kathmandu School of Law Review*, Vol. 6, No. 1, 2018, pp. 193–198.

任虎 [Ren, Hu], “国际强行法和普遍义务关系之争论及其辨析” [“The Debate and Identification on the Relationship between *Jus Cogens* and Obligations *Erga Omnes*”], ≪中国政法大学学报≫ [*Journal of China University of Political Science and Law*], Iss. 1, 2021, pp. 66–80.

Rest, Alfred, “State Responsibility/Liability: *Erga Omnes* Obligations and Judicial Control”, *Environmental Policy and Law*, Vol. 40, No. 6, 2010, pp. 298–307.

Robson, Verity, “The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions”, *Journal of Conflict & Security Law*, Vol. 25, No. 1, 2020, pp. 101–115.

Rose, Cecily, “Enforcing the ‘Community Interest’ in Combating Transnational Crimes: The Potential for Public Interest Litigation”, *Netherlands International Law Review*, Vol. 69, No. 1, 2022, pp. 57–82.

Rose, Cecily, “Symposium: Public Interest Litigation at the International Court of Justice: Introduction”, *The Law and Practice of international Courts and Tribunals*, Vol. 22, No. 2, 2023, pp. 229–233.

Rowhani, Mohsen, “Rights-based Boundaries of Unilateral Sanctions”, *Washington International Law Journal*, Vol. 32, No. 2, 2023, pp. 127–168.

Rubin, Alfred P., “*Actio Popularis*, *Jus Cogens* and Offenses *Erga Omnes*?”, *New England Law Review*, Vol. 35, No. 2, 2001, pp. 265–280.

Ruys, Tom, “Legal Standing and Public Interest Litigation – Are All *Erga Omnes* Breaches Equal?”, *Chinese Journal of International Law*, Vol. 20, No. 3, 2021, pp. 457–498.

Sachariew, K., “State Responsibility for Multilateral Treaty Violations: Identifying the ‘Injured State’ and Its Legal Status”, *Netherlands International Law Review*, Vol. 35, Issue 3, 1988, pp. 273–289.

Šaltinytė, Loreta, “Ar tarptautinė paprotinė teisė įtvirtina įsipareigojimą *erga omnes* vykdyti baudžiamąjį persekiojimą dėl sunkių žmogaus teisių pažeidimų” [“Customary international law establishes an *erga omnes* obligation to prosecute serious human rights violations”], *Jurisprudencija [Jurisprudence]*, Vol. 79, No. 1, 2006, pp. 113–127.

Saul, Matthew, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?”, *Human Rights Law Review*, Vol. 11, No. 4, 2011, pp. 609–644.

Scobbie, Iain, “Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* for the Responsibility of the UN for Palestine”, *European Journal of International Law*, Vol. 16, No. 5, 2005, pp. 941–961.

Shah, Sangeeta, “Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*)”, *Human Rights Law Review*, Vol. 13, No. 2, 2013, pp. 351–366.

Shchokin, Yu. V., “Prizvanie k otvetstvennosti gosudarstva za narushenie objazatel’stv v otnoshenii mezhdunarodnogo soobshhestva v celom” [“State Responsibility for Violation of Obligations Owed to the International Community as a Whole”], *Problemi zakonnostì [Problems of Legality]*, 2021 (154), pp. 274–287.

Shigeta, Yasuhiro, “Obligation to protect the environment in the ICJ’s Practice: To What Extent *Erga Omnes*?”, *Japanese Yearbook of International Law*, Vol. 55, 2012, pp. 176–207.

Sicilianos, Linos-Alexander, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility”, *European Journal of International Law*, Vol. 13, No. 5, 2002, pp. 1127–1145.

Simma, Bruno, “From Bilateralism to Community Interest in International Law”, *Recueil des Cours*, Vol. 250, 1994, pp. 217–384.

Simonen, Katariina, “Internal Conflicts and Protection of Fundamental Human Rights as an Obligation *Erga Omnes*”, *Finnish Yearbook of International Law*, Vol. 10, 1999, pp. 191–208.

Stern, Brigitte, “Et si on utilisait le concept de préjudice juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États”, *Annuaire français de droit international*, tome 47, 2001, pp. 3–44.

Stolz, Sheila, “Algunas acotaciones sobre el carácter inviolable o absoluto (*erga omnes*) de los derechos humanos”, *Revista direitos fundamentais & democracia*, Vol. 3, No. 3, 2008, pp. 1–14.

Stremitzer, Alexander, “*Erga Omnes* Norms and the Enforcement of International Law”, *Journal of Institutional and Theoretical Economics*, Vol. 165, No. 1, 2009, pp. 1–4.

Tamada, Dai, “Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?”, *Journal of International Dispute Settlement*, Vol. 12, 2021, pp. 405–426.

Tamada, Dai, “War in Ukraine and the International Court of Justice: Provisional Measures and the Third-Party Right to Intervene in Proceedings”, *International Community Law Review*, Vol. 26, 2024, pp. 39–68.

Tams, Christian J.; Tzanakopoulos, Antonios, “Barcelona Traction at 40: The ICJ as an Agent of Legal Development”, *Leiden Journal of International Law*, Vol. 23, No. 4, 2010, pp. 781–800.

Tanaka, Yoshifumi, “Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011”, *Netherlands International Law Review*, Vol. 60, No. 2, 2013, pp. 205–230.

Tanaka, Yoshifumi, “Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea* Cases”, *The Law and Practice of International Courts and Tribunals*, Vol. 17, No. 3, 2018, pp. 527–554.

Tanaka, Yoshifumi, “The Legal Consequences of Obligations *Erga Omnes* in International Law”, *Netherlands International Law Review*, Vol. 68, No. 1, 2021, pp. 1–33.

Urs, Priya, “Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice”, *Leiden Journal of International Law*, Vol. 34, No. 2, 2021, pp. 505–525.

Urs, Priya, “The Elusiveness of ‘Interdependent Obligations’ and the Invocation of Responsibility for Their Breach”, *British Yearbook of International Law*, forthcoming, available at <https://doi.org/10.1093/bybil/brae006>.

Vadapalas, Vilenas, “L’intérêt pour agir en responsabilité internationale”, *Polish Yearbook of International Law*, Vol. 20, 1993, pp. 17–35.

Vermeer-Künzli, Annemarieke, “A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*”, *International and Comparative Law Quarterly*, Vol. 56, Pt. 3, 2007, pp. 553–582.

Viljoen, Frans, “Inter-State Complaints under the African Human Rights System: A Breeze of Change?”, *International Human Rights Law Review*, Vol. 13, No. 1, 2024, pp. 96–129.

Villalpando, Santiago, “The Legal Dimension of the International Community: How Community Interests are Protected in International Law”, *European Journal of International Law*, Vol. 21 (2), 2010, pp. 387–419.

Wolfrum, Rüdiger, “Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law”, *Recueil des Cours*, Vol. 416, 2021, pp. 9–479.

薛捍勤 [Xue, Hanqin], “国家责任与‘对国际社会整体的义务’” [“State Responsibility and ‘the Obligation *Erga Omnes*’”], ≪中国国际法年刊≫ [*Chinese Yearbook of International Law*], 2004, pp. 15–35.

薬師寺公夫 [Yakushiji, Kimio],「ヨーロッパ人権条約に於ける国家の申立権と国内的救済原則の適用可能性」[“Applicability of the Local Remedies Rule to Inter-State Disputes under the European Convention on Human Rights”],『神戸商船大学紀要・第 1 類・文化論集』 [*Review of Kobe University of Mercantile Marine, Part I, Studies in Humanities and Social Science*], No. 30, 1981, pp. 29–51.

薬師寺公夫 [Yakushiji, Kimio],「人権条約の下で国家が負う義務の特殊な性格が条約義務不履行に対する締約国の国家責任の内容と実施に及ぼす影響について（1）（2）」[“The Special Character of International Human Rights Obligations and its Potential Consequences for the Content and Implementation of State Responsibility (1) & (2)”],『立命館法学』 [*Ritsumeikan Law Review*], No. 403, 2022, pp. 529-558 and No. 404, 2022, pp. 469–511.

Zemanek, Karl, “New Trends in the Enforcement of *Erga Omnes* Obligations”, *Max Planck Yearbook of United Nations Law*, Vol. 4, 2000, pp. 1–52.

Annex IV

Legal aspects of accountability for crimes committed against United Nations personnel serving in peacekeeping operations

Mr. Bimal N. PATEL

A. Introduction

1. The concept of peacekeeping has developed through the practice of the United Nations and stands as one of its most positive and tangible contributions to the maintenance of international peace and security.[1] Peacekeepers often serve in complex and deteriorating security environments where they are targeted by hostile actors and face asymmetrical threats.[2] According to global peacekeeping data reports, there has been a notable escalation in fatalities resulting from malicious acts – the cumulative toll of UN personnel serving in peacekeeping killed due to malicious acts. Of the total 4,433 fatalities among UN peacekeeping personnel, 1,134 were due to malicious acts, while 1,410 resulted from accidents, 1,640 from illness, and 239 from other causes.[3] Most of those responsible for these crimes have yet to be brought to justice.

2. As the International Committee of the Red Cross (ICRC) observes, the offence of intentionally directing attacks against peacekeepers constitutes a crime under customary international law.[4] The international community—including UN Member States, the UN Security Council, and the UN Secretary-General—has repeatedly expressed serious concerns about the challenges in bringing to justice the perpetrators of crimes that have been committed against UN peacekeeping personnel. The low rate of prosecution of such crimes keeps contributing to an environment of impunity and undermines the safety and security of

[1] The proposed topic is limited to Legal Aspects of Accountability for crimes committed against United Nations personnel serving in the peacekeeping operations. Accountability for Crimes committed by Peacekeepers is not within the scope of the proposed study. Noelle Higgins, "The Protection of United Nations and Associated Personnel", *Journal of Humanitarian Assistance*, Volume April 2003, p. 1. There is no jurisprudence defining the classification of "peacekeeping mission established in accordance with the Charter of the UN. Furthermore, although the topic focusses on UN personnel serving in peacekeeping operations, the study will inevitably draw law and practices (including best practices and lessons) that are being available from the deployment of peacekeeping operations conducted by or with authority of regional organisations. Indeed, the state practice and jurisprudence of the African Union and NATO are important to understand and appreciate the applicability of the legal elements at global level in the context of the UN.

[2] UN General Assembly, *Report of the Secretary-General on the implementation of the recommendations of the special committee on peacekeeping operations* (A/77/573), (1 November 2022), para. 59.

[3] Every troop and police contributing country is concerned about the crime committed against UN personnel serving peacekeeping operations and have been advocating the safety and security of peacekeepers. While paying tribute to 43 Norwegian peacekeepers, Jean-Pierre Lacroix, Under Secretary-General appreciated Norway's efforts in supporting national authorities in their fight against impunity. Statement of Jean-Pierre Lacroix 22 March 2023. To 'measure the crimes committed' various information technology related initiatives including the Database by Group of Friends can be leveraged to study such crimes in order to establish a comprehensive legal framework to combat crimes against UN peacekeeping personnel. See UN Peacekeeping, Global peacekeeping data: fatalities by year and incident type up to 23 May 2025, available at https://peacekeeping.un.org/sites/default/files/stats_by_year_incident_type_5_111_may_2025.pdf.

[4] ICRC, Rule 33, Customary International Humanitarian Law Data Base. It is mentioned that as per ICRC, the offence of intentionally directing attacks against peacekeepers constitutes a crime under international law, whereas whether this can be confirmed is a matter that can be determined through examination of state practice and jurisprudence. The study aims to prepare guidelines which will render customary norm distinct and readily accessible to users. Accordingly, courts and tribunals, UN system, field missions, practitioners will find the draft guidelines more immediately useful.

personnel.[5] The rising impunity affects 123 troop and police contributing countries and adversely impacts peacekeeping, "which is an expression of international solidarity and one of the most effective tools available to the United Nations in the promotion and maintenance of international peace and security".[6] To prevent aggravation of this trend and ensure fulfilment of the mandate of the maintenance of international peace and security, the Security Council unanimously adopted Resolution 2589 (2021), co-sponsored by more than 80 member States, on strengthening accountability for crimes committed against peacekeepers. The Council called for a renewed focus on measures to bring to justice the perpetrators of such acts.[7] This study proposal derives its purpose and scope from the UNSC Resolution 2589 (2021) and the voice of the member States and the UN leadership expressed over the years at various forums.

3. Special Committee on Peacekeeping Operations (C-34),[8] General Assembly,[9] Security Council,[10] and the Secretary-General[11] have strongly condemned targeted attacks against United Nations peacekeeping personnel (i.e., UN personnel serving in peacekeeping operations) and all acts of violence against such personnel. In line with these concerns, the Secretary-General has launched the Action for Peacekeeping (A4P) and Action for Peacekeeping+ (A4P+) initiatives,[12] which emphasize seven key priorities, including placing accountability at the core of collaborative efforts to combat impunity.[13] The High-Level Meetings of the Group of Friends to Promote Accountability for Crimes Against Peacekeepers also featured a substantive discussion on providing legal frameworks to support the concept of accountability for crimes against UN peacekeeping personnel.[14]

4. Since 1948, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace and security. This transition from 'traditional UN peacekeeping operations' (conducted with the consent of the parties to a conflict, usually States, in which "Blue Helmets" monitor a truce between warring sides while mediators seek a political solution to the underlying conflict) such as the two observation and monitoring-based peacekeeping operations established in the late 1940s to the contemporary robust peacekeeping such as Multidimensional Integrated Stabilization Mission in Mali **(**MINUSMA), United Nations Organization Mission in Democratic Republic of the Congo (MONUSCO), United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

[5] UN Security Council, *S/RES/2589 on safety and security of peacekeepers*, (18 August 2021), page 02. In 1996, the Commission emphasized the special responsibility of the international community to effectively investigate and prosecute such crimes, as highlighted in the proposal. Therefore, peacekeeping operations and crimes against peacekeepers stand out as a separate and important issue that needs to be specifically addressed.

[6] UN Security Council, *S/RES/2518(2020)*, (30 March 2020), page 01.

[7] Report of the UN Secretary General, see Supra note 3, para. 70.

[8] UN General Assembly, *Report of the Special Committee on Peacekeeping Operations.* See Paras: 187 of A/77/19 (2023), 151 of A/75/19 (2021); 35 of A/72/19 (2018); 36 of A/69/19 (2015); 33 of A/64/19 (2010); 113 of A/54/839 (2000); 55 of A/51/130 (1996).

[9] UN General Assembly, *A/RES/47/120B An Agenda for Peace*, (20 April 1993), page 5, available at https://digitallibrary.un.org/record/174286?ln=en, last accessed on 11 July 2023.

[10] UN Security Council, *S/RES/2436 on developing a comprehensive and integrated performance policy framework for UN peacekeeping operations*, (21 September 2018), page 01.

[11] UN General Assembly & Security Council, *S/2015/682 The future of United Nations peace operations: implementation of the High-level Independent Panel on Peace Operations*, (2 September 2015), para 103. *Also see* para. 66 of the *An Agenda for Peace: Preventive diplomacy, peace-making, and peacekeeping*.

[12] Canada, Australia and New Zealand, while welcoming A4P+ focus on accountability to peacekeepers, emphasized that "these peacekeepers deserve and demand a process that fairly and promptly investigates and prosecutes perpetrators crimes and attacks against peacekeepers, in order to prevent future loss…ech[oes] the call for more action to address impunity for crimes against peacekeepers". Statement by H.E Craig Hawke, Permanent Representative of New Zealand, dated 20 October 2021.

[13] UN, *Action for peacekeeping+: priorities for 2021-23*, page 05.

[14] The Group of Friends includes 49 member States and regional organisations including Bangladesh, Nepal, Brazil, China, Indonesia, Russia, Rwanda, USA, UK, France, Germany, Japan, Morocco, South Africa, Pakistan, India, Egypt, Ethiopia, League of Arab States, among others.

(MINUSCA), requires an examination of international law protection entitled to UN peacekeeping personnel. The evolution of peacekeeping has given rise to an array of complexities in the application of governing international law and these legal gaps can be filled through examination of state practice, precedents, jurisprudence and emerging doctrine. This legal study, the first of its kind dedicated to the cause and mission of UN peacekeeping personnel, will address the needs, interests and concerns of Troop Contributing Countries in general as well as the UN membership.

B. Gaps in the Existing Legal Framework

5. December 9, 1994, marked a historic day with the adoption of the Convention on the Safety of UN and Associated Personnel ("the Safety Convention").[15] This milestone addressed a crucial gap in international law—the absence of legal remedies or instruments for forces engaged in traditional non-combatant peacekeeping functions. The scope of the Convention was expanded by the 2005 Optional Protocol to extend protection to personnel involved in "humanitarian, political or development assistance in peacebuilding" or "emergency humanitarian assistance".[16] It is crucial to highlight the 'reason for review' aimed to encompass the 'evolving responsibilities' undertaken by peace operations, specifically in the context of humanitarian efforts.

6. Two decades have elapsed since the last review on the scope of legal protection under the Safety Convention and the Protocol. During this period, peace operations have undergone a rapid evolution, shifting from 'traditional peacekeeping' to 'multidimensional operations' with increasingly robust mandates.[17] The period has also witnessed a notable escalation in overall fatalities, including those resulting from malicious acts, 488 fatalities between 2005 and 2025.[18] Taking note of the evolution of peace operations, it is imperative to recognize the emerging trends in peace operations, underscoring the necessity for a review of the legal aspects of accountability for crimes against the UN peacekeeping personnel.

7. **The grey areas: The blurred distinction between various forms of peace operations** The 'UN Peacekeeping Operations: Principles and Guidelines' acknowledges that the boundaries between conflict prevention, peace-making, peacekeeping, peacebuilding and peace enforcement have become increasingly blurred and UN peacekeeping personnel are at the greatest risk in such operations.[19] The grey area is further broadened by the novel concept 'robust peacekeeping' which involves the use of force at the tactical level with the consent of the host authorities and / or the main parties to the conflict. Peace enforcement may involve the use of force at the strategic or international level, which is normally prohibited for member States under Article 2 (4) of the Charter unless authorized by the Security Council.[20] The Security Council gives "robust" mandates to UN peacekeeping operations, authorizing them to "use all necessary means" to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and / or, assist

[15] The 1994 Safety Convention was negotiated and adopted in the backdrop of attacks on UN personnel in Somalia, the former Yugoslavia and Rwanda. The relative speed with which the Convention was negotiated and concluded also led to a number of questions which remained ill-defined then. Even the 2005 Protocol continues to have lack of clarity and certainty flowing from the 1994 Convention.

[16] The debate highlights the need to bring legal clarity to various aspects of peace operations. ILC study is hence crucial to overcome legal challenges, and address the lack of legal certainty directly affects implementation of the Convention both in the international and domestic sphere.

[17] The study emphasizes that the legal regime applicable to UN peacekeeping missions no longer responds to the needs of contemporary peacekeeping missions operating in hostile environments and non-international armed conflict and fails to sufficiently protect peacekeepers.

[18] As of 2005, the total fatalities were 2228 and between 2005 and April 2025, the number of fatalities has increased from 2228 to 4423, i.e. 2195 fatalities in the last 20 years, almost double from between 1948 to 2005. https://peacekeeping.un.org/sites/default/files/stats_by_year_1_108_february_2025.pdf.

[19] United Nations Peacekeeping Operations, *Principles and Guidelines*, (March 2008) at page 18. The study intends to examine the evolution in detail, the current understanding and relevance of the Capstone doctrine and its impact on the protection of Peacekeepers.

[20] The topic examines the existence of legal gaps (both substantive and procedural issues) but does not aim to address the technical and operational aspects causing impunity.

the national authorities in maintaining law and order.[21] However, the issue that needs to be studied is whether the 'blurred distinction' or the 'grey area' results in the application of the appropriate law governing the protection of personnel involved. The issue of blurred distinction is evident in the Report of the International Commission of Inquiry for Mali which acknowledges asymmetric threats faced by MINUSMA and highlights the profound complexity of the status of MINUSMA under international humanitarian law, the difficulty of determining its exact status in the Malian armed conflict,[22] and the difficulty of accurately classifying the legal nature of the attacks against it. The Inquiry Commission noted that risk of MINUSMA being perceived by armed groups as participating in the armed conflict.[23]

8. **Need to clarify the International Humanitarian Law (IHL) protection entitled to the Peacekeepers engaged in contemporary Peacekeeping Operations and its extent:** UN peacekeeping operations do not fall within the category of international armed conflict, which as per definitions involve one or more States taking recourse to armed force against another State.[24] For example, situations may arise in which UN peacekeeping personnel are caught up in an armed conflict between states and subjected to attacks by members of one or more belligerent forces but the UN force does not itself become a party to an armed conflict. This case is different because the law of armed conflict makes almost no express provision for it, except for an indirect protection under Article 37(1)(d) of Protocol I to the Geneva Convention 1949, which prohibits the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not parties to the conflict. This provision clearly envisages that the United Nations and, by extension, UN peacekeeping personnel, enjoy "protected status"; however, the nature of that status and the rights and obligations which flow from it are not set out in the Protocol.[25]

9. Peacekeeping operations do not neatly fit into the traditional definition of non-international armed conflict either, which typically involves protracted armed violence between a state's armed forces and dissident or rebel groups, or between multiple non-state actors within a state that may not involve government troops. Indeed, UN peacekeeping operations may belong to a *sui generis* category, unless they are mandated to engage directly in hostilities. The proposed study aims to identify elements of distinction between UN peacekeeping acting under the mandate of the Security Council and in the interest of the international community, and state or non-state actors who pursue their own positions. Furthermore, scholarly findings suggest that the legal regime applicable to UN peacekeeping missions no longer responds to the needs of contemporary peacekeeping missions operating in hostile environments and non-international armed conflict and fails to sufficiently protect peacekeeping personnel.[26] UN officials and scholars have been suggesting the need for

[21] For instance, in connection with the situation in Abyei, the Council extended the tasks of the UN Interim Security Force for Abyei (UNISFA) as per paragraph 3 of resolution 1990 (2011), which included the authorization to take "necessary actions". Same goes for MINUSCA (Resolution 2659 (2022), para. 34), and MONUSCO (Resolution 2666 (2022), para. 22). Such authorizations, directly / indirectly touch upon the cornerstone of international law applicable to peacekeeping, especially international humanitarian law and the Safety Convention.

[22] The term "armed conflict," which is not defined in the 1949 Geneva Conventions, has generally been given a very broad interpretation. The prosecution and investigations by national authorities of the Central African Republic, Democratic Republic of Congo and Mali enable us to identify challenges, namely, political focus by the UN and states, limitation of law enforcement agencies, difficulty in evidence collection, capacity of state institutions, among others. Stéphane Jean, "Supporting National Justice and Security Institutions: The Role of UN Peace Operations," *UN Chronicle*, February 23, 2023.

[23] Report of the International Commission of Inquiry for Mali, S/2020/1332/ (19 June 2020) Para 829. Perpetrators use various means to target peacekeepers, in such cases, identifying the individual is very difficult. State rule of law institutions are absent in such places, so apprehending criminals is a challenge. It is also necessary that the domestic trials meet relevant international legal standards.

[24] ICRC case-study identifies several questions in this regard. https://casebook.icrc.org/case-study/convention-safety-un-personnel. This study supplements the existing legal analysis and aims to fill the gap by answering those questions on the basis of state practice and case-law.

[25] Christopher Greenwood, "Protection of Peacekeepers: The Legal Regime", *Duke Journal of Comparative and International Law*, vol. 7 (1996), pp. 185–190.

[26] Huw Llewellyn, "The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel", *International and Comparative Law Quarterly*, vol. 55, 2006, pp. 718–728;

protection to peacekeepers. For example, Stephen Mathias highlights jurisprudence from the Special Court for Sierra Leone to the International Criminal Court, wherein it has been held that 'personnel of peacekeeping missions are entitled to protection but will lose that protection if they take a direct part in military operations'. [27] Although focusing on international tribunals, MS Bangura highlights multiple challenges in prosecuting perpetrators of crimes against peacekeepers – loss of evidence over time, difficulty in securing witnesses, restricted access to UN-held evidence, high evidentiary burden, political and diplomatic sensitivities among other challenges.[28] Role, limitation and importance of the 1994 Safety Convention and its effectiveness in protecting peacekeepers from attacks is appreciable. Under Articles 7 and 11, State Parties have specific obligations to protect peacekeepers and criminalize any attacks against them in their domestic laws.[29] Nevertheless, the international community is well aware of several drawbacks of the Convention – difficulty in determining the applicability of the Convention, limited scope of protection (does not apply to enforcement missions), reluctance of States to recognize 'armed conflict,' and difficulty in enforcing State obligations.[30] To elucidate the legal framework governing robust mandates that authorize peacekeepers' involvement in active military operations beyond the traditional 'self-defence' and 'defence of mandate' exception, it is imperative to examine the interplay among *jus ad bellum*, *jus in bello*, *jus post bellum*, and peacetime international law.[31] A crucial question arises as to whether engaging in the *defence of mandate* amounts to participating in hostilities, which could potentially result in the loss of the protected status of peacekeepers. "The responsibility for working out whether a situation is governed by the Safety Convention regime or international humanitarian law will lie with the commanders and soldiers in the field, and the criteria on which they must rely are ill defined and probably unworkable in practice. It is difficult to know what regime is applicable to a situation, such as Somalia, in which the Geneva Conventions were stated not to apply, yet the UN forces viewed "everyone on the ground in that vicinity [as] a combatant."[32] In this context, it is imperative to pay attention to proposal made by Costa Rica in the Sixth Committee, supported by Sierra Leone and Switzerland which recognised the need to clarify the respective areas of application of international humanitarian law and of the Safety Convention and the Protocol, so as to avoid any imbalances in protection and to fill any gaps.[33]

Thierry Kaiser & Carlijin Ruers, The application of international humanitarian law to peacekeepers, available at https://doi.org/10.1163/1875fa4112-20210004.

[27] Stephen Mathias, 'UN Peacekeeping Today: Legal Challenges and Uncertainties' (2017) 18 *Melbourne Journal of International Law* 13.

[28] BANGURA, M.A. (2010) 'Prosecuting the Crime of Attack on Peacekeepers: A Prosecutor's Challenge', Leiden Journal of International Law, 23(1), pp. 165–181. doi:10.1017/S0922156509990379.

[29] Article 7 concerning 'Duty to ensure the safety and security of United Nations and associated personnel' and article 11 concerning 'Prevention of crimes against United Nations and associated personnel'.

[30] Siobhan Wills, 'The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (2003) Human Rights Brief, Volume 10, Issue 2.

[31] Marco Longobardo, *Robust peacekeeping mandates: an assessment in light of jus post bellum*, Oxford Academic, available at https://academic.oup.com/book/39643/chapter/339611114.
Alice Gadler, The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection (CUP 2010 – German Law Journal).

[32] Sara Lindberg Bromley, 'Hazards of Peacekeeping: Peacekeepers as Targets of Violence', in *Handbook on Peacekeeping and International Relations* (Edward Elgar Publishing, December 2022), pp. 300-313 quoted in Siobhán Wills, "The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", 10 *Human Rights brief* 2, 2003, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1407&context=hrbrief.

[33] General Assembly official records, 60th session: 61st plenary meeting, (A/60/PV.61) 8 December 2005. *Also see* Summary record of the 9th meeting: 6th Committee, held at Headquarters, New York, on Thursday, 20 October 2005, General Assembly, 60th session (A/C.6/60/SR.9) Summary record of the 8th meeting: 6th Committee, held at Headquarters, New York, on Wednesday, 19 October 2005 (A/C.6/60/SR.8).

10. **Absence of Substantive Law on Crimes Committed Against Peacekeepers**: The 2023 report of the International Peace Institute,[34] centred on three specific priority missions outlined by the UN Secretariat: MINUSCA, MINUSMA and MONUSCO.[35] These missions were selected as priority missions due to their significant exposure to a high number of attacks. The report put forth a recommendation to foster the development of a common definition of crimes against peacekeepers and encouraged legal clarity on the nature of crimes against peacekeepers. Similarly, various discourses held in connection with the Peacekeeping Ministerial Meeting in Accra, Ghana in December 2023, led to important conclusions that,

a. while the Safety Convention does define certain crimes, it does not encompass contemporary threats like disinformation or misinformation campaigns, which indeed jeopardize the safety and security of peacekeeping personnel,

b. establishment of a consistent and clear definition or the elements constituting a crime against peacekeeping is essential, and

c. progressive development of norms based on evolving state and UN practices concerning national and international legal frameworks addressing evolving challenges is required.[36]

11. **Illustration of legal challenges faced by conflict-affected States**: An instance of a gap in substantive criminal law in domestic sphere is an issue evident in the letter dated 12 June 2000, written to the President of the Security Council by the President of Sierra Leone requesting the former to consider establishing a Special Court to try and bring to justice the perpetrators responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages. The letter stated that "Sierra Leone does not have the resources or expertise to conduct trials for such crimes. Also, there are gaps in Sierra Leonean criminal law as it does not encompass such heinous crimes as such as the crimes against humanity and some of the gross human rights abuses committed."[37] This letter holds historic significance as it led to the establishment of the Special Court of Sierra Leone. Subsequently, its judgments became the first to specifically address the nature and scope of crimes against peacekeepers. The letter is also significant as it evidences the challenges faced by conflict-affected states in investigating and prosecuting heinous crimes including the lack of an effective criminal law and criminal justice administration. The functioning of the Special Court for Sierra Leone (SCSL) had a direct impact on the functioning of the peacekeeping operations. It holds specific significance for this topic as it contributed to the broader field of international criminal law including attacks on peacekeepers, transnational justice mechanisms and challenges of implementing international criminal justice with the full support of the stakeholders.

12. **Challenges in Procedural Law Affecting Investigation and Prosecution:** An overview of the existing international legal framework applicable to the safety and security of the peacekeepers may be summarized as follows. First, Article 9 of the Safety Convention which provides for the definition of crimes against United Nations and associated personnel,

---

[34] International Peace Institute, *Accountability for crimes against peacekeepers*, (March 2023), available at https://www.ipinst.org/wp-content/uploads/2023/03/2303_Accountability-for-Crimes-Against-Peacekeepers.pdf, last accessed on 11 July 2023.

[35] In various cases, the mandate of the UN peacekeeping may expire, however, the life span of accountability cases goes beyond Mission mandates, and, therefore, there has to be continuity of UN support to prosecuting crimes against peacekeepers. Group of Friends, consisting of 49 states and international and regional organisations have been playing an important role in sensitizing the international community and advocating for the means, methods and mechanisms to address the accountability for crimes committed against UN peacekeeping personnel.

[36] UN Peacekeeping, *Preparatory Meeting of the 2023 UN Peacekeeping Ministerial Safety & Security of Peacekeepers Co-Hosted by Pakistan and Japan August 30 and 31, 2023, Islamabad*, page 3, available at https://peacekeeping.un.org/sites/default/files/peacekeeping_ministerial_safety_and_security_preparatory_meeting_summary_2023.pdf.

[37] UN Documents for Sierra Leone: Security Council Letters https://www.rscsl.org/Documents/Establishment/S-2000-786.pdf.

inter alia, obliges the State Parties to penalize the offence under domestic legislation.[38] Second, the United Nations does not have the authority or capacity to conduct criminal investigations in respect of alleged crimes committed against peacekeepers occurring in the host State's territory. Third, the United Nations may only conduct internal investigations for administrative purposes and does not have the legal authority to compel witnesses to cooperate in its investigations and there may be obstacles regarding the admissibility of United Nations investigation reports under the substantive and procedural criminal laws of member States.[39] Thus, under international law, States hosting United Nations peacekeepers have the right and the obligation to investigate and prosecute crimes committed within their territories against peacekeepers.[40] At the same time, this review shows several limitations. First, to the extent that the investigation of crimes against peacekeepers is conducted by different States in accordance with their relevant national laws, it is all the more difficult for the UN to propose the procedures set forth in the model memorandum of understanding, for general application in the investigation of such crimes.[41] Second, Article 9 and 10 of the Safety Convention are routinely incorporated into status-of-forces or status-of-mission agreements concluded by the UN with host countries.[42] Despite this, the lack of clarity regarding the point at which UN forces become combatants—due to an ill-defined threshold mechanism—effectively places control over their protection status in the hands of the very belligerent forces targeted by the UN mission. If attacks against UN forces remain at a low level with only a few people killed, then response by the peacekeepers is unlikely to be strong enough to cross the threshold above which the Safety Convention no longer applies. If, however, the peacekeepers are subjected to merciless and relentless attacks, they may be forced into self-defensive action that crosses that threshold. This separation between the Convention regime and humanitarian law regime seems unworkable.[43]

13. **Ratification Status of Safety Convention and Optional Protocol:** Safety Convention is not widely ratified for various reasons, as stated in the Sixth Committee.[44] First,

[38] Article 9 of *Convention on the safety of United Nations and associated personnel*: Article 9 Crimes against United Nations and associated personnel - (1) The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law. (2). Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

[39] International cooperation is inevitable to ensure effective investigation and prosecution of crimes against UN peacekeeping personnel. It is essential to ensure that legal impediments do not prevent such cooperation. The topic covers the principle of cooperation between peacekeepers agencies, host States, States sending peacekeepers and the UN agencies and clarification of the responsibility of each author.

[40] UN General Assembly, *A/66/598 Comprehensive report on all processes involved in the investigation and prosecution of crimes committed against deployed United Nations peacekeepers*, (09 December 2011), para. 3. *Also see:* UN General Assembly, *Article 10 of the Convention on Safety of United Nations and Associated Personnel*.

[41] UN General Assembly, *A/66/598 Comprehensive report on all processes involved in the investigation and prosecution of crimes committed against deployed United Nations peacekeepers*, (09 December 2011), paras. 32–34.

[42] *Ibid.* at para. 7.

[43] Mahnoush H. Arsanjani, *Convention on the Safety of United Nations and Associated Personnel*, UN Visual Library of International Law, available at https://legal.un.org/avl/pdf/ha/csunap/csunap_e.pdf.

[44] General Assembly 60th Session 61st Plenary Meeting 08 December 2005 A/60/PV.61 also see, Summary record of the 9th meeting: 6th Committee, held at Headquarters, New York, on Thursday, 20 October 2005, General Assembly, 60th session (A/C.6/60/SR.9) Summary record of the 8th meeting: 6th Committee, held at Headquarters, New York, on Wednesday, 19 October 2005 (A/C.6/60/SR.8). A brief summary of statements made by member States is given hereunder: 1. **Burkina Faso**: The growing number of attacks made it imperative to strengthen and **expand the scope of legal protection** under the Convention. 2. **Senegal**: Particular attention should be paid to the harmonization of that protocol with various international legal instruments, in particular the Geneva

as Brazil stated, the protection regime under the Convention involved sensitive legal and political issues and legal clarification was crucial for the implementation of the Convention in the domestic courts. Nigeria pointed out that the Convention, valuable though it was, had from the outset lacked universality, largely owing to serious concerns regarding its scope.[45] Some international engagements undertaken by the UN were not covered by the Convention, despite having serious security undertones. The Sixth Committee deliberations also highlight lack of clarity in defining key terms, which is crucial in applying applicable law. For instance, regarding the term 'peacebuilding', Iran (the Islamic Republic of) pointed out that different understandings and interpretations of member States of the term "peacebuilding" in the Protocol must seriously be taken into account.[46]

Conventions of 1949 and their additional protocols and the Rome Statute of the International Criminal Court. The future of peacekeeping, humanitarian assistance, technical and other missions carried out under the auspices of the UN would depend on the human, material and financial resources made available to the Organization, but it would also depend on the international community's ability to protect the personnel involved. Every effort should be made to guarantee the safety of those emissaries of peace and to ensure that the perpetrators of crimes against them did not go unpunished. 3. **Liechtenstein**: The risks to which UN and associated personnel were exposed appeared to have become greater, partly owing to the larger number of staff deployed but also **owing to the atmosphere of impunity** in some of the areas where they were deployed. 4. **Nigeria**: The Convention, valuable though it was, had from the outset lacked universality, largely owing to serious concerns regarding its scope. Some international engagements undertaken by the UN were not covered by the Convention, despite having serious security undertones. Action should therefore be expedited to draft an optional protocol that would address the inadequacies of the Convention. 5. **Guatemala:** The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973 established a broad protection regime for the persons in question. The principle of *aut dedere aut judicare* (obligation to extradite or prosecute) was fundamental to that regime, which was applicable to persons of the relevant status irrespective of whether or not they were in a high-risk location. UN and associated personnel at particular risk should be afforded a similar level of protection to that provided under the 1973 Convention. The scope of the Convention on the Safety of UN and Associated Personnel should therefore be broadened so as to ensure, as far as possible, that those who attacked the personnel in question did not escape justice. 6. **Namibia on behalf of the African Group:** The Group unequivocally condemned all acts that sought to, or actually did, undermine the safety and security of UN and associated personnel, which were crucial for the success of UN operations aimed at maintaining international peace and security. The Group believed that the Convention was an important tool for strengthening the legal protection regime, but that it continued to suffer from a lack of universality. Moreover, **UN and associated personnel participated in undertakings that had grave security consequences which the Convention did not address.** 7. **UK on behalf of the EU and 12 other countries**: The term 'peacebuilding' enshrined in paragraph 1(a) of article II of the Protocol is restricted to conflict or post-conflict situations. It was expressed that UN operations at any stage of the conflict cycle may be peacebuilding operations under the Protocol. Secondly, the Protocol extends the application of the 1994 Convention to all such UN operations, without reference to any trigger mechanism of risk or exceptional risk. 8. **Cuba**: We do not have a broadly accepted definition of the term peacebuilding, either in political doctrine or under international law. It is therefore now up to States to enact the national legislation necessary to implement the Convention and the Optional Protocol. The term however is not applicable in pre-conflict situations.

[45] The study identifies gaps in international law as well as blurring lines between various forms of peace operations and thus, the draft guidelines, based on the research, will have filled the gaps and be helpful to states at national level while dealing with cases at national level. The guidelines prepared at international level will tend to make space for the Commission to address norms that are at different stages of stability and consensus, as the current jurisprudence suggests. For example, the ILC Guide to Practice on **Reservations to Treaties** was characterized by the ILC as a "toolbox," which suggests opportunities for states to elect among the guidelines; the Guide also contains recommendations concerning best practices that are framed as suggestions rather than requirements. ILC **Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties** elaborated on its previous hard law project developing draft articles that became the Vienna Convention on Treaties. Similarly, the ILC guidelines on this topic will elaborate on the Safety Convention and Optional Protocol although these were not prepared by the ILC.

[46] The topic covers the study of the issue of legal clarity of terminology, the scope and absence of substantive criminal law.

14. The legal challenges to peacekeeping are real and these need to be addressed. These include the facts that threats to security of peacekeepers are constantly evolving, and there is growing need for the capabilities to counter them as well as need for strong commitment from member States and the UN to generate and sustain the capabilities that will help deliver the ambitious mandates, as highlighted by Jean-Pierre Lacroix, UN Under-Secretary-General for Peace Operations, during the 2023 UN Peacekeeping Ministerial in Ghana.[47]

C. The proposed topic fulfils the International Law Commission criteria for new topics

15. The topic fully satisfies fourfold criteria for selection of new topics as prescribed by the International Law Commission and one of the most important contributions of this topic is its **genuine practical value**.[48] First, the topic reflects the needs of States in respect of the progressive development of international law and its codification. Crimes against peacekeepers affects 123 troop and police contributing states and are of concern to the international community because "they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of humankind".[49] The expressed concern over the escalating incidents of malicious acts against United Nations peacekeeping personnel, as indicated in UNSC Resolution 2589,[50] demonstrates the political will and legal necessity to address the issue of impunity and actively promote accountability for crimes committed against these personnel. Strengthening the international legal framework on the safety and security of UN peacekeeping personnel would supplement the effort of Member States to promote accountability.[51]

16. Second, the topic is sufficiently advanced in terms of State practice to permit progressive development and codification. Prohibition of attacks on peacekeepers and crimes against peacekeepers is found in military manuals and domestic criminal codes of various

[47] https://ghana.un.org/en/254944-2023-un-peacekeeping-ministerial-usg-jean-pierre-lacroixs-opening-statement-behalf-secretary.

[48] International Law Commission, *Yearbook of the ILC 1997.* Vol II. Part II, at page 72.

[49] *Yearbook of the ILC 1996, vol. II (2)* at page 51.

[50] The Security Council since the adoption of the resolution 2589 (2021) on preventing crimes against UN Peacekeepers, has called upon the implementation of various aspects of this resolution consistently through resolutions 2594 (2021), 2612 (2022), 2618, 2625 (2022), 2628 (2022), 2640 (2022), 2659 (2022), 2666 (2022), 2674 (2023), 2709 (2023), 2717 (2023), 2723 (2024). This emphasis highlights the need as well as the gravity of situation and concern of the Security Council.

[51] The draft guidelines will help experts and practitioners whether and how to implement the decision instead of addressing political aims of the decision which are primarily in the purview of the legislative authorities. This can gradually lead to the evolution of norms based on that bottom-up practice. State actors have varied views on the Safety Convention and Optional Protocol, whereas the draft guidelines will be helpful to those who actually implement the peacekeeping, peacebuilding and peace enforcement mandate. Since hard-law instruments already exist, member States will be more favourable to draft guidelines and also the draft guidelines will not contribute in any manner to the fragmentation of international law in this area. The draft guidelines will find its utility, credibility and persuasive value among the important stakeholders. At the same time, the draft guidelines will have benefitted from state's consideration, analysis and input during the debates in the 6th Committee, Group of Friends, C34 and the Biannual Ministerial, among others.

States. [52] Attackers against peacekeeping personnel and objects have generally been condemned by States and no official contrary practice is found.[53]

17. Third, the topic is "concrete and feasible". The International Law Commission has acknowledged that, subject to fulfilment of requisite elements, "crimes against United Nations and associated personnel constitute crimes against peace and security of mankind."[54] Analysis of replies of questionnaires to member States, UN Department of Peace Operations, and relevant stakeholders will help to study and analyse state and international organisations' practice. Available open-source records of meetings among stakeholders—including the Group of Friends—raise several questions, such as: (i) Are there any standard operating procedures for handling cases of accountability? (ii) Do these procedures vary from mission to mission? (iii) Is there sufficient political support and advocacy for promoting accountability? (iv) What external challenges exist in promoting accountability, and are any policies being developed to address them? (v) Should all crimes against peacekeepers fall within the scope of accountability, not just those resulting in fatalities? (vi) What mechanisms exist to prosecute offenders after missions have concluded? (vii) How can Member States contribute to promoting accountability, and are there mission-level mechanisms to strengthen the capacities of host states? The emerging list of questions identified by states, UN Secretariat and field missions reinforce the urgency of the need to undertake examinations for the practical benefits of the states, UN, field missions and international community as a whole.

18. **Absolute pressing concerns of the international community, *inter alia*, UN member States, Troop Contributing Countries, UN Security Council, UN Secretary-General:** Fourth, the Commission can also consider those topics that reflect new developments in international law and pressing concerns of the international community. It is imperative to highlight the needs expressed by the States condemning attacks against UN peacekeeping personnel. As the proposed study has highlighted, the attacks against UN peacekeepers despite efforts of the international community, continue to remain a significant concern. The years 2024 and 2025 have witnessed killing and injury to UN peacekeeping personnel and have elevated the concerns of the UN Secretary-General, UN Under Secretary-General for Peacekeeping Operations, UN Security Council, Member States, the Troop Contributing Countries. The underlying need and concern singularly point to a direction of holding perpetrators accountable for crimes committed against the UN peacekeeping personnel. United Nations Interim Force in Lebanon (UNIFIL) witnessed killings and injury of the peacekeepers and associated personnel on 10 October, 11 October, 29 October, 7 November, 19 November, 22 November, 2024. **Two peacekeepers** from **Sri Lanka** were injured at UNIFIL headquarters on 10 October 2024. **Two peacekeepers** from **Indonesia** were **injured** after two explosions occurred close to an observation tower near the mission's base on 11 October 2024. **Eight peacekeepers** from **Austria** were wounded after a rocket hit UNIFIL headquarters in southern Lebanon on 29 October 2024.

---

[52] Article 9 of the Safety Convention requires all states which are parties to make the intentional commission of various attacks and hostile acts against UN or associated personnel crimes under their national law, in addition to their general duty to either extradite or try those accused of such offenses. United Kingdom: Section 1 of the UN Personnel Act 1997; Germany: Section 10 of the Act to Introduce the Code of Crimes against International Law, 2002; France: Article 461-12 of the Code penal 1992; South Africa: Section 8 (2)(b)(iii) of the Implementation of the Rome Statute of the International Criminal Court Act, 2022; Sudan: Article 154(g) of the Armed Forces Act, 2007; Finland: Section 7(15) of the Criminal Code of Finland, 1889; Australia: Section 268.79 of the Criminal Code Act 1995; Azerbaijan: Section 116.0.3 of the Criminal Code 2000; Belgium: Article 136.17quater of the Code Penal 1867; Canada: Crimes Against Humanity and War Crimes Act, 2000 Also see: ICRC, *Practice relating to rule 33*, available at Customary IHL - Practice relating to rule 33 Personnel and Objects Involved in a Peacekeeping Mission (icrc.org), last accessed on 13 February 2023.

[53] ICRC, *Rule 33 of the IHL Database*, available at https://ihl-databases.icrc.org/en/customary-ihl/v1/rule33, last accessed on 12 February 2023.

[54] International Law Commission, Article 19 of *Draft Code of Crimes against Peace and Security of Mankind, 1996*. The clarifications and improvements in the legal frameworks surrounding the protection of UN personnel and associated personnel are essential steps towards achieving the fulfilment of the commitment of the Commission.

UNIFIL convoy bringing newly arrived peacekeepers, due to a nearby drone attack in south Lebanon, led to injuring **five peacekeepers** on 7 November 2024. **Four peacekeepers** from **Ghana** were **wounded** when a rocket hit their base in southern Lebanon on 19 November 2024. **Four peacekeepers** from **Italy** were **wounded** when two rockets struck in Shama on 22 November 2024.[55] The Security Council condemned these incidents that impacted the UNIFIL positions and killed and injured UNIFIL peacekeepers.[56] The Security Council, while expressing deep appreciation to UNIFIL troop-contributing countries, **urged all parties to take all measures to respect the safety and security of UNIFIL personnel** and premises.[57] At least **116 UNRWA personnel have been confirmed killed** in 2024 in the conflict between Israel and Hamas.[58]

19. Year 2025 was yet again a year where UN peacekeepers fell victims to attacks. In January 2025, **several blue helmets were killed** serving the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). In the wake of the attacks, Greece echoed that attacks against peacekeepers may constitute war crimes, and noted that attacks against MONUSCO peacekeepers constitute a basis for sanctions designations. The United Kingdom also made these points. Slovenia stressed that the attacks constitute "an attack on peace itself" and also underlined the UN Security Council responsibility "**to stand unequivocally behind [its personnel]** in these perilous times **and ensure they return safely to their loved ones"**.[59] Condemning the **killing of peacekeeper from Kenya** on 28 March 2025, (MINUSCA), the Security Council condemned the attack in the strongest terms and reiterated that attacks against peacekeepers may constitute war crimes. The Council called on the Government of the Central African Republic to swiftly investigate the attack with the support of MINUSCA, promote accountability for such acts by bringing perpetrators to justice, and keep the relevant troop contributing country informed of the progress consistent with Security Council resolutions 2518 (2020) and 2589 (2021).[60] **One peacekeeper** from **Tunisia** was killed in February 2025, while serving the MINUSCA. The Security Council also expressed its deep appreciation to MINUSCA's troop and police-contributing countries.[61] **Two UN helicopters** conducting an evacuation **came under fire**, resulting in the **death of a crew member and injuries to two others** in the United Nations Mission in South Sudan (**UNMISS**) on 7 March 2025. The Security Council reiterated that attacks against peacekeepers may constitute war crimes. The Council called for those responsible for the attacks to be held accountable.[62] **Detention of over 60 UN Peacekeepers** on 28 February 2025 serving United Nations Interim Security Force for Abyei (**UNISFA**) led the Security Council unequivocally condemning the Rapid Support Forces' detention of over 60 UN Peacekeepers, armed abduction of eight civilian personnel and looting of a UNISFA logistics convoy. The Security Council expressed deep alarm over threats to the safety and security of UNISFA peacekeepers and civilian personnel. The Council condemned all forms of violence against UN personnel and civilians, including targeted kidnapping, and reiterated that attacks against peacekeepers may constitute war crimes.[63] In February 2025, UNIFIL convoy taking peacekeepers to Beirut airport was violently attacked, and a vehicle was set on fire. UNIFIL **outgoing Deputy Force Commander from Nepal**, who was returning home after ending his mission, was **injured**. Several other peacekeepers were also injured. UNIFIL demanded a full and immediate investigation by Lebanese authorities and for all perpetrators to be brought to justice.[64] The UN Secretary-General stated that the perpetrators must be held accountable. And **the safety and security of UN personnel and property must be respected at all times**. He added that attacks against peacekeepers are in

[55] https://press.un.org/en/2025/org1746.doc.htm.
[56] https://press.un.org/en/2024/sc15897.doc.htm
[57] https://press.un.org/en/2024/sc15897.doc.htm
[58] *Ibid*.
[59] https://press.un.org/en/2025/sc15981.doc.htm.
[60] https://news.un.org/en/story/2025/03/1161706.
[61] https://press.un.org/en/2025/sc15994.doc.htm.
[62] https://press.un.org/en/2025/sc16026.doc.htm.
[63] https://press.un.org/en/2025/sc16022.doc.htm#:~:text=The%20members%20of%20the%20Security,of%20eight%20vehicles%20and%20280%2C000.
[64] https://unifil.unmissions.org/unifil-statement-14-february-2025#:~:text=We%20are%20shocked%20by%20this,may%20amount%20to%20war%20crimes.

breach of international law, including international humanitarian law as applicable, and may constitute war crimes.[65] These incidents, killings and attacks against UN peacekeeping personnel year after year, aiming at times to delegitimise the entire UN Peacekeeping mandate, underlines the necessity for a detailed study and guidelines on legal aspects of accountability for crimes committed against them. A subsidiary organ of the UN General Assembly, namely, the UN International Law Commission, consisting of persons of recognised competence in international law and whose works have over the last 75 years, remain source of doctrinal and practical application and help to the international community, is most suited to conduct such a study.

20. The dynamic nature of safety and security threats posed by organized armed groups, terrorists, spread of misinformation and disinformation campaigns about peacekeeping missions and their mandates have resulted in exponential increase in the number of crimes committed against UN peacekeeping personnel in the recent years.[66] The UN Peacekeeping Ministerial held from 13 to 14 May 2025, reiterated concerns on safety and security of UN peacekeeping personnel. Besides UN Secretary-General and Under Secretary-General for Peacekeeping Operations, states from various regions of the world, among others, Germany, Indonesia, Ireland, Japan, Kenya, Malawi, Romania, South Africa, Ghana, Australia, Denmark, Poland and Zambia. The UN Secretary-General emphasized that "We need to ask some tough questions about the mandates guiding these operations, and what the outcomes and solutions should look like".[67]

D. The topic refers and builds upon the work of the International Law Commission

21. The report of the ILC on the work of its 48th session (6 May-26 July 1996), contains the text of, and commentaries to Draft Code of Crimes against Peace and Security of Mankind. The draft Article 19 recognizes and defines crimes against United Nations and associated personnel. These crimes entail negative consequences for the effective performance of the mandate entrusted to them and the broader negative consequences on the ability of the United Nations to effectively perform its central role in the maintenance of international peace and security. The Commission affirmed the **special responsibility** of the international community to ensure the effective prosecution and punishment of perpetrators and expressed the concern that these crimes occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. The topic will analyse the previous work of the Commission on Article 19 of the Draft Code of Crimes against the Peace and Security of Mankind.

E. Scope and content of the topic

22. The objective of this topic is to determine whether existing international legal instruments are capable of meeting the current and future challenges of UN peacekeeping operations and, if not, to find ways of filling legal gaps to enhance legal accountability for crimes against UN peacekeeping personnel.

23. The scope of the topic is as follows:

a. First, the development of a taxonomy of UN peacekeeping operations which takes into account the shift from traditional to modern peacekeeping operations. The UN Charter does not make reference to peacekeeping, and there is no jurisprudence defining "a

[65] https://press.un.org/en/2025/sgsm22556.doc.htm.

[66] Ministry of External Affairs of India, *Keynote address by External Affairs Minister, Dr. S Jaishankar at launch of Group of Friends on UNSCR 2589: Accountability for crimes against peacekeepers*, (16 December 2022), https://mea.gov.in/Speeches.

[67] https://peacekeeping.un.org/en/remarks-to-media-following-peacekeeping-ministerial-meeting-future-of-peacekeeping.

peacekeeping operation in accordance with the Charter of the United Nations".[68] Defining this and associated terms is therefore crucial to ascertain the meaning and scope of 'United Nations Personnel and Associated Personnel involved in peacekeeping operations.'

b. Second, a detailed consideration of the international legal frameworks that apply to crimes against UN peacekeeping personnel, including the Safety Convention, Geneva Conventions, Additional Protocols and International Humanitarian Law. This will include review of the legal definitions of 'crimes against UN peacekeeping personnel' and 'intentionally directing attack against peacekeeping personnel.[69] It will also include express recognition and codification of customary international law in relation to crimes against UN peacekeeping personnel and the protection entitled to a UN peacekeeping mission.

c. Third, the scope will address the issue of accountability for crimes against UN peacekeeping personnel. The term 'accountability' is used to study all feasible methods of holding the perpetrators accountable. The topic will address only legal aspects of accountability and will focus on the legal elements of answerability, liability and attributability. This part of the topic will consider, *inter alia*, the efficacy of provisions in the peacekeeping mandates governing accountability for crimes against UN peacekeeping personnel and the legal consequences of serious violations of status-of-force or status-of-mission agreements in respect of reporting, investigation and prosecution of such crimes, including after the cessation of such agreements. It will include a review of existing mechanisms to report, investigate, and prosecute the perpetrators of crimes against UN peacekeeping personnel with the aim of identifying the possibilities of proposing a procedure for general application in the investigation of such crimes.[70]

d. In order to ensure comprehensiveness, the study will also examine the applicability of universal jurisdiction, *aut dedere aut judicare*, the international law governing immunities and privileges, state responsibility, and the principle of complementarity. The state practices of troop-contributing and troop-hosting countries, along with decisions from special tribunals such as the Special Criminal Court of the Central African Republic and the Special Court of Sierra Leone, will provide important insights from States and relevant international organizations for the consideration of this topic.

24. The scope of the topic will be confined to legal aspects of accountability for crimes against UN peacekeeping personnel. Without minimising the importance of the issue, due to the need to confine the topic to a manageable extent, the aspect of the accountability of UN peacekeepers for actions during peacekeeping operations is not addressed in this study. This is in line with UN Security Council Resolution 2589 (2021) on promoting accountability for crimes against peacekeepers. Similarly, the topic focuses on 'UN Mandated Peacekeeping Operations' and excludes other UN operations, given the particular importance and impact of crimes against UN peacekeeping personnel.

25. The overall purpose of the study is to assess the international legal frameworks applicable to UN peacekeeping operations and all feasible means to study legal aspects of accountability for crimes against UN peacekeeping personnel. The study aims to present **draft guidelines** that will be of assistance to States and the UN in implementing peacekeeping operations so that crimes against UN peacekeeping personnel are adequately addressed to prevent impunity.

---

[68] Special Court for Sierra Leone, *Prosecutor v. Sesay* (Issa Hassan), Judgment, Case number SCSL-04-15-T, ICL 667 (SCSL 2009) at para. 221:
at https://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf.

[69] The scope of the study includes review of definitions of UN Personnel and Associated Personnel.

[70] In various cases, the mandate of the UN Peacekeeping may expire, however, the life span of accountability cases goes beyond Mission mandates, and, therefore, there has to be continuity of UN support to prosecuting crimes against peacekeepers. Group of Friends, consisting of 49 states and international and regional organisations have been playing an important role in sensitizing the entire international community and advocating for the means, methods and mechanisms to address the accountability to peacekeepers.

Conclusion

26. The legal needs, interests and concerns felt by states and the international community for identifying, assessing and taking measures of accountability for crimes against UN peacekeeping personnel, remain one of the most important steps forward for the overall protection and safety of the UN peacekeeping personnel.[71] **Consequently, the efforts of ILC in clarifying, codifying and progressively consolidating international law in this area will be of direct practical value.** It would also supplement other efforts of the UN such as the Project on Implementation of Resolution 2589 (2023-26). The ILC work is a logical step forward in consolidating the state practice, doctrine and emerging jurisprudence. The final output that is proposed is **draft guidelines.** ILC has been transitioning from hard-law draft articles to draft-guidelines or conclusions. One of the main objectives is to enable soft-law influence through draft guidelines. Furthermore, given that the ILC is examining this topic for the first time, and that the existing Safety Convention and Optional Protocol, though exist, are insufficient to address the variety of situations and the gaps. Recognizing the sensitivity of the topic, a comprehensive and thoroughly researched and well-argued soft-law instrument – namely, draft guidelines - would find better acceptance among States. This shift will continue to align with ILC works of the last 15 years, i.e. preference for soft law norms instead of hard law norms which can find more support for the gradual development, interpretation, and evolution of the norms. **Draft guidelines** will be an effective vehicle of codifying and progressively developing international law, and that the Commission is indeed well-structured to produce soft law in form of draft guidelines. Recognising the sensitivity of the topic, needs and existing gaps, draft guidelines will be more helpful to states, both host and sending States and the UN and peacekeepers in general. A synchronous advancement of law alongside various initiatives to promote accountability for crimes against UN peacekeeping personnel strengthens peacekeeping operations and eventually contributes to a more effective role of the UN in the promotion and maintenance of international peace and security.

27. Both the UN International Law Commission and the UN Peacekeeping have completed 75 years and as the UN commemorates its 80th year of existence, this ILC study proposal concludes by paying tribute to all United Nations peacekeeping personnel who have sacrificed their lives in the line of duty for the cause of peace and security.

Selected Bibliography

A. United Nations Documents

- UN Security Council, *On developing a comprehensive and integrated performance policy framework for UN peacekeeping operations*, S/RES/2436(2018).
- UN Security Council, *On peacekeeping reform*, S/RES/2378(2017).
- UN Security Council, *On safety and security of peacekeepers*, S/RES/2518(2020).
- UN Security Council, *On safety and security of peacekeepers*, S/RES/2589(2021).
- UN General Assembly, *Report of special committee on peacekeeping operations*, A/75/19(2021).
- UN General Assembly, *Report of special committee on peacekeeping operations*, A/51/130(1996).
- UN General Assembly, *An agenda for peace: resolutions*, A/RES/47/120B.

[71] The study is based on the necessity felt as can be inferred from various resolutions of the UN Security Council, General Assembly, various formal and informal mechanisms of member States, previous works of the ILC, and also draws inspiration from similar exercise undertaken by the ILC in the context of another topic – Sea-Level Rise and International Law (Ref. ILC/A/73/10). The Sea-Level Rise and International Law topic responds to one of the pressing concerns of the international community.

- UN Secretary-General, *The future of United Nations peace operations: implementation of the recommendations of the high-level independent panel on peace operations*, A/70/357-S/2015/682 (1994).
- Report of the Ad Hoc Committee, *Elaboration of an International Convention dealing with the safety and security of United Nations and associated personnel*, A/49/22. (1993).
- UN General Assembly, *Official records of 60th session: 61st plenary meeting*, A/60/PV.61.
- UN General Assembly- Sixth Committee, *Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice*, A/C.6/49/L.4 (1994).
- UN General Assembly- Sixth Committee, *Summary record of the 8th meeting*, A/C.6/60/SR.8 (2005).
- UN General Assembly- Sixth Committee, *Summary record of the 9th meeting on the scope of legal protection under the Convention on the safety of United Nations and associated personnel*, A/C.6/60/SR.9 and A/C.6/60/SR.22.
- UN General Assembly, *Convention on the safety of United Nations and associated personnel*, A/RES/49/59 (1995).
- UN General Assembly-Sixth Committee, *Scope of legal protection under the Convention on the safety of United Nations and associated personnel*, A/60/518 (2005).
- UN General Assembly, *Optional Protocol to the Convention on the safety of United Nations and associated personnel*, A/RES/60/42 (2005).
- UN Secretary-General, *Comprehensive report on all processes involved in the investigation and prosecution of crimes against deployed United Nations peacekeepers*, A/66/598 (2011).
- UN Secretary-General, *Implementation of the recommendations of the Special Committee on peacekeeping operations*, A/77/573 (2022).
- UN Secretary-General, *Action for peacekeeping+: priorities for 2021-23*.
- UN Secretary-General, *Prosecution of crimes against deployed peacekeepers*, A/65/700.
- UN Secretary-General, *Safety and security of humanitarian personnel and protection of United Nations personnel*, A/73/392 (2018).

B. Other International Legal Instruments

- Rome Statute of the International Criminal Court, UN Doc 2187 U.N.T.S. 90.
- Statute of the Special Court for Sierra Leone, 2178 U.NT.S 145.
- UN Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc UNTAET/REG/2000/15.

C. International Law Commission Documents

- International Law Commission, *Draft code of crimes against the peace and security of mankind*, (A/51/10), Yearbook 1996, Vol. II. Part II, pp. 51–53.
- International Law Commission, *Yearbook of the ILC 1997*. Vol II. Part II.

D. International jurisprudence

- International Criminal Court: Pre-trial Chamber I, *Situation in Georgia: Decision on the Prosecutor's request for authorization of an investigation*, ICC-01/15.
- International Criminal Court: Pre-trial Chamber I, *Situation in Darfur, Sudan: Prosecutor v. Abdallah Banda Abakaer*, Decision on confirmation of charges, ICC-02/05-03/09.
- International Criminal Court: Pre-trial Chamber I, *Prosecutor v. Abu Garda*, Decision on confirmation of charges, ICC-02/05-02/09.
- International Criminal Tribunal for Rwanda: Trial Chamber I, *Prosecutor v. Bagosora*, Judgment & sentence, ICTR-98-41-T.
- International Criminal Tribunal for Rwanda: Trial Chamber II, *Prosecutor v. Augustin Ndindiliyimana*, Judgement & sentence, ICTR-00-56-T.
- International Tribunal for Former Yugoslavia: Trial Chamber I, *Prosecutor v. Ratko Mladic*, Judgment, IT-09-92-T.
- Special Court for Sierra Leone: Trial Chamber I, *Prosecutor v. Issa Hassan Sesay*, Judgment, SCSL-04-15-T.
- Special Court for Sierra Leone: Appeals Chamber, *Prosecutor v. Charles Taylor*, Judgment, SCSL-03-01-A.

E. Selected Articles, Books, Lectures, other documents

- Alassane, Diallo, "Les Nations Unies face aux nouveaux enjeux de la paix et de la sécurité internationales." (2005): 1-400.
- Álvarez, Pablo. "La Seguridad del Personal de Paz de las Naciones Unidas: Evaluación de Riesgos y Medidas de Protección." Estudios Internacionales 46, no. 178 (2013): 43–59.
- Arsanjani, Mahnoush, *Convention on the Safety of United Nations and Associated Personnel*, United Nations Visual Library of International Law.
- Blondel, J.-L. (1993). Las fuerzas de las naciones unidas para el mantenimiento de la paz y la aplicacion del derecho internacional humanitario (The United Nations Peacekeeping Forces And The Application Of International Humanitarian Law). *Estudios Internacionales*, *26*(104), 702–716.
- Bloom, E. T., *Protecting Peacekeepers: The Convention on the safety of United Nations and associated personnel*, *American Journal of International Law*, vol. 89, 1995, pp. 621–631.
- Bothe, Michael. "The Protection of the Peacekeepers: The Legal Regime of the Safety Convention." *Journal of Conflict and Security Law* 7, no. 2 (2002): 191–204.
- Challenges Forum and United Services Institute, UN Peacekeepers' Safety and Security: Patterns of attacks and pathways to peacekeeping performance, Background paper, October 2022.
- Corten, Olivier, and Klein, Pierre, "Action humanitaire et chapitre VII: La redéfinition du mandat et des moyens d'action des Forces des Nations Unies." *Annuaire français de droit international* 39.1 (1993): 105–130.
- Engdahl, Ola, *An emerging legal regime against impunity*, Protection of Personnel in Peace Operations, International Humanitarian Law Series, vol. 16, 2007, pp. 293–308.
- Fernández, Juan. "La Protección Jurídica de los Cascos Azules: La Convención sobre la Seguridad del Personal de las Naciones Unidas y el Protocolo Facultativo de 2005." Derecho Internacional y Relaciones Internacionales 16 (2008): 101–115.
- Greenwood, Christopher, "Protection of Peacekeepers: The Legal Regime", Vol. 7, *Duke Journal of Comparative and International Law* 185 (1996), pp. 185–207.

- Guéhenno, Jean-Marie. “Maintien de la paix: les nouveaux défis pour l’ONU et le Conseil de sécurité.” *Politique étrangère* (2003): 689–700.
- Howard, L. M., & Dayal, A. K. (2018). The Use of Force in UN Peacekeeping. *International Organization*, *72*(1), 71–103. https://www.jstor.org/stable/26569462.
- Kaiser, Thierry and Ruers, Carlijin, *The application of International Humanitarian Law to Peacekeepers*, Journal of International Peacekeeping, 2021.
- Lilly, Damian, *The United Nations as a Party to Armed Conflict*, Journal of International Peacekeeping, 2016.
- Llewellyn, Huw, “The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel”, 55 *International and Comparative Law Quarterly* 3 (2006), pp. 718–728.
- Macura, Tomas, *Accountability and protection of UN peacekeepers in light of MONUSCO*, vol. 88, No. 3/4, 2013, PP 143–156.
- Maertens, Lucile. “Les opérations de maintien de la paix de l’ONU: doctrine et pratiques en constante évolution.” (2013).
- Martín, Diego J. “La Protección del Personal de las Naciones Unidas: Retos y Desafíos.” Revista de Derecho Internacional 14, no. 2 (2012): 235–250.
- Pacholska, M. *Illegality of killing peacekeepers*, The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals, 13(2015) 1 *Journal of International Criminal Justice*, pp. 43–72.
- Palwankar, Umesh. “Applicabilité du droit international humanitaire aux Forces des Nations Unies pour le maintien de la paix.” *International Review of the Red Cross* 75.801 (1993): 245–259.
- Pastor, Jaime. “La Convención de Seguridad del Personal de las Naciones Unidas y el Protocolo de 2005: Un Análisis Crítico.” Revista de Estudios Internacionales 17, no. 3 (2009): 311–326.
- Pineschi, Laura. “L’emploi de la force dans les opérations de maintien de la paix des Nations Unies “robustes”: conditions et limites juridiques.” *La sécurité collective entre légalité et défis à la légalité*. Vol. 1. Giuffrè, 2008. 139–178.
- Rodríguez-Villasante y Prieto, Joaquín. “Derecho Internacional Humanitario y Misiones de Paz de las Naciones Unidas.” Revista Española de Derecho Militar 63 (2007): 45–67.
- Salverda, Nynke, *Blue helmets as targets: a quantitative analysis of rebel violence against peacekeepers 1989-2003*, Journal of Peace Research, vol.50, No. 6, 2013, pp. 707–720.
- Sandoz, Yves (1978), La aplicación del derecho humanitario por las fuerzas armadas de la Organizatión de las Naciones Unidas (The Application of Humanitarian Law by the Armed Forces of the United Nations Organization), RICR, nº 29, septiembre-octubre de, p. 283.
- Solan, James, *Peacekeepers under fire: prosecuting the RUF for Attacks against the UN assistance mission in Sierra Leone*, The Law & Practice of International Courts and Tribunals, 2010, pp. 243–293.
- De Tomás Morales, Maria Susana, “Las Operaciones de Mantenimiento de la Paz y el Derecho Internacional Humanitario.” Anuario de Derecho Internacional Humanitario 11 (2008): 213–232.
- Thakur, R. (1994). From Peacekeeping to Peace Enforcement: The UN Operation in Somalia. *The Journal of Modern African Studies*, *32*(3), 387–410. http://www.jstor.org/stable/161981.
- Thouvenin, Jean-Marc. “Le statut juridique des forces de maintien de la paix des Nations Unies.” *Int’l LFD Int’l* 3 (2001): 105.
- Trihart, Albert, *Disinformation against UN peacekeeping operations*, International Peace Institute, November 2022.

- Urquhart, Brian, *Development in the role of the United Nations in peacekeeping* (28 May 2008), United Nations Audio Visual Library of International Law
- Uzonyi, Gary, *Finding Soldiers of Peace: three dilemmas for UN Peacekeeping Missions*, Georgetown University Press, 2020.
- Van der Lijn, Jair and Smit, Timo, *Peacekeepers under threat?: fatality trends in UN peace operations*, Stockholm International Peace Institute, 2015.
- Wharton, Sara, *The evolution of International Criminal Law: prosecuting 'new' crimes before the Special Court for Sierra Leone*, International Criminal Law Review, 2011, pp. 233–237.
- Wills, Siobhán, "The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", *Human Rights Brief* 10, no. 2 (2003): 26–30.
- 蒋圣力.(2017).联合国维持和平行动法律制度研究(博士学位论文,华东政法大学).
- 方瑞安.(2021).论海外驻军的刑事管辖与豁免(博士学位论文,华东政法学).DOI:10.27150/d.cnki.ghdzc.2021.000022.
- 时宏远 & 周培佩.(2023).印度参与联合国维和行动的动因、作用及挑战.南亚研究, (04),58-83+155.DOI:10.16608/j.cnki.nyyj.2023.04.03.
- 伍建华 & 王樱惠.(2020).21 世纪的联合国维和行动:环境、任务与挑战.武警学院学报,36(05), 22–29.
- 洪叶子. (2020).联合国维和行动与中国安全利益的法律保护.黑龙江省政法管理干部学院学报,(02),108–113.
- 何银 (2021)。联合国维和的退化与出路。中国联合国协会。理事专栏 5 期 0125-14。https://www.unachina.org/article/1694 (Degradation and Solutions for United Nations Peacekeeping).
- 越通社 (2024)。越南呼吁加强妇女安全保障及其在联合国维和行动中的作用。越通社中文网站时政版，2024 年 2 月 22 日。(Vietnam Calls for Strengthening Women's Safety and Security And Role In UN Peacekeeping Operations) https://zh.vietnamplus.vn/越南呼吁加强妇女安全保障及其在联合国维和行动中的作用-post211499.vnp.
- 刘阳 (edi.), 2021。中国推动成立联合国维和人员安全小组。新华社, 2021 年 4 月 28 日(China Promotes the Establishment of a Security Team for United Nations Peacekeepers) http://www.xinhuanet.com/world/2021-04/28/c_1127385732.htm.
- Зверев П.Г. Правовой статус персонала ООН и связанного с ней персонала во время миротворческих операций и правовой режим их защиты// Актуальные проблемы гуманитарных и естественных наук.-2014.-№ 1-2.- С.57-60.
- Сидорова Г. М. Проблема миротворчества в условиях обострения конфликтов в ДРК // Научный диалог, 2012. № 9. С. 75 – 89.