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Report of the International Law Commission

**Seventy-fifth session
(29 April–31 May and 1 July–2 August 2024)**

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Report of the International Law Commission

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(29 April–31 May and 1 July–2 August 2024)



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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 2024*.

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Chapter I Introduction

1. The International Law Commission held the first part of its seventy-fifth session from 29 April to 31 May 2024 and the second part from 1 July to 2 August 2024 at its seat at the United Nations Office at Geneva. The session was opened by Ms. Patrícia Galvão Teles, Chair of the seventy-fourth 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 Guilloff (Chile)

Mr. Huikang Huang (China)¹

Mr. Charles Chernor Jalloh (Sierra Leone)

Mr. Ahmed Laraba (Algeria)

Mr. Keun-Gwan Lee (Republic of Korea)

Mr. Xinmin Ma (China)²

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)³

Mr. Hassan Ouazzani Chahdi (Morocco)

Mr. Mario Oyarzábal (Argentina)

Mr. Mārtiņš Pāparinskis (Latvia)

Mr. Bimal N. Patel (India)

¹ See paragraph 4 below.

² See paragraph 4 below.

³ See paragraph 3 below.

Mr. August Reinisch (Austria)
Ms. Penelope Ridings (New Zealand)
Mr. Juan José Ruda Santolaria (Peru)
Mr. Alioune Sall (Senegal)
Mr. Louis Savadogo (Burkina Faso)
Mr. Munkh-Orgil Tsend (Mongolia)
Mr. Marcelo Vázquez-Bermúdez (Ecuador)
Mr. Evgeny Zagaynov (Russian Federation)

B. Casual vacancies

3. At its 3660th meeting, on 1 May 2024, the Commission elected Ms. Alina Orosan (Romania) to fill the casual vacancy occasioned by the resignation of Mr. Bogdan Aurescu⁴ who had been elected to the International Court of Justice.

4. At its 3699th meeting, on 31 July 2024, the Commission elected Mr. Xinmin Ma (China) to fill the casual vacancy occasioned by the resignation of Mr. Huikang Huang.⁵

C. Officers and the Enlarged Bureau

5. At its 3658th meeting, on 29 April 2024, the Commission elected the following officers:

Chair:	Mr. Marcelo Vázquez-Bermúdez (Ecuador)
First Vice-Chair:	Mr. Mārtiņš Pāparinskis (Latvia)
Second Vice-Chair:	Ms. Vilawan Mangklatanakul (Thailand)
Chair of the Drafting Committee:	Ms. Phoebe Okowa (Kenya)
Rapporteur:	Ms. Penelope Ridings (New Zealand)

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, the Special Rapporteurs⁶ and the Co-Chairs of the Study Group on sea-level rise in relation to international law.⁷

7. On 13 May 2024, the Planning Group was constituted, composed of the following members: Mr. Mārtiņš Pāparinskis (Chair); Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Mario Oyarzábal, Mr. Bimal N. Patel, Mr. Juan José

⁴ See [A/CN.4/773](#) and [Add.1](#).

⁵ See [A/CN.4/776](#) and [Add.1](#).

⁶ Mr. Yacouba Cissé, Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. August Reinisch and Mr. Marcelo Vázquez-Bermúdez. At its 3681st meeting, on 10 July 2024, the Commission was informed that Mr. Yacouba Cissé had resigned as Special Rapporteur for the topic “Prevention and repression of piracy and armed robbery at sea”. At its 3701st meeting, on 2 August 2024, Mr. Louis Savadogo was appointed Special Rapporteur for the topic.

⁷ Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

Ruda Santolaria, Mr. Alioune Sall, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Ms. Penelope Ridings (*ex officio*).

D. Drafting Committee

8. At its 3662nd, 3667th, 3672nd and 3680th meetings, on 3, 15, 28 May and 9 July 2024, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Settlement of disputes to which international organizations are parties:* Ms. Phoebe Okowa (Chair), Mr. August Reinisch (Special Rapporteur), Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Ahmed Amin Fathalla, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Pāparinskis, Mr. Bimal N. Patel, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Marcelo Vázquez-Bermúdez and Ms. Penelope Ridings (*ex officio*);

(b) *Subsidiary means for the determination of rules of international law:* Ms. Phoebe Okowa (Chair), Mr. Charles Chernor Jalloh (Special Rapporteur), Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Ahmed Amin Fathalla, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Ivon Mingashang, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Pāparinskis, Mr. Bimal N. Patel, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Ms. Penelope Ridings (*ex officio*);

(c) *Prevention and repression of piracy and armed robbery at sea:* Ms. Phoebe Okowa (Chair), Mr. Yacouba Cissé (Special Rapporteur),⁸ Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Pāparinskis, Mr. Bimal N. Patel, Mr. Juan José Ruda Santolaria and Ms. Penelope Ridings (*ex officio*);

(d) *Immunity of State officials from foreign criminal jurisdiction:* Ms. Phoebe Okowa (Chair), Mr. Claudio Grossman Guiloff (Special Rapporteur), Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Ahmed Amin Fathalla, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Pāparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Ms. Penelope Ridings (*ex officio*).

9. The Drafting Committee held a total of 21 meetings on the four topics indicated above.

E. Working Groups and Study Group

10. On 14 May 2024, the Planning Group established the following Working Groups:

⁸ See footnote 6 above.

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

(b) *Working Group on methods of work and procedures*: Mr. Charles Chernor Jalloh (Chair), Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Keun-Gwan Lee, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Pāparinskis, Mr. Bimal N. Patel, Mr. Juan José Ruda Santolaria, Mr. Marcelo Vázquez-Bermúdez and Ms. Penelope Ridings (*ex officio*).

11. At its 3659th meeting, on 30 April 2024, the Commission established 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, and Chair at the current session), Ms. Nilüfer Oral (Co-Chair), Mr. Juan José Ruda Santolaria (Co-Chair and Chair at the current session), Mr. Dapo Akande, Mr. Masahiko Asada, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Ahmed Laraba, 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 Pāparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Mr. Louis Savadogo, Mr. Marcelo Vázquez-Bermúdez and Ms. Penelope Ridings (*ex officio*).

12. At its 3667th meeting, on 15 May 2024, the Commission re-established an open-ended Working Group on “Succession of States in respect of State responsibility” chaired by Mr. August Reinisch.

F. Secretariat

13. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto, Principal Legal Officer, served as Principal Assistant Secretary to the Commission. Ms. Carla Hoe, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Mr. Carlos Ivan Fuentes, Mr. Jorge Paoletti, Ms. Paola Patarroyo and Mr. Douglas Pivnichny, Legal Officers, and Mr. Alexey Bulatov, Associate Legal Officer, served as Assistant Secretaries to the Commission.

G. Agenda

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

1. Organization of the work of the session.
2. Filling of casual vacancy.
3. Immunity of State officials from foreign criminal jurisdiction.

4. Succession of States in respect of State responsibility.
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. Commemoration of the seventy-fifth anniversary of the Commission.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the seventy-sixth session.
13. Cooperation with other bodies.
14. Other business.

Chapter II

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

15. With respect to the topic “**Settlement of disputes to which international organizations are parties**”, the Commission had before it the second report of the Special Rapporteur on the topic (A/CN.4/766), which concentrated on “international disputes”. The second report provided an analysis of the practice of settling international disputes to which international organizations are parties, as well as of policy issues relevant to the Commission’s work on the topic. The Special Rapporteur also outlined his plans for the future work on the topic. The Special Rapporteur proposed four draft guidelines. The Commission also had before it a memorandum by the Secretariat (A/CN.4/764) 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, on the basis of the questionnaire prepared by the Special Rapporteur.

16. In his second report, the Special Rapporteur explained that the report focused on international disputes between international organizations as well as between international organizations and States or other subjects of international law arising under international law. The report did not address disputes of a non-international character, which would be covered in the third report. In analysing the practice of international organizations, all forms of dispute settlement were used in practice and with different frequency. The prevalence of negotiation, consultation or other amicable dispute settlement means seemed to be reflective of the fact that many dispute settlement provisions provided for this form of dispute settlement as a first step, and a result of the preference of international organizations and States to discreetly and diplomatically settle disputes in an informal manner. Mediation, conciliation, enquiry or fact-finding did not appear to be very frequently resorted to by international organizations. There was also only limited practice of arbitration as a means of settling international disputes to which international organizations were parties, mainly due to arbitration being specifically provided for only in a limited number of treaties and an apparent reluctance of international organizations and other parties to initiate arbitration. In terms of judicial dispute settlement, various international courts and tribunals had played an important role in the settlement of international disputes to which international organizations were parties, particularly in providing advisory opinions and in allowing judicial settlement of disputes between regional economic integration organizations and their members. The second report also addressed policy issues anchored in the rule of law as endorsed on the international level, notably three particular aspects: access to dispute settlement; adjudicatory independence and impartiality; and due process or a fair trial. The Special Rapporteur also explained that his third report in 2025 would analyse the practice of the settlement of non-international disputes to which international organizations were parties. This would enable the conclusion of the first reading of the topic and a second reading would take place based on the comments of States in 2027.

17. The Special Rapporteur proposed four draft guidelines on the topic. Draft guideline 3 set out what was meant by “international disputes” and draft guideline 4 addressed the practice of the settlement of disputes to which international organizations were parties. Draft guidelines 5 and 6 addressed the policy considerations and recommendations identified in the second report.

18. Members of the Commission welcomed the extensive and comprehensive analysis of dispute settlement practice contained in the second report of the Special Rapporteur. Members noted the challenge of distinguishing between international and non-international disputes. Different views were expressed on whether the

distinction should be drawn on the basis of the parties to the dispute, or the applicable law, or both. In drawing on the dispute settlement practice of international organizations, members preferred a draft guideline with a normative content, rather than a description of that practice. It was noted that the description of dispute settlement practice proposed by the Special Rapporteur appeared to imply a certain hierarchy among the means of dispute settlement, with an emphasis placed on adjudicatory means for the settlement of disputes. Members considered that there were practical considerations such as cost, speed and preservation of relationships that would often seem to make arbitration or judicial settlement less attractive than their non-adjudicatory counterparts. Similarly, members expressed caution over the desirability of recommending more use of arbitration and judicial dispute settlement, as compared with making these means more widely accessible. It was emphasized that depending on the type of dispute, different forms of dispute settlement might be appropriate to the circumstances. Members supported the basic policy recommendation that adjudicatory forms of dispute settlement should conform to rule of law requirements, but differed over how best to express this. Members also expressed appreciation for the “road map” outlined by the Special Rapporteur for the topic, although some members considered that it was rather ambitious.

19. Following the debate in plenary, the Commission decided to refer draft guidelines 3, 4, 5 and 6, as proposed in the second report, to the Drafting Committee, taking into account the comments and observations made in plenary. There was an extensive and thorough debate in the Drafting Committee on draft guideline 3, which focused on the use of the term “international disputes”; whether it was appropriate for the draft guideline to contain a reference to the parties to the dispute and to the applicable law; and the use of the term “other subjects of international law”. The Drafting Committee decided to arrange the draft guidelines into different parts, with draft guideline 3 clarifying the scope of Part Two. The reference to “arising under international law” was removed for reasons of clarity and on the understanding that the commentaries would explain the law applicable to the disputes that fell under draft guideline 3. Some members reserved their position on this removal. After an exchange of differing views, the reference to “other subjects of international law” was also deleted. Both draft guidelines 4 and 5 were revised to meet concerns of members, particularly over a perceived hierarchy of means of dispute settlement. The Drafting Committee also revised draft guideline 6 to remove the express reference to the rule of law and to emphasize the judicial guarantees of independence, impartiality and due process. Upon consideration of the report of the Drafting Committee (A/CN.4/L.998 and Add.1), the Commission provisionally adopted draft guidelines 3, 4, 5 and 6 and the commentaries thereto (chap. IV).

20. As regards the topic “**Subsidiary means for the determination of rules of international law**”, the Commission had before it the second report of the Special Rapporteur (A/CN.4/769), which addressed, *inter alia*, the work of the Commission on the topic thus far and the views of States in the Sixth Committee; the nature and function of subsidiary means, focusing on judicial decisions as subsidiary means for the determination of rules of international law; the general nature of precedent in domestic and international adjudication, including the relationship between Article 38, paragraph 1 (*d*), and Article 59 of the Statute of the International Court of Justice; and the future programme of work on the topic with the completion of the first reading scheduled for the seventy-sixth session (2025). The Commission also had before it a second memorandum by the Secretariat providing examples of judicial decisions and other materials found in the case law of international courts, tribunals and other bodies that might assist the Commission in its future work (A/CN.4/765).

21. In his second report, the Special Rapporteur explained the nature and general function of subsidiary means, recalling that they were subordinate to the sources of international law found in subparagraphs (*a*) through (*c*) of Article 38, paragraph 1, of the Statute of the International Court of Justice. They played an assistive role in relation to the sources of international law. This was supported by the drafting history

of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice and confirmed in the actual practice of the International Court of Justice and other international courts and tribunals, in the practice of some domestic courts and by the works of scholars. The Special Rapporteur also addressed the general nature of precedent in domestic and international adjudication. Although international law lacked a formal theory or doctrine of precedent within the narrow sense of the term, the International Court of Justice and other international courts and tribunals followed prior decisions and judgments where, *inter alia*, there was no reason to depart from previous legal reasoning that might still be regarded as sound. In this connection, he examined the relationship between Article 38, paragraph 1 (d), and Article 59 of the Statute of the International Court of Justice, which provided that the decisions of the Court were binding only on the parties to the case and qualified the use of the former; the link between Articles 59 and 61; and the practice of courts and tribunals, in particular the International Court of Justice and the International Tribunal for the Law of the Sea. He concluded that although there is no *stare decisis* in international law, the legal effects of decisions were constraining not only on the parties, as the effects were also felt by third parties, due to the force of the decisions of the International Court of Justice as expressions of rules of international law, and followed for reasons of legal certainty and predictability and the persuasive and practical value of past decisions in helping resolve a later dispute.

22. The Special Rapporteur proposed three draft conclusions on the nature and function of subsidiary means (draft conclusion 6); the absence of a rule of precedent in international law (draft conclusion 7); and the persuasive value of decisions of courts or tribunals (draft conclusion 8).

23. Members of the Commission welcomed the Special Rapporteur's comprehensive report and its rich discussion of complex conceptual issues. They supported the Special Rapporteur's view that subsidiary means were not a source of international law, and the view that in general there was no system of binding precedent in international law, but that judicial decisions were followed, including for reasons of legal certainty and predictability, which was the essence of any legal system based on the rule of law. Hesitancy was expressed, however, over the reference to the "persuasive value" of judicial decisions. Some members sought clarification of the reference made by the Special Rapporteur in his second report not only to the general function of subsidiary means, but also to specific functions that one or other of the subsidiary means might have. Some members also suggested that the draft conclusions give guidance not just to courts and tribunals as users of judicial decisions, but to others including policymakers, legal advisers, agents and advocates.

24. Following the plenary debate, the Commission referred draft conclusions 6, 7 and 8, as presented in the second report, to the Drafting Committee. The Special Rapporteur introduced the conclusions and presented a series of working papers adjusting his proposed draft conclusions to take into account the views of members expressed during the debate. Concerning draft conclusion 6, the Drafting Committee favoured a negative phrasing that subsidiary means were not a source of international law; decided to address the nature and function in a single provision which referred to the assistive function of subsidiary means; and clarified that this was without prejudice to the use of the same materials for other purposes. The Special Rapporteur recommended that the question of the placement of draft conclusion 6 on function be revisited once the Commission had completed its first reading on the topic in 2025. Regarding draft conclusion 7 on the absence of legally binding precedent in international law, the Drafting Committee decided on a general rule in the first sentence that "[d]ecisions of international courts and tribunals may be followed on points of law where those decisions address the same or similar issues"; and in the second sentence a clear statement that "[s]uch decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law". As to draft conclusion 8, the Drafting Committee noted that the non-exhaustive criteria in draft conclusion 8 concerning the weight to be accorded to

decisions of courts and tribunals were supplemental to draft conclusion 3, as envisaged by the Commission in the commentary to that conclusion adopted in 2023. Upon consideration of the report of the Drafting Committee (A/CN.4/L.999), the Commission provisionally adopted draft conclusions 6, 7 and 8 and commentaries thereto. The Commission had, earlier in the current session, also provisionally adopted draft conclusion 4 (Decisions of courts and tribunals) and draft conclusion 5 (Teachings), as orally revised, which had only been taken note of during the seventy-fourth session (A/CN.4/L.985/Add.1), and also adopted commentaries thereto (chap. V).

25. With regard to the topic “**Prevention and repression of piracy and armed robbery at sea**”, the Commission had before it the second report of the Special Rapporteur (A/CN.4/770), which discussed the practice of international organizations involved in combating piracy and armed robbery at sea; reviewed the regional and subregional approaches to combating piracy and armed robbery at sea; described the practice of States in concluding bilateral agreements; and outlined the future work on the topic. The Commission also had before it a memorandum prepared by the Secretariat providing information on the treatment of the provision containing the definition of piracy in the 1956 draft articles concerning the law of the sea; views expressed by States at the First United Nations Conference on the Law of the Sea and at the Third United Nations Conference on the Law of the Sea; and writings relevant to the definitions of piracy and of armed robbery at sea (A/CN.4/767).

26. In his second report, the Special Rapporteur first described the practice of international organizations involved in the fight against piracy and armed robbery at sea, in particular resolutions of the General Assembly, the Security Council and the International Maritime Organization (IMO), as well as the practice of the North Atlantic Treaty Organization with regard to naval interventions carried out pursuant to the authorization of the Security Council acting under Chapter VII of the Charter of the United Nations. He noted that criminalization and the establishment of the jurisdiction of national courts were two requirements consistently recalled by the Security Council, the General Assembly and IMO. He then focused on the practice of regional and subregional organizations in the prevention and repression of piracy and armed robbery at sea in Africa, Asia, Europe, the Americas and Oceania. This practice showed the different modalities of cooperation and gave substantive meaning and operational content to cooperation. The Special Rapporteur also examined bilateral agreements that sought to strengthen cooperation in the prevention and repression of piracy and armed robbery at sea and covered a range of legal issues. He explained that he proposed to study, in his third report, the doctrine or academic writings on aspects that raised legal questions concerning the prevention and repression of piracy and armed robbery at sea.

27. The Special Rapporteur proposed four draft articles, as contained in his second report. Draft articles 4 and 5 aimed to reflect and give material content to the general obligation of article 100 of the United Nations Convention on the Law of the Sea. Draft articles 6 and 7 concerned, respectively, the criminalization of piracy and armed robbery at sea under domestic law and the establishment of the jurisdiction of national courts, both of which were considered fundamental conditions for the repression of piracy and armed robbery at sea.

28. Members of the Commission generally welcomed the second report by the Special Rapporteur and the richness of the material it contained and highlighted the importance and complexity of the topic. Members raised a number of key points: the relevance of the United Nations Convention on the Law of the Sea as the starting point for the analysis; the importance of several other international conventions and the desirability of not duplicating existing legal frameworks; the need for a cautious approach when analysing the practice of the General Assembly and Security Council as this practice did not derogate from the norms of international law; and the importance of distinguishing between piracy and armed robbery at sea, given their different jurisdictions and applicable laws, when analysing practice. Members

expressed support for the inclusion of a provision concerning the general obligation of States to cooperate in the prevention and repression of piracy and armed robbery at sea, and generally supported the promotion of harmonization of national laws for the criminalization of piracy and armed robbery at sea, as well as the establishment of national jurisdiction over these crimes. Members questioned some of the drafting of the proposed draft articles, including the obligation to repress piracy and armed robbery at sea; the reference to “armed conflict”; the treatment of armed robbery at sea as an international crime; the requirement for cooperation with non-State actors; the reference to crimes committed pursuant to an order of a Government or by a person performing an official function; whether the crimes should not be subject to any statute of limitations; and whether armed robbery at sea was subject to universal jurisdiction. Members also suggested that the Commission would benefit from a discussion on a “road map” or a general framework for the analysis of the topic.

29. Following the debate in plenary, the Commission decided to refer draft articles 4, 5, 6 and 7, as contained in the second report of the Special Rapporteur, 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. In this discussion, members of the Drafting Committee agreed that the United Nations Convention on the Law of the Sea was the starting point for the topic and the approach of the Commission was to not alter but to work within the normative limits of the Convention. As that Convention did not explicitly address armed robbery at sea, the Commission could clarify relevant rules, noting that matters not regulated by the United Nations Convention on the Law of the Sea were governed by general international law. The relevance of other instruments, particularly the Convention for the suppression of unlawful acts against the safety of maritime navigation, the United Nations Convention against Transnational Organized Crime and their respective protocols, was highlighted. The Drafting Committee identified areas where there were gaps or legal issues that needed to be addressed. These included the definitions of piracy and armed robbery at sea (such as “illegal acts of violence or depredation” and “private ends”); new technologies (such as the use of drones and autonomous craft); modern piracy including acts committed on land; and further issues such as national legislation, jurisdiction, enforcement, pursuit of offenders, private security providers and the root causes of piracy. There was also a need to address the modalities of cooperation, such as sharing shipriders, mutual legal assistance and human rights considerations. The Drafting Committee recognized that the jurisdictional basis for piracy and armed robbery at sea were different. The legal basis for rules regarding armed robbery at sea were not as clear as the provisions on piracy in the United Nations Convention on the Law of the Sea, but they should be considered in a coordinated manner and dealt with together and separately where appropriate. Members of the Drafting Committee also identified several areas where the Commission could add value by proposing draft articles for a possible future convention.

30. The Drafting Committee considered the draft articles proposed by the Special Rapporteur and adopted draft article 4. This was based on a revised proposal of the Special Rapporteur that built on draft articles 4 and 5. It expressed a general obligation to prevent and to repress piracy and armed robbery at sea, in conformity with international law through, first, taking effective legislative, administrative, judicial or other appropriate measures; and second, cooperating to the fullest possible extent with other States and competent international organizations at the international, regional and subregional levels. The Commission heard an interim oral report of the Chair of the Drafting Committee. The report of the Drafting Committee on the topic ([A/CN.4/L.1000](#)) would be considered at a future session, as it had not been possible to prepare draft commentaries at the current session. Following the resignation of Mr. Yacouba Cissé as Special Rapporteur for the topic, the Commission appointed Mr. Louis Savadogo as Special Rapporteur at its 3701st meeting, on 2 August 2024 (chap. VI).

31. With respect to the topic “**Immunity of State officials from foreign criminal jurisdiction**”, the Commission had before it the first report of Special Rapporteur Claudio Grossman Guiloff (A/CN.4/775), which covered draft articles 1 to 6. The Special Rapporteur explained some of the challenges faced in completing the report. The presentation of State responses to draft articles 1 to 6 only was an approach that was in accordance with the wish expressed by some States to have more time to reflect on the topic and to allocate more than one session to complete the second reading. The report of the Special Rapporteur considering the comments and observations of Governments regarding draft articles 7 to 18 was to be presented and considered in 2025. The Commission also had before it a compilation of comments and observations received from Governments on the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading by the Commission at its seventy-third session (2022) (A/CN.4/771 and Add.1–2).

32. In his first report, the Special Rapporteur explained his approach to the consideration of the draft articles on second reading whereby he presented a summary of the comments and observations received from States, his analysis as Special Rapporteur and a set of recommendations for amending the draft articles to reflect States’ comments. In response to the views of States, he proposed further clarifying in the commentaries the distinction between the exercise of criminal jurisdiction and inviolability and explaining with examples what was meant by “State official” and “act performed in an official capacity”. He proposed an amendment to draft article 1, paragraph 3, to clarify the relationship with international courts and tribunals, including those established by the Security Council. He did not recommend any changes to draft article 3 on the limitation of immunity *ratione personae* to the troika. However, he proposed clarifying a few of the draft articles, including draft article 5, that some States had found problematic. The Special Rapporteur proposed that some other drafting proposals from States be considered in the Drafting Committee.

33. Members of the Commission welcomed the first report of the Special Rapporteur and were in general agreement with the decision to focus on draft articles 1 to 6. Members noted that the topic was of high importance and generally supported the approach of the Special Rapporteur of concentrating on draft articles 1 to 6 and the progress that had been made on the topic to date. Some members of the Commission were in favour of defining the exercise of foreign criminal jurisdiction and inviolability, if not in the draft articles, in the commentaries. Various views were expressed on particular drafting suggestions. These were considered in the Drafting Committee. A number of members of the Commission responded to the Special Rapporteur’s invitation to the Commission to consider possible recommendations for the General Assembly, to commend the draft articles to the attention of States in general or to use them as the basis to negotiate a treaty on the topic.

34. The Drafting Committee considered the draft articles proposed by the Special Rapporteur. The Drafting Committee proposed some adjustments to the draft articles in light of the views of States and the proposals of the Special Rapporteur. The Commission took note of draft articles 1, 3, 4 and 5 (chap. VII).

35. Concerning the topic “**Non-legally binding international agreements**”, the Commission had before it the first report of the Special Rapporteur (A/CN.4/772). The Special Rapporteur explained that his first report was of a preliminary nature and deliberately did not propose any draft provisions. It contained a general discussion of the topic and a first assessment of the relevant material and proposals for the scope of the topic and the questions to be examined. The objective of this preliminary assessment was to enable the Commission to be better prepared to undertake a drafting exercise in 2025 on the basis of the general orientations that would be collectively defined at the current session. He described certain issues on which it would be particularly useful to obtain views, including the reference to “agreements” in the title; the precise scope of the topic, such as the exclusion of acts adopted by international organizations as such, oral or tacit agreements, and inter-institutional agreements; the question of the (potential) legal effects of non-legally binding

international agreements; and the final form of the outcome of the topic, currently proposed to be draft conclusions. He also placed great weight on the need for representativeness of State practice and would be seeking such practice from members of the Commission and States. He also emphasized the need to proceed as cautiously as possible on the topic, to avoid converting indirectly non-binding agreements into binding ones, which they were not, and to maintain flexibility in international cooperation.

36. Members of the Commission welcomed the first report of the Special Rapporteur and his approach of beginning with a general discussion on the topic. They agreed on the need to focus on the practical aspects of the topic and to ensure the representativeness of State practice. Differing views were expressed on the title of the topic, with a majority of members supporting the reference in the title to “agreements”, and others expressing support for other alternatives. Of the alternatives, “instruments” was considered by a number of members to be overly broad, including because it would mean that resolutions adopted by international organizations as such would have to be included within the scope of the topic. Some thought the term “arrangements” did not clearly express the scope of the topic and was difficult to translate into all official languages. With respect to the scope of the topic, members of the Commission generally agreed that the topic should exclude oral or tacit agreements, unilateral acts, non-binding provisions in treaties, and agreements stating exclusively factual matters and positions. Different views were expressed on the inclusion of agreements at the inter-institutional level and stemming from inter-governmental conferences, and it was suggested that there was a need for some flexibility. A few members suggested including agreements concluded with non-State actors, at least tangentially. Regarding the outcome of the topic, some members preferred draft conclusions, as proposed by the Special Rapporteur, while others preferred draft guidelines. Members agreed, however, that the outcome of the topic should not be prescriptive.

37. In light of the debate on the title of the topic, the Special Rapporteur indicated that the current title of the topic should be maintained, at least pending the debate in the Sixth Committee of the General Assembly. In any case, it would be expressly stated in the commentaries of the draft provisions to be adopted that the title was without prejudice to the nature of the agreements covered by the draft provisions and to the terminological choices made by States in their practice. With respect to the scope of the topic, the Special Rapporteur noted the general agreement on most areas and suggestions made in the first report, but also the need to be flexible in defining the contours of the topic and not take too categorical a perspective, in particular with regard to inter-institutional agreements and acts adopted by international conferences. On the outcome of the topic, the Special Rapporteur indicated that as he had initially proposed draft conclusions and as this proposal had received the support of a slight majority of members, he would retain this pending receipt of the views of States and the drafting of provisions to begin at the following session. He noted that his second report in 2025 would focus on the object and scope of the topic and what were seen by the members as the most important issues to be addressed, such as the criteria for distinguishing between legally binding and non-legally binding agreements (chap. VIII).

38. Regarding the topic “**Succession of States in respect of State responsibility**”, the Commission re-established a Working Group on the topic, chaired by Mr. August Reinisch, with a view to making a recommendation on the way forward for the topic. The Working Group had before it a working paper prepared by the Chair of the Working Group. Issues discussed in the Working Group included the sufficiency of State practice and the representativeness of State practice; the extent to which negotiated solutions among the States concerned could be taken as evidence of rules of customary international law; the distinction between a transfer of responsibility as such and the transfer of rights and obligations arising from the responsibility of the predecessor State; the need to distinguish between codification and progressive

development; policy justifications for and against automatic succession and the “clean slate” approach; whether a parallel between State responsibility and State debts was justified; and the relationship of the draft guidelines to the principle of unjust enrichment. The Working Group also noted several issues in the draft guidelines that merited clarification.

39. In light of the issues and difficulties, the Working Group considered various possible ways forward to complete the work of the Commission on the topic. After discussion of the options, the Chair of the Working Group observed that the prevailing view of its members was in favour of a summary report that would describe the difficulties faced in the work on the topic without going into its substance and that would be prepared with a view to concluding the work on the topic at the following session of the Commission. The Commission decided to establish a Working Group at the seventy-sixth session for the purpose of drafting a report that would bring the work of the Commission on the topic to an end and to appoint Mr. Bimal N. Patel as its Chair (chap. IX).

40. 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 additional paper (A/CN.4/774) to the second issues paper, prepared by the Co-Chairs, Ms. Galvão Teles and Mr. Ruda Santolaria, which addressed two subtopics, namely statehood and the protection of persons affected by sea-level rise. A selected bibliography, prepared in consultation with members of the Study Group, was issued as an addendum (A/CN.4/774/Add.1) to the additional paper. The Study Group also had before it a memorandum by the Secretariat identifying elements in the previous work of the Commission that could be relevant for its future work on the topic (A/CN.4/768).

41. The Study Group had an extensive exchange of views on the additional paper. Members of the Study Group reiterated the topic’s importance and relevance to States, especially those that were directly affected by sea-level rise, and the need to demonstrate the practical value of the topic to States. The interrelationship between the three subtopics of the sea-level rise topic was also emphasized.

42. With respect to the subtopic of statehood, the Study Group generally supported the continuity of statehood and agreed that the criteria in article 1 of the 1933 Montevideo Convention on Rights and Duties of States, generally accepted as establishing the existence of a State as a subject of international law, did not address as such the question of the continuity of statehood. Indeed, State practice had revealed a degree of flexibility in the application of international law to the issues of statehood. The Pacific Islands Forum’s 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, which presumed the continuity of statehood regardless of the impact of sea-level rise, was particularly illustrative. Drawing on the additional paper, the Study Group discussed various bases for the continuity of statehood, including the right of States to preserve their existence; the role of recognition in the continuity of statehood; the right of each State to defend its territorial integrity; the right of self-determination of peoples; and consent on the part of the State facing a loss of habitable territory. Reference was also made to security, stability, certainty and predictability; equity and justice; sovereign equality of States; permanent sovereignty of States over their natural resources; the maintenance of international peace and security; the stability of international relations; and international cooperation.

43. In discussing scenarios relating to statehood in the context of sea-level rise, the Study Group agreed that a distinction should be drawn between situations of partial submergence of land surface that would be uninhabitable and situations of total submergence of the land surface as a result of the phenomenon. States had a right to provide for their preservation, which could take many forms, including various adaptation measures to reduce the impacts of sea-level rise. International cooperation for such efforts was considered essential. While various possible future

modalities were considered by the Study Group, reference was made to the need to consult and cooperate in good faith with the populations concerned, including indigenous peoples, and the need for international cooperation between affected States and other members of the international community based on the sovereign equality of States, as well as considerations of equity and fairness.

44. With respect to the subtopic of protection of persons affected by sea-level rise, the Study Group agreed with the conclusion contained in the additional paper that the current international legal frameworks that were potentially applicable to the protection of persons affected by sea-level rise were fragmented and mostly not specific to sea-level rise. The Study Group welcomed the analysis in the additional paper of possible elements for the legal protection of persons affected by sea-level rise based on such current international legal frameworks, such as human dignity as a guiding principle for any action to be taken in the context of sea-level rise; the need for combined needs-based and rights-based approaches as the basis for the protection of persons affected by sea-level rise; the need to delineate human rights obligations of different human rights duty bearers; the recognition of the importance of general human rights obligations in the context of the protection of persons affected by sea-level rise; the acknowledgement of the various tools that may be applicable to address the protection of persons; and the importance of the duty to cooperate for the protection of persons in the context of sea-level rise. The Study Group held a broad discussion of the 12 elements contained in the additional paper which could be either used for the interpretation and application of hard- and soft-law instruments applicable to the protection of persons affected by sea-level rise, and/or could be included in further such instruments concluded at the regional or international levels. It was noted that such elements could be further developed and specified, and could be restructured according to their varying legal relevance.

45. The Study Group also held a discussion on the future programme of work on the topic and confirmed the proposal that at the Commission's session in 2025, the Study Group would consider a joint final report on the topic as a whole to be prepared by the Co-Chairs, consolidating the work undertaken so far on the three subtopics, with a set of conclusions. The importance of taking into account the views of States and international developments was reaffirmed. The Commission adopted the report of the Study Group on its work at the current session (chap. X).

46. Concerning "**Other decisions and conclusions of the Commission**", the Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, chaired by Mr. Marcelo Vázquez-Bermúdez, and the Working Group on methods of work and procedures of the Commission, chaired by Mr. Charles Chernor Jalloh (chap. XI, sect. C). The Commission decided to include in its long-term programme of work the topic "Compensation for the damage caused by internationally wrongful acts" and the topic "Due diligence in international law" (chap. XI, sect. C and annexes).

47. Judge Nawaf Salam, President of the International Court of Justice, addressed the Commission on 17 July 2024. Due to the liquidity crisis at the United Nations, the Commission's session, as approved by General Assembly resolution 78/108 of 7 December 2023, was reduced from twelve to ten weeks. Therefore, the Commission was unable to have its traditional exchange of views with international and regional international legal bodies. Nevertheless, members of the Commission held an informal exchange of views with the International Committee of the Red Cross on 11 July 2024 (chap. XI, sect. D).

48. The Commission decided that its seventy-sixth session would be held in Geneva from 14 April to 30 May and from 30 June to 31 July 2025 (chap. XI, sect. C).

49. The Commission filled two casual vacancies during the session. Ms. Alina Orosan was elected on 1 May 2024 to fill the vacancy occasioned by the resignation

of Mr. Bogdan Aurescu, who had been elected to the International Court of Justice. Mr. Xinmin Ma was elected on 31 July 2024 to fill the vacancy occasioned by the resignation of Mr. Huikang Huang (chap. I, sect. B).

Chapter III

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

A. Immunity of State officials from foreign criminal jurisdiction

50. To afford the opportunity for more Governments to comment, the Commission would appreciate receiving any further comments and observations from Governments, by 15 November 2024, concerning draft articles 7 to 18 and the draft annex of the draft articles on immunity of State officials from foreign criminal jurisdiction,⁹ as adopted on first reading at its seventy-third session (2022), and the commentaries thereto.¹⁰

B. General principles of law

51. The Commission recalls that it completed the first reading of the draft conclusions on the topic “General principles of law” at its seventy-fourth session (2023) and had decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2024.¹¹ The Commission reiterates the importance it attaches to receiving such comments and observations from as many Governments as possible.

C. Sea-level rise in relation to international law

52. The Commission would welcome any information that States, international organizations and other relevant entities could provide on their practice, as well as other pertinent information concerning sea-level rise in relation to international law, and reiterates its requests made in chapter III of its reports on the work of its seventy-first (2019),¹² seventy-second (2021),¹³ seventy-third (2022),¹⁴ and seventy-fourth (2023)¹⁵ sessions.

53. At the seventy-sixth session (2025), the Study Group will seek to produce its final report on the subject of sea-level rise in relation to international law. In this connection, the Commission reiterates that it would appreciate receiving information from States who have not submitted information in the past, any updates or additional information, including comments on the reports of the Co-Chairs and Study Group in relation to the law of the sea, statehood and protection of persons affected by sea-level rise, by 1 December 2024.

D. Non-legally binding international agreements

54. The Commission would appreciate receiving by 31 December 2024, information from States on their practice concerning non-legally binding international agreements which may be of relevance to its future work on the topic.

⁹ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 68.

¹⁰ *Ibid.*, para. 69.

¹¹ *Ibid.*, *Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 38.

¹² *Ibid.*, *Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 31–33.

¹³ *Ibid.*, *Seventy-sixth Session, Supplement No. 10 (A/76/10)*, para. 26.

¹⁴ *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 28.

¹⁵ *Ibid.*, *Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 28.

The Commission would in particular appreciate receiving examples relevant to this topic of:

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

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

Chapter IV

Settlement of disputes to which international organizations are parties

A. Introduction

55. 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 work¹⁶ and appointed Mr. August Reinisch as Special Rapporteur for the topic. Also at its seventy-third session,¹⁷ 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.

56. 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.

57. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,¹⁸ which addressed the scope of the topic and provided an analysis of the subject matter of the topic in light of previous work of the Commission relevant to it and of other international bodies. The report also addressed certain definitional issues. Following the debate in plenary, the Commission decided to refer draft guidelines 1 and 2, as contained in the Special Rapporteur’s first report, to the Drafting Committee. 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”.¹⁹

B. Consideration of the topic at the present session

58. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/766), 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 (A/CN.4/764). In his second report, the Special Rapporteur focused on the discussion of “international disputes”. He also provided an analysis of the practice of settling international disputes to which international organizations are parties, 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 four draft guidelines: one on the definition of international disputes for the purposes of the draft guidelines, one on the practice of dispute settlement, one on access to arbitration and judicial settlement, and one on dispute settlement and rule of law requirements.

¹⁶ 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).

¹⁷ At its 3612th meeting, on 5 August 2022.

¹⁸ A/CN.4/756.

¹⁹ See A/78/10, paras. 44–49.

59. The Commission considered the second report of the Special Rapporteur and the memorandum by the Secretariat at its 3658th to 3662nd meetings, from 29 April to 3 May 2024. At its 3662nd meeting, on 3 May 2024, the Commission decided to refer draft guidelines 3, 4, 5 and 6, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.

60. At its 3673rd meeting, on 31 May 2024, the Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.998 and Add.1) and provisionally adopted draft guidelines 3 to 6 (see sect. C.1 below).

61. At its 3688th to 3692nd meetings, from 23 to 25 July 2024, the Commission adopted the commentaries to the draft guidelines provisionally adopted at the current session (see sect. C.2 below).

C. Text of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted thus far by the Commission

1. Text of the draft guidelines

62. The text of the draft guidelines provisionally adopted by the Commission at its seventy-fourth and seventy-fifth sessions is reproduced below.

Part One Introduction

Guideline 1 Scope

The present draft guidelines concern the settlement of disputes to which international organizations are parties.

Guideline 2 Use of terms

For the purposes of the present draft guidelines:

(a) “international organization” means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.

(b) “dispute” means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial.

(c) “means of dispute settlement” refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes.

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

Guideline 3 Scope of the present Part

This Part addresses disputes between international organizations as well as disputes between international organizations and States.

Guideline 4 Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of

cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph (c), that may be appropriate to the circumstances and the nature of the dispute.

Guideline 5

Accessibility of means of dispute settlement

The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.

Guideline 6

Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-fifth session

63. The text of the draft guidelines, together with commentaries provisionally adopted by the Commission at its seventy-fifth session, is reproduced below.

Guideline 3

Scope of the present Part

This Part addresses disputes between international organizations as well as disputes between international organizations and States.

Commentary

(1) Draft guideline 3 sets out the scope of Part Two of the draft guidelines. Part Two is entitled “Disputes between international organizations as well as disputes between international organizations and States”. Draft guideline 3 is not intended to be a definition of certain types of disputes. Rather, it lays out the scope of Part Two by outlining which disputes are addressed therein.²⁰

(2) Disputes between international organizations have been rare in practice. They concern matters arising from joint projects, issues concerning operational activities and/or their funding.²¹ Few instances have led to third-party dispute settlement procedures.²²

(3) Disputes between international organizations and States occur more frequently.²³ They range from headquarters-related disputes between organizations and their host States, disputes involving the privileges and immunities enjoyed by international organizations and persons connected with them, to disputes concerning

²⁰ The reasons for which the Commission has decided to introduce a distinction between two categories of disputes (those between international organizations and international organizations and States on the one hand, and those between international organizations and private parties on the other hand) are presented in the statement of the Chair of the Drafting Committee delivered on 31 May 2024 (https://legal.un.org/ilc/documentation/english/statements/2024_dc_chair_statement_sidio.pdf).

²¹ Second report on the settlement of disputes to which international organizations are parties by the Special Rapporteur ([A/CN.4/766](#)), para. 15.

²² See, e.g., Permanent Court of Arbitration, *International Management Group v. European Union*, represented by the European Commission, Case Nos. 2017-03 and 2017-04. See <https://pca-cpa.org/en/cases/157/> and <https://pca-cpa.org/en/cases/158/>.

²³ Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat ([A/CN.4/764](#)), chap. II, sect. B 1.

the withdrawal from membership. They may also relate to the scope of the powers of organizations or the compliance of member States with their obligations.

(4) An example of a dispute between international organizations and States concerning rights and obligations under headquarters or seat arrangements can be found in the advisory opinion of the International Court of Justice in the *WHO Regional Office* case,²⁴ which addressed the question under what conditions and modalities a specialized agency's regional office might be transferred. Another example is the *PLO Mission* case,²⁵ which determined whether a dispute had arisen between the United Nations and the United States that had triggered the obligation to arbitrate under the Headquarters Agreement. Privileges and immunities of international organizations, their officials and State representatives may give rise to disputes between international organizations and States. They are routinely handled through direct consultations, including in host country committees.²⁶ Sometimes, however, they may lead to arbitration. Examples of this are the *EMBL* case,²⁷ assessing the scope of tax privileges of an international organization, and the *UNESCO* case,²⁸ concerning the tax privileges of an international organization's retired officials. They also may result in judicial pronouncements, such as in the advisory opinion with binding effect²⁹ of the International Court of Justice in the *Cumaraswamy* case,³⁰ wherein the Court found that Malaysia had to respect the jurisdictional immunity of the Special Rapporteur on the independence of judges and lawyers when acting in the course of the performance of his mission.

(5) In some regional economic integration organizations, disputes between international organizations and their member States arise with more frequency than in organizations with a lesser degree of integration. Their constituent treaties sometimes provide for recourse to courts before which members can challenge the legality of acts of the organs of organizations in proceedings often termed "annulment

²⁴ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980*, p. 73.

²⁵ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, I.C.J. Reports 1988*, p. 12.

²⁶ See, e.g., Committee on Relations with the Host Country, established pursuant to General Assembly resolution 2819 (XXVI) of 15 December 1971.

²⁷ *European Molecular Biology Laboratory (EMBL) v. Germany*, Arbitration Award, 29 June 1990, *International Law Reports*, vol. 105 (1997), pp. 1–74.

²⁸ *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, *Reports of International Arbitral Awards (UNRIAA)*, vol. XXV, pp. 231–266.

²⁹ Art. VIII, sect. 30, Convention on the Privileges and Immunities of the United Nations (General Convention) (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15; art. IX, sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), United Nations, *Treaty Series*, vol. 33, No. 521, p. 261. See also Roberto Ago, "'Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85 (1991), pp. 439–451; Guillaume Bacot, "Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I et de la C.I.J.", *Revue générale de droit international public*, vol. 84 (1980), pp. 1027–1067.

³⁰ *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.

actions”³¹ and where the compliance of member States with the law of the respective organizations can be tested by their organs in “infringement actions”.³²

(6) To the extent that regional economic integration organizations exercise powers conferred by their member States, they may also act as substitute for them in disputes with third States. This is the case in the World Trade Organization, where the European Union, a founding member of the organization,³³ regularly takes part in the quasi-judicial dispute settlement system offered by the organization to settle its trade disputes with third countries.³⁴ Since the World Trade Organization is open to any “separate customs territory”,³⁵ other regional economic integration organizations may also become members of this organization and thus participate in this form of dispute settlement. International organizations may also become members of the United Nations Convention on the Law of the Sea³⁶ and take part in the dispute settlement procedures provided therein.³⁷ To date few disputes to which international organizations are parties have been brought before the International Tribunal for the Law of the Sea.³⁸

(7) Most disputes between international organizations or disputes between international organizations and States arise under international law.³⁹ They may concern questions of treaty interpretation and application. Disputes between international organizations and States may also concern customary international law,

³¹ See, e.g., art. 263, Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 115, 9 May 2008, p. 162; art. 22 (b), Convention on the Statute of the Central American Court of Justice (Panama City, 10 December 1992), United Nations, *Treaty Series*, vol. 1821, No. 31191, p. 279; arts. 17 et seq., Treaty Creating the Court of Justice of the Cartagena Agreement (Andean Community) (Cartagena, 28 May 1979), *International Legal Materials*, vol. 18 (1979), p. 1203, as amended by the Protocol of Cochabamba amending the Treaty creating the Court of Justice (Cochabamba, 28 May 1996), available from <https://www.wipo.int/wipolex/en/treaties/details/401>; art. 9, para. 1 (c), Protocol on the Community Court of Justice (ECOWAS) (Abuja, 6 July 1991), United Nations, *Treaty Series*, vol. 2375, No. 14843, p. 178, as amended by the Supplementary Protocol amending the Protocol on the Community Court of Justice (Accra, 19 January 2005), ECOWAS document A/SP.1/01/05; art. 15, para. 2, Règlement n°1 1/96/CM portant Règlement des procédures de la Cour de Justice de l’UEMOA (Rules of procedure of the West African Economic and Monetary Union Court of Justice) (5 July 1996).

³² See, e.g., arts. 258 and 259, Consolidated version of the Treaty on the Functioning of the European Union; arts. 23 et seq., Cochabamba Protocol; art. 9, para. 1 (d), Protocol on the Community Court of Justice (ECOWAS), as amended; art. 15, para. 1, Rules of procedure of the West African Economic and Monetary Union Court of Justice. See, in detail, [A/CN.4/766](#), paras. 159 et seq.

³³ Art. XI, para. 1, Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vol. 1867–1869, No. 31874.

³⁴ World Trade Organization, “The European Union and the WTO: disputes involving the European Union (formerly EC) – cases”, available at https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

³⁵ Art. XII, para. 1, Marrakesh Agreement establishing the World Trade Organization.

³⁶ Art. 305, para. 1 (f), and annex IX, art. 1, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (with annex), adopted by the General Assembly of the United Nations on 28 July 1994, United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

³⁷ Annex IX, art. 7 (Participation by international organizations), United Nations Convention on the Law of the Sea.

³⁸ See, e.g., *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, Order of 20 December 2000, *ITLOS Reports 2000*, p. 148.

³⁹ See paras. (2) to (7) of the commentary to draft guideline 1 of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission at its seventy-fourth session, [A/78/10](#), para. 49. See also *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), annex I, para. 3.

such as the dispute that formed the background to the advisory opinion of the International Court of Justice in the *Reparation for Injuries* case⁴⁰ or the dispute between Belgium and the United Nations concerning harm suffered by Belgian nationals in the course of United Nations military operations.⁴¹

(8) While the disputes addressed in Part Two generally arise under international law, that does not exclude the possibility that disputes may also arise under domestic law. International organizations and States may subject agreements they have entered into to domestic law.⁴² There does not appear to be a frequent practice in this regard, but examples of a service⁴³ and a loan⁴⁴ agreement between international organizations and sub-State entities that have given rise to arbitration and judicial settlement illustrate this possibility.⁴⁵

(9) The formulation of draft guideline 3, specifying that Part Two addresses disputes between international organizations as well as disputes between international organizations and States, does not exclude the possibility that disputes may arise between international organizations and *sui generis* subjects of international law.⁴⁶ Since there appears to be hardly any practice concerning disputes between international organizations and such subjects of international law, it does not seem necessary to expressly mention them in the text of draft guideline 3. It is however understood that, should such disputes arise, they would also be covered by Part Two.

(10) Private parties, including individuals or legal persons under national law such as corporations or associations, can also be viewed as subjects of international law to the extent that they are direct bearers of rights and/or obligations under international law, as in the fields of international human rights law or international criminal law.⁴⁷

⁴⁰ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 174.

⁴¹ Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, No. 7780, p. 197.

⁴² See para. (3) of the commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), para. 63.

⁴³ Permanent Court of Arbitration, *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)*, Case No. 2014-38. Available at <https://pcacases.com/web/view/109>.

⁴⁴ Community Court of Justice of the Economic Community of West African States, *ECOWAS Bank for Investment and Development v. Cross River State*, Judgment No. ECW/CCJ/JUD/01/21, 5 February 2021.

⁴⁵ See [A/CN.4/766](#), para. 21.

⁴⁶ For instance, the Sovereign Order of Malta which has retained treaty-making powers and the right to send and receive diplomatic representatives (see Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law ([A/CN.4/752](#)), paras. 126–137) as well as other entities which may have treaty-making capacity in certain circumstances, such as insurgents, have traditionally been considered to be *sui generis* subjects of international law. See also Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague, T.M.C. Asser Press, 2004); Roland Portmann, *Legal Personality in International Law* (Cambridge, Cambridge University Press, 2010), pp. 5–28; James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford, Oxford University Press, 2019), pp. 105–116; Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public*, 14th ed. (Paris, Dalloz, 2018), pp. 27–30.

⁴⁷ See, e.g., Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 3rd revised ed. (Leiden/Boston, Brill Nijhoff, 2020), pp. 213–273; Louis Henkin, “International Law: Politics, Values and Functions”, *Recueil des Cours*, vol. 216 (1989), pp. 33–35; Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), pp. 27–72; Manuel Diez de Velasco, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), pp. 301–302; José E. Alvarez, “Are Corporations

Private parties regularly enjoy certain rights with regard to the settlement of disputes stemming from treaty or customary international law guaranteeing access to justice and due process.⁴⁸ Their disputes with international organizations will be addressed in Part Three of the present draft guidelines.

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

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph (c), that may be appropriate to the circumstances and the nature of the dispute.

Commentary

- (1) Draft guideline 4 generally recommends that the disputes covered by Part Two be settled by resorting to appropriate means of dispute settlement.
- (2) In practice, international organizations settle their disputes with other international organizations and States by having recourse to all means of dispute settlement referred to in draft guideline 2, subparagraph (c).⁴⁹ Since disputes are often settled in a confidential manner, it is difficult to precisely assess the actual use and frequency of specific dispute settlement means. However, both international organizations and States often express a preference for “amicable” methods of dispute settlement, in the form of direct negotiations and/or having recourse to diplomatic means.⁵⁰ This suggests that they aim at settling disputes without resorting to independent third-party adjudication, in the form of arbitration or judicial settlement. To what extent the availability of the latter types of dispute settlement facilitates amicable dispute settlement is difficult to assess empirically, although it appears that such availability may increase the willingness to find a negotiated settlement.⁵¹
- (3) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States by any means of peaceful dispute settlement referred to in draft guideline 2, subparagraph (c). Draft guideline 2, subparagraph (c), in turn encompasses all peaceful means of

‘Subjects’ of International Law?’, *Santa Clara Journal of International Law*, vol. 9 (2011), pp. 1–36; Hernán Valencia Restrepo, *Derecho Internacional Público*, 4th ed. (Medellín, Librería Jurídica Sánchez R Ltda., 2016), paras. 371–377; cf. Raymon Ranjeva and Charles Cadoux, *Droit International Public* (Vanves, Edicef, 1992), p. 127.

⁴⁸ Art. 10, Universal Declaration of Human Rights, General Assembly resolution 217 (III); art. 6 para. 1, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221; art. 14 para. 1, International Covenant on Civil and Political Rights (New York, 16 December 1966), *ibid.*, vol. 999, No. 14668, p. 171; art. 8 para. 1, American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969), *ibid.*, vol. 1144, No. 17955, p. 123; art. 7 para. 1, African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217. See also Francesco Francioni, “The rights of access to justice under customary international law”, in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1–55; Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2021).

⁴⁹ See the overview in [A/CN.4/766](#), paras. 27–198; see also [A/CN.4/764](#).

⁵⁰ Miguel de Serpa Soares, “Responsibility of international organizations”, *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, 2022), p. 125. See also [A/CN.4/764](#), chap. II, sect. B.

⁵¹ Gerald Fitzmaurice, “The future of public international law and of the international legal system in the circumstances of today”, in Institute of International Law (eds.), *Livre du Centenaire 1873–1973. Evolution et perspectives du droit international* (Basel, Editions S. Karger S.A., 1973), pp. 196–363, at p. 276; C. Wilfred Jenks, *The Prospects of International Adjudication* (London, Stevens, 1964), p. 107.

dispute settlement contained in Article 33 of the Charter of the United Nations, as reaffirmed by the Manila Declaration on the Peaceful Settlement of International Disputes.⁵² By broadly referring to the means of peaceful dispute settlement, draft guideline 4 makes clear that the recommendation does not prioritize any specific means of dispute settlement.

(4) The free choice of dispute settlement means is reinforced by the additional language of draft guideline 4 referring to means “that may be appropriate to the circumstances and the nature of the dispute”. This language is inspired by paragraph 5 of the Manila Declaration which refers to “such peaceful means as may be appropriate to the circumstances and the nature of their dispute”. Depending on the nature of the dispute and the circumstances, certain forms of dispute settlement may be more appropriate than others. Where a dispute mainly involves a disagreement over facts, enquiry or fact-finding may be a more appropriate method of dispute settlement, while a dispute concerning the existence of a legal obligation may be more aptly settled through arbitration or judicial settlement.

(5) Draft guideline 4 recommends resorting to dispute settlement but avoids using language that could be understood as creating a legally binding obligation. Therefore, the term “should” is more appropriate than the expression “shall” in this context.

(6) The recommendatory language is also an acknowledgment that, in some situations, specific means of dispute settlement may be legally provided for in treaties. A number of constituent documents of international organizations,⁵³ some multilateral privileges and immunities treaties,⁵⁴ and many bilateral headquarters agreements⁵⁵ contain express obligations with regard to the settlement of specific types of disputes to which international organizations are parties. The draft guidelines do not intend to alter such obligations. By recommending resorting to the appropriate means, they acknowledge that, in some situations, specific means may be obligatory.

(7) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States in good faith and in a spirit of cooperation, which is also language inspired by paragraph 5 of the Manila Declaration. This clarifies that good faith and cooperation are underlying obligations that should guide the efforts to settle disputes covered by Part Two.

Guideline 5

Accessibility of means of dispute settlement

The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the

⁵² General Assembly resolution 37/10 of 15 November 1988, annex.

⁵³ See, e.g., art. XIV, para. 2, Constitution of the United Nations Educational, Scientific and Cultural Organization (London, 16 November 1945), United Nations, *Treaty Series*, vol. 4, No. 52, p. 275; art. XVIII (a), Agreement relating to the International Telecommunications Satellite Organization “INTELSAT” (Washington, 20 August 1971), United Nations, *Treaty Series*, vol. 1220, No. 19677, p. 21.

⁵⁴ See, e.g., art. VIII, sect. 30, Convention on the Privileges and Immunities of the United Nations (General Convention); art. IX, sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies; art. X, sect. 34, Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, No. 5334, p. 147; art. 32, Agreement on the Privileges and Immunities of the International Criminal Court (New York, 9 September 2002), United Nations, *Treaty Series*, vol. 2271, No. 40446, p. 3.

⁵⁵ See, e.g., art. VIII, sect. 21, Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11; art. XVII, sect. 35, Agreement regarding the Headquarters of the Food and Agriculture Organization of the United Nations (Washington, 31 October 1950), United Nations, *Treaty Series*, vol. 1409, No. 23602, p. 521; art. 29, para. 1, Agreement (with annexes) regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory (Paris, 2 July 1954), United Nations, *Treaty Series*, vol. 357, No. 5103, p. 3.

settlement of disputes between international organizations or between international organizations and States.

Commentary

(1) Draft guideline 5 addresses the accessibility of dispute settlement means. While draft guideline 4 recommends the use of the appropriate means of peacefully settling disputes to which international organizations are parties, draft guideline 5 addresses the separate issue of whether dispute settlement means are actually available and accessible.

(2) Draft guideline 5 recommends the wider accessibility of the means of dispute settlement referred to in draft guideline 2, subparagraph (c). The expression “accessibility” has been chosen to emphasize practical issues, such as costs and legal remedies available, and not only the legal availability of means of dispute settlement. The recommendation that means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely “accessible” is intended to focus on the practical use of the different forms of settling disputes to which international organizations are parties.

(3) While amicable forms of dispute settlement, such as negotiations or consultations, are practically always available, other means of dispute settlement, especially those involving neutral third parties, may not be easily available. Whether international organizations or States have, for instance, access to arbitration or judicial settlement in practice mostly depends upon whether such means of dispute settlement have been expressly stipulated.⁵⁶ International organizations and States are always free to agree on any form of dispute settlement in an *ad hoc* fashion once a dispute has already arisen. Practice demonstrates, however, that such forms of *ex post* agreement to resolve disputes by arbitration or judicial settlement rarely occur.⁵⁷ Thus, to make them practically available, a recommendation to make such forms of dispute settlement more widely accessible appears useful.

(4) Like draft guideline 4, draft guideline 5 does not establish a hierarchy of the different means of dispute settlement. This is stressed by the use of the words “as appropriate” after “means of dispute settlement, including arbitration and judicial settlement”. The words “as appropriate” also align with the idea expressed in draft guideline 4 that different means of dispute settlement may be appropriate for the settlement of different disputes.

(5) Draft guideline 5 recommends the wider accessibility of all means of dispute settlement and does not prioritize any particular means. The phrase “including arbitration or judicial settlement” was inserted because these methods of dispute settlement are particularly inaccessible if not expressly stipulated. The Commission has noted the problem of limited access to justice for international organizations several times.⁵⁸

⁵⁶ See para. (6) of the commentary to draft guideline 4 above. See also [A/CN.4/766](#), paras. 52 et seq.

⁵⁷ See the rare example of such a *compromis* in Exchanges of Notes Constituting an Agreement for the Settlement of a Dispute Concerning the Taxation Liability of the European Atomic Energy Community (EURATOM) Employees Working in the United Kingdom on the Dragon Project (Brussels, 11 July 1966), United Nations, *Treaty Series*, vol. 639, No. 9147, p. 99, which led to the arbitral award in *Taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, 25 February 1967, UNRIIAA, vol. XVIII, p. 503.

⁵⁸ See, e.g., *Yearbook of the International Law Commission, 2002*, vol. II (Part Two), para. 486, noting the inadequacy of available dispute settlement options for international organizations, in particular in regard to responsibility issues. Further, the topics “Arrangements to enable international organizations to be parties to cases before the International Court of Justice” (*Yearbook of the International Law Commission, 1968*, vol. II, document [A/7209/Rev.1](#), at p. 233) and “Status of international organizations before the International Court of Justice”

(6) The limited access of international organizations to dispute settlement in general, and to the International Court of Justice in particular, has led to repeated calls for broader access of the United Nations and its specialized agencies, as well as international organizations generally, to the Court, including to its contentious jurisdiction.⁵⁹

(7) The recommendation to make the means of dispute settlement, including arbitration and judicial settlement, more widely accessible for the settlement of disputes covered by Part Two of the draft guidelines is not intended to encourage resort to specific forms thereof, especially to litigation or arbitration. Rather, it is premised on the notion that the availability and accessibility of such means will contribute to the settlement of disputes by alternative means.⁶⁰

Guideline 6

Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

Commentary

(1) Draft guideline 6 addresses core requirements of the rule of law for the settlement of disputes through arbitration or judicial settlement.

(2) The concept of the rule of law has developed at the national level. Its relevance at the international level, namely with regard to States and international organizations, is strongly supported by the 2012 declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels,⁶¹ as well as by the resolutions on the same topic that the General Assembly has adopted annually since the rule of law was put on its agenda in 2006.⁶² The General Assembly confirmed in its 2012 declaration that “the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities”.⁶³

(*Yearbook of the International Law Commission, 1970*, vol. II, document A/CN.4/230, p. 268, para. 138) have been proposed to be included in the long-term programme of work of the Commission; *Yearbook of the International Law Commission, 2016*, vol. II (Part One), document A/CN.4/679, para. 58.

⁵⁹ Report of the Secretary-General on a review of the role of the International Court of Justice (A/8382). See also Philippe Couvreur, “Développements récents concernant l’accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice”, in Emile Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999), pp. 293–323; Ignaz Seidl-Hohenveldern, “Access of international organizations to the International Court of Justice,” in A.S. Muller, D. Raič and J.M. Thuránszky (eds.), *The International Court of Justice* (The Hague, Kluwer Law International, 1997), pp. 189–203; Jerzy Sztucki, “International organizations as parties to contentious proceedings before the International Court of Justice?,” in Muller, Raič and Thuránszky (eds.), *The International Court of Justice*, pp. 141–167; Tullio Treves, “International organizations as parties to contentious cases: selected aspects”, in Laurence Boisson de Chazournes, Cesare P.R. Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsey, New York, Transnational Publishers, 2002), pp. 37–46; International Law Association, Final report on accountability of international organisations, *Report of the Seventy-first Conference held in Berlin, 16–21 August 2004*, pp. 231–233.

⁶⁰ See para. (2) of the commentary to draft guideline 4 above.

⁶¹ General Assembly resolution 67/1 of 24 September 2012.

⁶² See, most recently, The rule of law at the national and international levels, General Assembly resolution 78/112 of 7 December 2023; The rule of law at the national and international levels, General Assembly resolution 77/110 of 7 December 2022; The rule of law at the national and international levels, General Assembly resolution 76/117 of 9 December 2021.

⁶³ General Assembly resolution 67/1, para. 2.

(3) Draft guideline 6 focuses on arbitration and judicial settlement because it is in these forms of third-party dispute settlement that independence and impartiality, as well as compliance with due process, are most crucial and well established. This does not affect the requirement of independence and impartiality of some other forms of dispute settlement, such as conciliation or mediation.⁶⁴

(4) By requiring the “independence and impartiality of adjudicators”, draft guideline 6 refers to the core requirement of the rule of law for those who have been empowered to settle a dispute by adjudication.⁶⁵ Independence primarily refers to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of organizational, personal, financial, or other close connection to them, whereas impartiality relates more to the views and opinions held by an adjudicator, requiring a lack of bias.⁶⁶

(5) Independence and impartiality of judges and arbitrators are required in the applicable rules.⁶⁷ The core meaning and substantive content of the requirements of

⁶⁴ See, e.g., arts. 4 and 7, para. 1, Permanent Court of Arbitration Optional Conciliation Rules (1996); arts. 12–14, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965), United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159; art. 5, Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe (Stockholm, 15 December 1992), United Nations, *Treaty Series*, vol. 1842, No. 31413, p. 121; art. 7, United Nations Model Rules for the Conciliation of Disputes between States, General Assembly resolution 50/50 of 11 December 1995, annex; art. 3, UNCITRAL Mediation Rules, Report of the United Nations Commission on International Trade Law, Fifty-fourth Session (28 June–16 July 2021) (A/76/17), annex III. See also Christian Tomuschat and Marcelo Kohen (eds.), *Flexibility in International Dispute Settlement: Conciliation Revisited*, (Leiden, Brill Nijhoff, 2020), pp. 25 et seq.

⁶⁵ General Assembly resolution 67/1, para. 13 (“We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.”); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, para. 92 (identifying “the right to an independent and impartial tribunal established by law” as an element of the right to a “fair hearing”); Bangalore Principles of Judicial Conduct, document E/CN.4/2003/65, annex, adopted by the Judicial Group on Strengthening Judicial Integrity, The Hague, 25–26 November 2001, recognized by the Economic and Social Council as a further development and as complementary to the Basic Principles on the Independence of the Judiciary in its resolution 2006/23 on strengthening basic principles of judicial conduct (E/2006/99(SUPP)), para. 2 (“WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law”, Bangalore Principles of Judicial Conduct, fifth preambular paragraph); Bangalore Principles of Judicial Conduct, Value 1 (“Judicial independence is a pre-requisite to the rule of law”). See also Hélène Ruiz-Fabri and Jean-Marc Sorel (eds.), *Indépendance et impartialité des juges internationaux* (Paris, Pedone, 2010); Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Cambridge, Intersentia, 2023).

⁶⁶ See, e.g., Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, 2011, General Assembly resolution 66/106 of 9 December 2011, paras. 1–2; UNCITRAL, Draft code of conduct for arbitrators in international investment dispute resolution and commentary (A/CN.9/1148), sect. II. C., text of the draft commentary, para. 19.

⁶⁷ See, e.g., arts. 2 and 20, Statute of the International Court of Justice (respectively, “The Court shall be composed of a body of independent judges” and “Every member of the Court shall, before taking up [their] duties, make a solemn declaration in open court that [they] will exercise [their] powers impartially and conscientiously”); art. 2, para. 1, Statute of the International Tribunal for the Law of the Sea (“The Tribunal shall be composed of a body of 21 independent members”); art. 21, para. 4, European Convention on Human Rights (“During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office”); art. 17, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Ouagadougou, 10 June 1998), available on the website of the African Commission: <https://au.int/> (under “Treaties”)

independence and impartiality are made more precise by various non-binding instruments⁶⁸ or by provisions contained in the statutes of international courts and tribunals,⁶⁹ as well as in their rules of procedure.⁷⁰ In addition to independence and impartiality, some instruments also refer to integrity, propriety, competence and/or diligence as requirements for adjudicators⁷¹ – concepts that often overlap with and/or complement independence and impartiality.

(6) By requiring “due process”, draft guideline 6 refers to the core procedural requirements of adjudicatory third-party dispute settlement.⁷² Due process or a fair trial/hearing specifically entails the right to be heard and the right to be heard equally.⁷³

(7) Both the independence and impartiality of adjudicators, and due process are core elements of the rule of law relevant to dispute settlement. In the practice of the International Court of Justice, these elements are also referred to as requirements of “the good administration of justice”.⁷⁴ The Court, for instance, found that “[t]he principle of equality of the parties follows from the requirements of good administration of justice”.⁷⁵ It further determined that “the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceedings vis-à-vis the opponent” are elements of the well-

(“The independence of the judges shall be fully ensured in accordance with international law”); art. 71, American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 144 (“The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes”); art. 6, para. 7, UNCITRAL Arbitration Rules (2010) and art. 6, para. 3, Permanent Court of Arbitration, Arbitration Rules (17 December 2012) (referring to an “independent and impartial arbitrator”); art. 18, para. 1, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 January 2017) (“Every arbitrator must be impartial and independent”).

⁶⁸ See, e.g., Burgh House Principles on the Independence of the International Judiciary, adopted in 2004 by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals; Bangalore Principles of Judicial Conduct; International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the Council of the International Bar Association on 23 October 2014); UNCITRAL, Draft code of conduct for arbitrators in international investment dispute resolution and commentary.

⁶⁹ See, e.g., Article 16–17, Statute of the International Court of Justice.

⁷⁰ See, e.g., rule 4, para. 1, European Court of Human Rights, Rules of Court. Available from <https://prd-echr.coe.int/web/echr/rules-of-court>.

⁷¹ See, e.g., values 3, 4 and 6, Bangalore Principles of Judicial Conduct.

⁷² See Arman Sarvarian and others (eds.), *Procedural Fairness in International Courts and Tribunals* (London, British Institute of International and Comparative Law, 2015), pp. 108–109; Clooney and Webb, *The Right to a Fair Trial in International Law*.

⁷³ Institute of International Law, resolution on the equality of parties before international investment tribunals, *Yearbook*, vol. 80 (2018–2019), Session of The Hague (2019), pp. 1–11 (referring in the preamble to “the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication”); European Commission for Democracy through Law (Venice Commission), Report on the rule of law, document CDL-AD(2011)003rev, 4 April 2011, para. 60 (“The rights most obviously connected to the rule of law include ... (3) the right to be heard”).

⁷⁴ *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77, at p. 85; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 65 above); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, I.C.J. Reports 2012, p. 10, at para. 47.

⁷⁵ *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 74 above), p. 86.

recognized right to a fair hearing.⁷⁶ It also considered “the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case” as well as “the right to equality in the proceedings vis-à-vis the opponent” to be “elements of the right to a fair hearing”.⁷⁷

(8) In light of the general acceptance that the independence and impartiality of adjudicators and due process are not merely aspirations, but legal obligations under applicable rules of international law, draft guideline 6 is formulated in obligatory language, stating that arbitration and judicial settlement “shall” conform to these requirements of the rule of law.

(9) Draft guideline 6 only refers to the requirements of the rule of law pertinent once international organizations and States have access to arbitration or judicial settlement and does not encompass a right of access to justice for such organizations or States. Such a right of access to justice is often considered to be part of the rule of law with regard to private parties.⁷⁸

(10) The formulation of draft guideline 6 does not alter the fact that wider accessibility of all means of dispute settlement, including arbitration and judicial settlement, is to be recommended, as provided for in draft guideline 5.

⁷⁶ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, (see footnote 65 above), para. 92.

⁷⁷ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, (see footnote 74 above), para. 30.

⁷⁸ General Assembly resolution 67/1, para. 14. See also European Court of Human Rights, *Golder v. United Kingdom*, No. 4451/70, 21 February 1975, Series A no. 18, para. 36; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, para. 50. See also Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1-55, at p. 3; Tom Bingham, *The Rule of Law* (London, Penguin, 2010), p. 85.

Chapter V

Subsidiary means for the determination of rules of international law

A. Introduction

64. 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.⁷⁹ Also at its seventy-third session,⁸⁰ 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).

65. 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.

66. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,⁸¹ 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.⁸²

67. 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.

B. Consideration of the topic at the present session

68. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/769). The Special Rapporteur 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 International Court of Justice and other international tribunals, and scholarly writings concerning the functions of subsidiary means; and the general nature of

⁷⁹ 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).

⁸⁰ At its 3612th meeting, on 5 August 2022.

⁸¹ A/CN.4/760.

⁸² A/CN.4/759.

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 of the International Court of Justice, and the link to the rights of third States. He proposed three draft conclusions and also made suggestions for the future programme of work on the topic.

69. 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” (A/CN.4/765).

70. The Commission considered the second report of the Special Rapporteur and the memorandum by the Secretariat at its 3663rd to 3667th meetings, from 9 to 15 May 2024. At its 3667th meeting, on 15 May 2024, the Commission 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.

71. At its 3661st meeting, on 2 May 2024, the Commission, having considered the report of the Drafting Committee on the topic at its seventy-fourth session,⁸³ provisionally adopted draft conclusions 4 and 5, as orally revised (see sect. C.1 below).

72. At its 3674th meeting, on 1 July 2024, the Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.999) and provisionally adopted draft conclusions 6, 7 and 8 (see sect. C.1 below).

73. At its 3693rd to 3699th meetings, from 25 to 31 July 2024, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current session (see sect. C.2 below).

C. Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted thus far by the Commission

1. Text of the draft conclusions

74. The text of the draft conclusions provisionally adopted by the Commission at its seventy-fourth and seventy-fifth sessions is reproduced below.

Conclusion 1 Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

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

Subsidiary means for the determination of rules of international law include:

(a) decisions of courts and tribunals;

(b) teachings;

(c) any other means generally used to assist in determining rules of international law.

Conclusion 3

⁸³ A/CN.4/L.985/Add.1.

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

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

- (a) their degree of representativeness;
- (b) the quality of the reasoning;
- (c) the expertise of those involved;
- (d) the level of agreement among those involved;
- (e) the reception by States and other entities;
- (f) where applicable, the mandate conferred on the body.

Conclusion 4

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.
2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Conclusion 5

Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

Conclusion 6

Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.
2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Conclusion 7

Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Conclusion 8

Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

- (a) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;
- (b) the extent to which the decision is part of a body of concurring decisions; and

(c) the extent to which the reasoning remains relevant, taking into account subsequent developments.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-fifth session

75. The text of the draft conclusions, together with commentaries provisionally adopted by the Commission at its seventy-fifth session, is reproduced below.

Conclusion 4 Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Commentary

(1) Draft conclusions 4 (decisions of courts and tribunals) and 5 (teachings) build on the prior work of the Commission. They both seek to clarify how decisions of courts and tribunals and teachings, the two principal subsidiary means derived from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, are to be used for the purpose of determining the existence and content of rules of international law.

(2) Draft conclusion 4 concerns the role of decisions of international and national courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law. It consists of two paragraphs. Paragraph 1 addresses decisions of international courts and tribunals, especially those of the International Court of Justice, which are a subsidiary means for the determination of the existence and content of rules of international law. Paragraph 2 considers the more limited role of decisions of national courts as a subsidiary means for the determination of the existence and content of rules of international law. As indicated in draft conclusion 6, paragraph 2, the latter use of decisions of national courts is without prejudice to their other uses. It is also without prejudice to the use of decisions in the writings of scholars and in other subsidiary means. Key elements of each of the two paragraphs of draft conclusion 4 are considered below.

Paragraph 1

“Decisions of international courts and tribunals, in particular of the International Court of Justice”

(3) The term “decisions”, as used in the present commentaries, was already explained in the commentary to draft conclusion 2, subparagraph (*a*). It is therefore sufficient to recall here that the Commission there indicates that the narrow term “judicial decisions”, found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, had been broadened by using the unqualified term “decisions” in order to reflect contemporary practice.⁸⁴ That contemporary practice confirms the use of a wider set of decisions from a wide variety of bodies, not just judicial ones, as part of the process of identifying or determining the existence and content of rules of international law.⁸⁵ The Commission has explained that this

⁸⁴ See para. (4) of the commentary to draft conclusion 2, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 126, at p. 81.

⁸⁵ See paras. (6)-(7), *ibid.*, pp. 81-82 (note that the reference to courts and tribunals would also encompass regional judicial bodies, such as the African Court on Human and Peoples' Rights, the Caribbean Court of Justice, the Court of Justice of the European Union, the Court of Justice of the Economic Community of West African States, the East African Court of

broader meaning of “decisions” would include final judgments, advisory opinions, awards and any other orders issued in incidental or interlocutory proceedings, including provisional measures.⁸⁶

(4) In the commentary to draft conclusion 2, the term “courts and tribunals” was also explained as forming part of two broad types or categories of courts: first, “international courts and tribunals”; and second, “national courts”. The distinction between international courts and tribunals, on the one hand, and national courts, on the other, in the present draft conclusion carries implications for the weight to be attached to the decisions of courts and tribunals and is further elaborated below in relation to paragraph 2.

(5) The current draft conclusion underscores that the decisions of “international courts and tribunals” should be understood broadly. The term is intended to cover “any international body exercising judicial powers”⁸⁷ and which is called upon to determine the existence and content of rules of international law. Examples of such international courts today abound. They would include permanent bodies such as the International Court of Justice, but also a wide variety of other specialist and regional courts and tribunals, some of which may be *ad hoc* instead of permanent and may be inter-State arbitral tribunals or other types of tribunals applying international law.⁸⁸ The body of law that they apply, as well as the skills and the breadth of evidence usually at the disposal of international courts and tribunals, may lend significant weight to their decisions, subject to the considerations mentioned in draft conclusion 3 providing general criteria for the assessment of subsidiary means and draft conclusion 8 identifying specific criteria to evaluate the weight of decisions of courts and tribunals.

(6) While paragraph 1 clarifies that decisions of all international courts and tribunals are a subsidiary means for the determination of the existence and content of rules of international law, the Commission expressly refers to the International Court of Justice. This understanding is captured by the formulation “in particular of the International Court of Justice”. This language is identical to paragraph 1 of conclusion 13 (decisions of courts and tribunals) of the conclusions on identification of customary international law,⁸⁹ paragraph 1 of draft conclusion 9 (subsidiary means for the determination of the peremptory character of norms of general international law) of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)⁹⁰ and paragraph 1 of draft conclusion 8 (decisions of courts and tribunals) of the draft conclusions on general principles of law.⁹¹

(7) The Commission considers that highlighting the International Court of Justice in paragraph 1 of draft conclusion 4 is warranted for several reasons. First, Article 38, paragraph 1 (*d*), is the applicable law clause of the Statute of the International Court

Justice, the European Court of Human Rights and the Inter-American Court of Human Rights).

⁸⁶ See para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 109 (“the term ‘decisions’ includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters”).

⁸⁷ Para. (4) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 109.

⁸⁸ *Ibid.* There is a burgeoning number of international courts and tribunals. For example, while studies show that around 1989 there were only six permanent international courts, over a dozen such bodies that had issued over 37,000 rulings existed as of 2014. See, in this regard, Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, Princeton University Press, 2014).

⁸⁹ *Yearbook ... 2018*, vol. II (Part Two), para. 65.

⁹⁰ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 43.

⁹¹ *Ibid.*, *Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 40.

of Justice, which forms an integral part of the Charter of the United Nations and directs the judges when resolving disputes between States in accordance with international law or issuing advisory opinions, to “apply” subject only to the provisions of Article 59 “judicial decisions” as a “subsidiary means for the determination of rules of law”. Naturally, a study such as the present one aimed at clarifying the practice in relation to a provision contained in the Statute of the Court ought to give due deference to that body’s extensive judicial practice. In fact, the practice indicates that the Court routinely refers to its own previous decisions, and increasingly those of other courts and tribunals, although without necessarily characterizing them as “subsidiary means”.⁹² In this way, the Court does not only apply the applicable law provision as a function of its own Statute, now deemed to be part of customary international law, it also issues authoritative decisions that assist in upholding the unity and coherence of international law as a legal system.

(8) Second, under Article 92 of the Charter of the United Nations, the International Court of Justice is “the principal judicial organ of the United Nations”.⁹³ Besides the fact that all Members of the United Nations are *ipso facto* “parties to the Statute of the International Court of Justice”,⁹⁴ its members are elected by the main political organs of the United Nations, namely, the General Assembly and the Security Council. The persons elected to the Court are not only required to individually possess the qualifications required by the Statute, but the body as a whole represents the main regions and legal systems of the world. The Court, in other words, is a truly universal body of jurists founded by a truly universal international organization that is broadly representative of the main regions and legal systems of the world. Its judicial findings therefore possess the legitimizing features that have rightly led to it be described as the “World Court”.⁹⁵

(9) Third, while some States have established courts to judicially settle disputes among themselves at the regional level,⁹⁶ the International Court of Justice remains the only international tribunal to date with general subject matter jurisdiction.

⁹² See memorandum by the Secretariat on subsidiary means for the determination of rules of international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic (A/CN.4/759), para. 219.

⁹³ See Charter of the United Nations, Article 92: “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”

⁹⁴ See Charter of the United Nations, Article 93, paragraph 1: “All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”

⁹⁵ For example, see United States of America, “The United States and the ‘World Court’”, Congressional Research Service, 17 October 2018, CRS Report No. LSB10206, available from <https://crsreports.congress.gov/product/pdf/LSB/LSB10206> (noting that the International Court of Justice is “commonly called the ‘World Court’”).

⁹⁶ See, for example, Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 403, art. 211 and 212 (noting the court has jurisdiction to resolve contentious disputes between member States and to issue advisory opinions); Treaty for the Establishment of the East African Community (Arusha, 30 November 1999), *ibid.*, vol. 2144, No. 37437, p. 255, art. 32, subpara. (b) (the East African Court of Justice has jurisdiction over disputes “[a]rising from a dispute between the Partner States regarding [the] Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned”); Statute of the Central American Court of Justice (Panama City, 10 December 1992), *ibid.*, vol. 1821, No. 31191, p. 291, art. 22, subpara. (a) (“The Court’s competence includes the following: ... To hear, at the request of the Member States, the controversies that arise among them”); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221, as revised, art. 33 (referring to inter-State cases heard before the European Court of Human Rights: “Any High Contracting Party may refer to the court any alleged breach of the provisions of the Convention and the protocols thereto another High Contracting Party”).

Although this power is not unique, the Court also possesses the competence to give advisory opinions on any legal questions requested by the two main political organs, as well as by other United Nations organs and their specialized agencies. It follows that there is some merit in attaching significance to its case law, given its special status as the only standing international court of general subject matter jurisdiction.

(10) Fourth, and this point also flows from Article 94 of the Charter of the United Nations, each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.⁹⁷ Such decisions, including final judgments, are enforceable by the Security Council. The Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. This power has not been frequently invoked in practice. Yet, the option for States to resort to that provision for the enforcement of the decisions of the Court remains under the Charter of the United Nations.⁹⁸

(11) Overall, taking into account the foregoing considerations, the Commission considered it appropriate to highlight the role of the International Court of Justice without implying that a hierarchy exists vis-à-vis other international courts and tribunals created by States or international organizations exercising specific competencies conferred on them by their constitutive instruments. For example, on matters of international criminal law, international human rights law, the law of the sea, and international economic law, decisions of the *ad hoc* or permanent international courts and tribunals created by States and international organizations must be taken into account and, in some cases, given considerable or even great weight compared to general courts. The legal value to attribute to such decisions from all such bodies will vary depending on the context and the quality of the reasoning and must be assessed on a case-by-case basis.

“are a subsidiary means for the determination of the existence and content of rules of international law”

(12) In the final element of paragraph 1 of draft conclusion 4, the Commission has determined that decisions of international courts and tribunals, especially those of the International Court of Justice, *“are a subsidiary means for the determination of the existence and content of rules of international law”* (emphasis added). The decisions of such courts and tribunals on questions of international law, in particular those decisions in which treaty rules are interpreted and applied or the existence of rules of customary international law, general principles of law or peremptory norms of general international law (*jus cogens*) is identified and applied, may offer valuable guidance for determining the existence or content of rules of international law.

⁹⁷ See Charter of the United Nations, Article 94, paragraph 1: “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”

⁹⁸ The United Kingdom requested the Security Council to call upon Iran to act in conformity with provisional measures that the International Court of Justice indicated in the *Anglo-Iranian Oil Co. case*. For a discussion of the debate, see https://legal.un.org/repertory/art94/english/rep_orig_vol5_art94.pdf. The Court addressed the effect and the force of its judgment under Article 94 of the Charter of the United Nations in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment*, *I.C.J. Reports 1982*, p. 18, at para. 29. Similarly, Article 94 was relevant in: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, *I.C.J. Reports 1986*, p. 14, at para. 178; *LaGrand Case (Germany v. the United States of America)*, *I.C.J. Reports 2001*, p. 466; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Provisional Measures, Order of 16 July 2008*, *I.C.J. Reports 2008*, p. 311; *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Judgment*, 11 September 1992, *I.C.J. Reports 1992*, p. 350; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment*, *I.C.J. Reports 2002*, p. 303.

(13) The terms “subsidiary means” and “determination” were already explained in the commentary to draft conclusion 1. Reference can be had to that explanation in the earlier part of the commentary to that draft conclusion (see paras. (10)-(13) thereof).⁹⁹ There, the Commission already established that the term “determination” relates to two main aspects. Consequently, the term “determination” encompasses different operations for the purposes of the draft conclusions. Similarly, the commentary also clarified the terms “existence and content” of rules of international law (para. (3) of the general commentary).¹⁰⁰ Thus, the reference to the “existence and content” reflects the fact that, while often in practice there may be a need to use such a subsidiary means to ascertain the existence of a rule, in some cases, it may already be accepted that the rule exists but its precise content is what is disputed and therefore needs to be determined. Both scenarios are captured by the formulation used.

(14) Regarding the term “rules of international law”, the earlier commentary (para. (3) of the commentary to draft conclusion 1¹⁰¹) explained the phrase, to the effect that “rules of law” is actually used in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. The Commission notes the case law has explained the reference to “rules” is meant to encompass all those rules that may be found in the sources of international law.¹⁰²

(15) Furthermore, the Commission had previously determined that, as with the sources of international law referred to in the preceding paragraph, decisions of international courts and tribunals are a subsidiary means for determining the peremptory character of norms of general international law.¹⁰³ It was elucidated in previous work that there “is an abundance of [such] examples”,¹⁰⁴ including in the case law of various international tribunals such as the International Criminal Tribunal for the Former Yugoslavia.¹⁰⁵ In short, consistent with the Commission’s approach on recent topics and as clarified in the commentary to draft conclusion 1 on scope, decisions of international courts and tribunals are a subsidiary means for determining the existence and content of rules of international law.

Paragraph 2 – Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law

(16) Paragraph 2 of draft conclusion 4 concerns decisions of national courts, which may be used, in certain circumstances, as a subsidiary means for the determination of

⁹⁹ A/78/10, para. 126.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² The International Court of Justice explained this in *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at para. 79 (“the association of the terms ‘rules’ and ‘principles’ is no more than the use of a dual expression to convey one and the same idea, since in this context, ‘principles’ clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term ‘principles’ may be justified because of their more general and more fundamental character”).

¹⁰³ European Court of Human Rights: *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161; *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A No. 201; and *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

¹⁰⁴ Para. (3) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44.

¹⁰⁵ See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, *Judicial Reports 1998*, vol. 1, p. 467, at p. 569, paras. 153–154. The European Court of Human Rights later relied on this interpretation in *Al-Adsani v. the United Kingdom* [Grand Chamber (GC)], No. 35763/97, ECHR 2001-XI, para. 30. See also Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, Series C, No. 153, para. 128, and Inter-American Commission on Human Rights, *Michael Domingues v. United States*, Case 12.285, Merits, 22 October 2002, Report No. 62/02, para. 49.

the existence and content of rules of international law. Two preliminary points appear necessary before explaining the text of the paragraph. First, the Commission recalls that Article 38, paragraph 1 (d), of the Statute of the International Court of Justice refers to “judicial decisions” without distinguishing the use of such decisions as emanating from international or national courts.¹⁰⁶ This means that decisions of both international and national courts could serve as subsidiary means that may be used to determine the existence and the content of rules of international law.

(17) Second, while it is usually not problematic to draw a distinction in practice between the decisions of international courts and tribunals, on the one hand, and the decisions of national courts, on the other, given the emergence of a new type of so-called “hybrid” courts, the distinction is not always clear-cut.¹⁰⁷

(18) The Commission places greater emphasis on the decisions of international courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law. However, the use of the decisions of national courts calls for some caution.¹⁰⁸ This caution is reflected in the use of the terms “may be used” and “in certain circumstances” in paragraphs 1 and 2, qualifying the phrase “subsidiary means for the determination of the existence and content of rules of international law”. Paragraph 1 definitively states that the decisions of international courts and tribunals “are” a subsidiary means. The use of “in certain circumstances” expresses essentially the same idea found in the Commission’s prior work on the identification of customary international law (conclusion 13, para. 2¹⁰⁹) and general

¹⁰⁶ See para. (6) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66, at pp. 109–110.

¹⁰⁷ There are several types of such tribunals that are hybrid to varying degrees. Some of the “hybrid courts” form part of or operate within a national legal system, while others operate as independent institutions with their own distinct legal personality under international law. Often discussed in terms of the legal basis for their establishment and whether they have mixed composition in terms of staff or apply international or national law, at least three broad categories can be identified. First, courts established through a treaty between either a State or an international or regional organization. Second, tribunals established by an international transitional administration charged with administering a country in transition. Third, courts established by States under their national law with some level of international, including technical and funding, support. The Extraordinary African Chambers within the Senegalese judicial system and the Extraordinary Chambers in the Courts of Cambodia are examples of the former. The Special Court for Sierra Leone and the Special Tribunal for Lebanon were created through bilateral treaties between the United Nations, on the one part, and, on the other part, the Governments of Sierra Leone and Lebanon, respectively. Other “hybrid” tribunals were established by international administrations such as the Special Panels for Serious Crimes in East Timor and the War Crimes Chamber in Bosnia and Herzegovina. Yet more examples are the internationally assisted national accountability efforts, such as those of the International Crimes Division of the High Court of Uganda, the War Crimes Chamber of the Belgrade District Court in Serbia supported by the Organization for Security and Cooperation in Europe and the Special Criminal Court in the Central African Republic. For more on hybrid courts, see: Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues* (Oxford, Bloomsbury, 2012); Laura A. Dickinson, “The promise of hybrid courts”, *American Journal of International Law*, vol. 97 (2003), pp. 295-310; Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, Oxford University Press, 2004); Chiara Ragni, *I Tribunali penali internazionalizzati. Fondamento, giurisdizione, diritto applicabile* (Milan, Giuffrè Editore, 2012); Hervé Ascensio et al. (eds.), *Les juridictions pénales internationalisées (Cambodge, Sierra Leone, Timor Leste)* (Paris, Société de Législation Comparée, 2006); Anne-Charlotte Martineau, *Les juridictions pénales internationalisées – Un nouveau modèle de justice hybride ?* (Paris, Pedone, 2007).

¹⁰⁸ On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, United Kingdom, Supreme Court, *Mohammed and others v. Ministry of Defence*, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

¹⁰⁹ *Yearbook ... 2018*, vol. II (Part Two), para. 65.

principles of law (draft conclusion 8, para. 2¹¹⁰) – “[r]egard may be had, as appropriate” – or its work on the topic identification and legal consequences of peremptory norms of general international law (*jus cogens*) (draft conclusion 9, para. 1¹¹¹) – “[r]egard may also be had, as appropriate”.

(19) The Commission has emphasized that sound reasons exist to distinguish between the decisions of international courts and tribunals and those of national courts. The decisions of international courts and tribunals reflect the views of international tribunals that are constituted to interpret and apply international law and that are typically composed of benches that are reflective of the main legal systems and regions of the world. They are therefore an authoritative means for identifying the existence of and determining the scope and content of rules of international law.

(20) In contrast, national courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Unlike international courts and tribunals, national courts sometimes lack international law expertise. They may have also reached their decisions without the benefit of hearing arguments advanced by States, or even where such arguments are heard, they may reflect the views of one or two organs of only one State.¹¹² That said, even within the category of national courts, reference should be had to the quality of the reasoning in the decision which must be assessed on a case-by-case basis. Greater weight is often placed on the decisions of national higher courts, such as supreme or constitutional courts. Less weight will attach to decisions of lower national courts. National court decisions that have been overturned by a higher national court, or through the passage of domestic legislation, may not carry much or any weight.

(21) Draft conclusion 4 must be read together with draft conclusion 3, which indicates the general criteria for the assessment of subsidiary means for the determination of rules of international law, draft conclusion 7, which addresses the absence of legally binding precedent in international law, as well as draft conclusion 8, which sets out illustrative criteria for the assessment of the weight to be given to decisions of any court or tribunal, whether international, national or hybrid.

(22) The Commission here underlines that the degree of representativeness of court decisions that are used in the determination of rules of international law is an important consideration that ought to be taken into account. Far too often, in practice, the decisions of certain courts from certain regions are given priority to the exclusion of others.¹¹³ This may have the unintended effect of undermining the global acceptance of international law. In the view of the Commission, much as with teachings as a subsidiary means in draft conclusion 5, best efforts should be made to use a representative set of court decisions from the various legal systems, regions and languages of the world. This helps to enhance legitimacy and the development of a truly universally applicable body of international law.

Conclusion 5 **Teachings**

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

¹¹⁰ A/78/10, para. 40.

¹¹¹ A/77/10, para. 43.

¹¹² See para. (7) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), p. 110.

¹¹³ See James Thuo Gathii, “Promise of international law: a third world view (including a TWAAIL bibliography 1996–2019 as an appendix)”, *American Society of International Law Proceedings*, vol. 114 (2020), pp. 165–187.

Commentary

(1) Draft conclusion 5 concerns the role of teachings or materials (“*la doctrine*” in French and “*la doctrina*” in Spanish) understood in a broad sense to include writings, as well as recorded lectures and audiovisual materials.¹¹⁴ The term also generally encompasses teachings produced by an individual or collectives of individuals organized into *ad hoc* or permanent expert groups, whether created by individuals or by States and/or international organizations.¹¹⁵ The draft conclusion takes up “teachings” whenever they are used in the process of determining the existence and content of rules of international law.

(2) The present draft conclusion comprises two sentences. The first sentence primarily sets out the general rule concerning teachings. The second sentence highlights particular aspects of the representativeness of teachings.

(3) The first sentence provides that “[t]eachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law.” The Commission recalls that the present formulation differs from the approach taken to the formulation of the conclusion on “Teachings” in the topics relating to the sources of international law. The differences relate primarily to two elements. First, in draft conclusion 5, the Commission has replaced the identical albeit archaic language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which employs “teachings of the most highly qualified publicists of the various nations”, with the more contemporary formulation used at the beginning of this paragraph. That said, for reasons of consistency, the much shorter title “Teachings”, as used in the other topics, has been retained.

(4) Second, whereas in previous conclusions teachings of the most highly qualified publicists of the various nations “may serve as” a subsidiary means, the Commission employed in the present draft conclusion the more direct formulation that teachings “are” a subsidiary means.¹¹⁶ Specifically with regard to teachings, the phrase “may serve as” was used in conclusions on teachings in the topics “Identification of customary international law” (conclusion 14)¹¹⁷ and “General principles of law” (draft conclusion 9)¹¹⁸ and in draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).¹¹⁹

(5) As with decisions of courts and tribunals, referred to above in draft conclusion 4, teachings are not themselves sources of international law. They may, however, offer useful guidance for the determination of the existence and content of rules of

¹¹⁴ In its prior work, the Commission has determined that “teachings” are “to be understood in a broad sense”. It also considered that the category would include “teachings in non-written form, such as lectures and audiovisual materials”. See para. (1) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 110.

¹¹⁵ The inclusion of teachings produced by individuals as well as collectives whether created privately or by States or international organizations is consistent with the prior work of the Commission. See, *inter alia*, para. (4), *ibid.* Examples of these private bodies include “the Institute of International Law (Institut de droit international) and the International Law Association” (see para. (5) of the commentary to draft conclusion 9 of the draft conclusions on general principles of law, as adopted on first reading, A/78/10, para. 41, at p. 28), and the Harvard Research in International Law. That said, in the context of the present topic, the Commission has indicated that it will revisit this issue.

¹¹⁶ See draft conclusion 14, *ibid.*, and para. 2 of draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44, at p. 43.

¹¹⁷ *Yearbook ... 2018*, vol. II (Part Two), para. 65.

¹¹⁸ A/78/10, para. 40.

¹¹⁹ A/77/10, para. 43.

international law. It follows that the use of “are” was not meant to alter the auxiliary role of teachings. Instead, it merely recognizes the value that teachings may have in the process of determining the existence and content of rules of international law.

(6) As regards the first part of the first sentence of draft conclusion 5, the Commission has previously indicated, including in the commentaries adopted at its seventy-fourth session, that the term “teachings” is a broad category. The word “especially” was included in the part of the first sentence, set off by commas, to emphasize that there could, in some situations, be an abundance of teachings that could be employed to determine the existence and content of rules of international law. Particular attention in such cases should be paid to “those [teachings] generally reflecting the coinciding views of persons with competence in international law”.

(7) The preponderance of views contained in teachings from those with competence in international law from the various legal systems and regions of the world, expressed in the first sentence, may reflect a general trend when considered in totality against the body of scholarly work available. In such instances, this could be an indication that those views – to the extent that they are diverse and representative – are more likely to carry greater weight. The draft conclusion does not require scholarly consensus, let alone unanimity, for a high-quality teaching to be found valuable in determining the existence and content of rules of international law. On the other hand, that there are diverging views among scholars could also be relevant to determining the weight to attach to a particular teaching. Where scholarly views are divided, and perhaps matched by uncertainty in the other subsidiary means such as in decisions, this could indicate that the law on the issue under consideration is unsettled.

(8) While there may be express preference for teachings that reflect special expertise or competence in international law, the Commission recognizes the possibility that there may be circumstances whereby teachings in disciplines other than international law could also be relevant for the determination of the existence and content of rules of international law. This may arise, for instance, in the case of related subject areas, such as comparative law.

(9) The formulation of teachings in the present draft conclusion speaks to the critical issue of the need for their representativeness when they are being consulted and taken into account. The draft conclusion, as framed, underlines the particular value that might be placed on certain teachings that come, first, from the various legal systems and, second, from the various regions of the world. Such teachings will carry greater weight as subsidiary means for the determination of the existence and content of rules of international law. The intention of the Commission here is to stress that teachings that, on balance, reflect the rich array of legal traditions of a pluralistic world should be accorded greater weight in the process of determining the existence and content of rules of international law. If the teachings consulted are of high quality but reflect only one legal system, instead of a wide variety of legal systems and regions of the world, then it would be harder for them to enjoy persuasive authority.

(10) The formulation “especially those generally reflecting the coinciding views of persons with competence in international law from various legal systems and regions of the world” is an inclusive and broad phrasing. It seeks to ensure that the diversity of viewpoints and teachings from different parts of the world are fully considered when determining the existence and content of rules of international law. The reference to “various legal systems and regions of the world” also indicates that, on the whole, even the weight of a particular teaching would be enhanced where it engages in a survey demonstrating that a certain rule of international law is prevalent in various systems representing the main legal families and traditions of the world.

(11) The second sentence of draft conclusion 5 develops, in an illustrative manner, the criterion of representativeness that ought to be taken into account, by indicating that “due regard should also be had to, *inter alia*, gender and linguistic diversity”.

(12) The Commission considered that gender and linguistic diversity as well as viewpoint diversity are all important considerations that may need to be weighed when assessing the representativeness of the teachings being consulted. However, since the reference to various regions of the world already reflected various forms of diversity, such as that of race, and the idea was to develop an illustrative instead of exhaustive list of factors to take into account, it was felt necessary to highlight only gender and linguistic diversity which, in the view of members that ultimately prevailed, would not necessarily be covered by the phrase “from the various legal systems and regions of the world”. The view was, however, expressed by several members, and two States¹²⁰ in the context of the Sixth Committee debate of the present draft conclusion, that racial diversity should have been included for the same reasons that linguistic and gender diversity were included. These reasons included the enumeration of race, alongside gender, as a prohibited ground of discrimination in international instruments such as the International Covenant on Civil and Political Rights¹²¹ and in regional human rights treaties and most national constitutions from all the different parts of the world.

(13) The formula “due regard should also be had to, *inter alia*,” would require users of the draft conclusion to undertake best efforts to ensure the representativeness of the teachings that they consider when using teachings as subsidiary means. The term “should” is used instead of “shall”. The use of the term “also” indicates that the listing that follows is additional to what had been stated before. The last element, i.e. “*inter alia*”, meaning among other things, clarifies that gender and linguistic diversity are not exhaustive of the forms of diversity that ought to be considered. Thus, the Commission here highlights some, though not all, of the considerations that may be relevant to the assessment of how representative teachings are, which, in addition to racial diversity, may include ethnic, cultural and religious diversity, as well as sexual orientation.

(14) The Commission considers that teachings do play a vital role in the process of determining and applying rules of international law. The importance of teachings notwithstanding, as indicated in the prior topics, there is a need for caution when drawing upon teachings because their actual value for the assessment of the existence and content of rules of international law may vary for different reasons. First, teachings sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate for its development (*lex ferenda*). Second, teachings may reflect the national or other individual viewpoints of their authors. Third, teachings may differ greatly in quality. Assessing the authority of a given work is thus essential. This approach is well established in State practice. For instance, the Supreme Court of the United States referred, in its *Paquete Habana* ruling of 8 January 1900, to “the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is”.¹²²

(15) Another more recent example shows not only how teachings are used in practice, but how they may interact with judicial decisions as subsidiary means. The

¹²⁰ See, in this regard, the statements by Uganda and Sierra Leone to the Sixth Committee at the seventy-eighth session of the General Assembly during the debate on the report of the Commission. Available from <https://www.un.org/en/ga/sixth/78/summaries.shtml>.

¹²¹ See, for instance, article 2 of the International Covenant on Civil and Political Rights, which, *inter alia*, provides for State recognition of the rights recognized in the Covenant for all individuals, without distinction of any kind, such as race, colour, sex, language or religion, International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. See United Nations, *Status of Multilateral Treaties*, chap. IV.4.

¹²² United States, Supreme Court, *The Paquete Habana and The Lola*, 175 U.S. 677 (1900), at p. 700.

Supreme Court of Appeal of South Africa,¹²³ determined in its March 2016 ruling, the narrow question of whether customary international law permitted exceptions to the immunity of Heads of State that might enable South Africa, including its courts, to disregard such immunity and authorize the execution of an arrest warrant by the International Criminal Court for then President of Sudan, Omar Hassan Ahmed Al-Bashir.¹²⁴ The Court analysed the Rome Statute before turning to customary international law and, faced with the difficulty of answering the question through analysis of those two sources contained in Article 38, paragraphs 1 (a) and (b), of the Statute of the International Court of Justice, considered that judicial decisions, including from the International Court of Justice, as well as teachings could offer “guidance” on whether an exception existed.¹²⁵ As part of that analysis, the Court examined the writings of several scholars and noted that their views were divided on the question of whether or not immunity applied. In the end, it rejected the appellant’s submission that such an exception existed under international law in so far as national courts were concerned. The Court observed that the views of scholars on the immunity point could “inform future debate and contribute to the development of customary international law”.¹²⁶ The latter observation addresses another role of teachings that must be borne in mind in the context of the present draft conclusion. It clarified that, instead of resolving academic debates, its own task was more limited to assessing the state of customary international law as it stood and to apply it without creating new law.¹²⁷

Conclusion 6

Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.
2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Commentary

(1) Draft conclusion 6 aims to clarify the role of subsidiary means for the determination of rules of international law vis-à-vis the sources of international law. It consists of two paragraphs. Paragraph 1 considers the nature and function of subsidiary means, while paragraph 2 is a without prejudice clause.

Paragraph 1 – the nature and function of subsidiary means

(2) Paragraph 1 of draft conclusion 6 is composed of two sentences. The first sentence addresses the nature of subsidiary means and provides that subsidiary means are *not* a source of international law. The Commission found that there is an extensive body of international and national judicial practice and scholarly works, as well as drafting history, to justify this conclusion.¹²⁸

(3) Implicit in the negative formulation of the first sentence specifying what the subsidiary means are not, instead of what they are, is the question of the relationship between the sources of international law and the subsidiary means for the determination of the rules of international law. In formulating the Commission’s position, two main alternatives were considered. The first was to provide that the

¹²³ Supreme Court of Appeal of South Africa, *Minister of Justice and Constitutional Development and others v. Southern African Litigation Centre and others*, 2016 (3) SA 317 (SCA) (15 March 2016).

¹²⁴ *Ibid.*, para. 69.

¹²⁵ *Ibid.*, para. 70.

¹²⁶ *Ibid.*, para. 74.

¹²⁷ *Ibid.*

¹²⁸ See second report on subsidiary means for the determination of rules of international law by the Special Rapporteur (A/CN.4/769), paras. 64-126.

subsidiary means are auxiliary in nature *vis-à-vis* treaties, customary international law and general principles of law and that they are mainly resorted to when determining the rules of international law.¹²⁹

(4) The second alternative was to indicate that subsidiary means are not an “autonomous” source of international law or that they are “distinct from” the sources of international law. While it was found that there was merit in each of those approaches, several questions were raised about each of the alternatives, including the possible need to explain them further. The Commission therefore opted for the more direct formulation, stating simply that they are not sources of international law. Still, a view was expressed that the proposition contained in the first sentence was too categorical in light of their use for other purposes and that some nuances of what actually occurs in practice regarding the subsidiary means risk being lost.

(5) The second sentence of paragraph 1 of draft conclusion 6 builds on the basic proposition contained in the first sentence by indicating that the function of subsidiary means “is to assist with the determination of the existence and content of rules of international law”. Alternative formulations considered included specifying that subsidiary means are assistive or auxiliary in nature. For various reasons, the Commission did not choose those formulations. In this regard, it was observed that the term “auxiliary” is used to describe “subsidiary” in other languages. This means that, if the term auxiliary is used in this draft conclusion, when translated into other official languages such as French, Spanish and Russian, it would not only be repetitive but also circular. In that context, it was considered sufficient to simply provide that the function of subsidiary means is “to assist” in the process of determining the existence and content of rules of international law. That said, the Commission did not exclude, by this formulation, the possibility that materials used as subsidiary means could perform other functions as confirmed by paragraph 2 of draft conclusion 6.

Paragraph 2 – use of materials as subsidiary means is without prejudice to their other uses

(6) Paragraph 2 of draft conclusion 6 is comprised of a single sentence. It provides, in a simple statement, that the use of “materials” as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes. This proposition takes as a point of departure the fact that materials used as subsidiary means, for example judicial decisions and teachings, may be used for multiple purposes.

(7) In the first place, such materials may be used to assist in determining the existence and content of rules of international law.¹³⁰ In the second place, they may be used for a wide variety of other purposes. For instance, when it comes to the decisions of national courts, the Commission has already determined in its previous works that they may serve a dual function: (a) either as evidence of the constituent elements of customary international law; or (b) as subsidiary means that are useful to assess whether there exists evidence of State practice and *opinio juris*.¹³¹ Similarly,

¹²⁹ *Ibid.*

¹³⁰ See para. (6) of the commentary to draft conclusion 1, [A/78/10](#), para. 126, at p. 77 (“[subsidiary means] are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules”). See also [A/CN.4/769](#), para. 21 (there was consensus among the members of the Commission during the first plenary debate on the topic of subsidiary means for the determination of rules of international law that subsidiary means “play an important assistive role in the process of determining the existence and content of rules of international law”).

¹³¹ See first report on subsidiary means for the determination of rules of international law by the Special Rapporteur ([A/CN.4/760](#)), para. 286. See also para. (1) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 109 (“decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as

when it comes to general principles of law, judicial decisions – in particular those derived from national legal systems – may be used to determine the existence or lack thereof of general principles of law as well as their content.¹³² Moreover, when identifying an international legal norm as constituting *jus cogens*, the subsidiary means, such as the decisions of national courts, may also constitute primary evidence of acceptance and recognition, but may not, in and of themselves, be the evidence of such acceptance and recognition.¹³³

(8) The broad reference to other uses of the materials is additionally important for another reason. The Commission contemplated, in draft conclusion 2, subparagraph (c), the possibility of the existence of other materials that could fall within the category of subsidiary means as part of “any other means generally used to assist in determining rules of international law”.¹³⁴ In any case, when it reaches the first reading stage of this topic, the Commission will revert to the separate question of the best placement of the present draft conclusion.

Conclusion 7

Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Commentary

(1) Draft conclusion 7 deals with the question of precedent in international law. It confirms the existence of an extensive practice from which the Commission has established that, as a general rule, there is no system of legally binding precedent, or *stare decisis*, in international courts or tribunals under international law.¹³⁵ However, for reasons of legal security, stability and consistency, which is the essence of any rule of law-based legal system, international courts or tribunals routinely take into account the legal reasoning contained in the decisions of other courts and tribunals, although they are not obligated to apply them. The general rule, in international adjudication involving States, is that decisions of courts are binding only on the

draft conclusions 6 and 10 indicate, they may serve as practice as well as evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules.”).

¹³² See para. (5) of the commentary to draft conclusion 5 of the draft conclusions on general principles of international law, [A/78/10](#), para. 41, at pp. 19–20.

¹³³ See para. (6) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), [A/77/10](#), para. 44, at p. 45.

¹³⁴ Para. (18) of the commentary to draft conclusion 2, [A/78/10](#), para. 126, at p. 84 (“The Commission has left the third category open in order not to foreclose the possibility of other subsidiary means, which may not be in widespread use now or that are in use but left out of the work on the present topic, from being covered by the present draft conclusions as the work develops”).

¹³⁵ For example, see International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, *I.C.J. Reports 1998*, p. 275, at para. 28; International Centre for Settlement of Investment Disputes, *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on objections to jurisdiction, 29 January 2004, para. 97; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, para. 540 (“generally speaking, and subject to the binding force of decisions of the Tribunal’s Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries” (emphasis added)).

parties to the case – as is stated in Article 59 of the Statute of the International Court of Justice.

(2) The present draft conclusion consists of two interrelated sentences. The first sentence provides that “[d]ecisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration”. The Commission considered that the term “decisions”, as well as the phrase “international courts or tribunals”, should be understood in the same way as described in the context of draft conclusion 4. The general proposition that decisions of international courts or tribunals “may be followed on points of law” requires fulfilment of a precondition triggering its application, namely, “where those decisions address the same or similar issues as those under consideration”.¹³⁶

(3) First, with regard to the formulation of the key elements of the first sentence of draft conclusion 7, the Commission selected the term “may”. The idea is that the possibility exists for an international court or tribunal to follow other decisions on points of law, but also clarifies that doing so is not mandatory. Second, the term “points of law”, which is a reference to the legal reasoning and legal conclusions, was used to describe what could potentially be followed. The formulation “points of law” explains that the object is not the decision, as such, but the reasons in support thereof.

(4) The distinction between the decision constituting the operative part of the judgment and the reasons underlying it is well settled in the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice. In the *Polish Postal Service in Danzig* case, for instance, the Permanent Court of International Justice explained that: “it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned.”¹³⁷ In the *Readaptation of the Mavrommatis Jerusalem Concessions* case, the respondent State challenged the jurisdiction of the Permanent Court of International Justice to hear the case. However, in decisions adopted before, it had been determined that there was jurisdiction. The Court found that it had “no reason to depart from a construction which clearly flows from the previous judgments *the reasoning of which it still regards as sound*”.¹³⁸

(5) The International Court of Justice has, in a series of cases, established a similar position. For example, the Court in *Land and Maritime Boundary between Cameroon and Nigeria* held that: “It is true that, in accordance with Article 59, the Court’s judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.”¹³⁹ By this formulation, the Court made clear that its general starting point to apply would be the reasoning and conclusions on points of law in earlier cases except if there are compelling reasons.

(6) A last and important consideration for the Commission when formulating the first sentence of draft conclusion 7 on the absence of legally binding precedent in international law was the notion that the decisions of the relevant tribunals, to be followed on the points of law, must address “the same or similar issues as those under consideration”. This statement indicates, as is well established in jurisprudence, that there must be a level of comparability between the case at issue and the subsequent

¹³⁶ See also Institute of International Law, Resolution adopted on 1 September 2023 (Angers Session) on precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings, para. 3: “A precedent or case law (*jurisprudence*) may be used in support of a judicial pronouncement if they concern legal issues comparable to the case at hand”. Available from www.idi-iiil.org.

¹³⁷ See *Polish Postal Service in Danzig, Advisory Opinion, P.C.I.J., Series B, No. 11*, p. 6, at pp. 29–30.

¹³⁸ *Readaptation of the Mavrommatis Jerusalem Concessions, P.C.I.J., Series A, 1927, No. 11*, p. 4, at p. 18 (emphasis added).

¹³⁹ *Land and Maritime Boundary ..., Preliminary Objections* (see footnote 135 above), para. 28.

cases.¹⁴⁰ The point is that whether to follow the prior decision on points of law in a subsequent case requires a further assessment that it concerns the same or similar issue. Plainly, the earlier decision only applies to analogous cases. In practice, this “means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision”.¹⁴¹ The earlier decision must also be capable of generalization, as the International Court of Justice explained in *Barcelona Traction* that for the general arbitral jurisprudence cited by parties in that case to be followed, the decisions cited must be capable of “giv[ing] rise to generalization going beyond the special circumstances of each case”.¹⁴²

(7) There is practice of certain international courts or tribunals of following previous decisions unless there are “convincing reasons”¹⁴³ or “compelling reasons”¹⁴⁴ not to do so, or the existence of a provision to the effect that they “shall be guided by” their own previous decisions as in the statute of the Special Court for Sierra Leone or those of another international court or tribunal.¹⁴⁵ This practice of

¹⁴⁰ International Centre for Settlement of Investment Disputes, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 145 (holding that the Centre’s tribunals “ought to follow solutions established in a series of consistent cases, *comparable to the case at hand*, but subject of course to the specifics of a given treaty and of the circumstances of the actual case”). See also, for instance, International Centre for Settlement of Investment Disputes: *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. the Argentine Republic*, Decision on Liability, 30 July 2010, para. 189; *Metal-Tech Ltd. v. the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 116; and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Case No. ARB/11/17, Award, 9 January 2015, para. 76. On the other hand, some caution is warranted. See, for example, Wolfgang Alschner, abstract for Chapter 6 of *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford, Oxford University Press, 2022).

¹⁴¹ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zlatko Aleksovski*, No. IT-95-14/1-A, Judgment, 24 March 2000, Appeals Chamber, para. 110. See also Permanent Court of International Justice, *Case of the S.S. “Lotus”*, Judgment, 7 September 1927, Series A, No. 10, p. 4, at p. 21; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 105.

¹⁴² *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, at para. 63. For a more recent discussion, see also *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293.

¹⁴³ See, for example, the decision of the International Criminal Court where its Appeals Chamber held that it will not lightly depart from its previous decisions absent “convincing reasons” given “the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions”, see Situation in the Republic of Côte d’Ivoire in the Case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15 OA 6, Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo’s detention (ICC-02/11-01/15-134-Red3)”, 31 July 2015, Appeals Chamber, para. 14.

¹⁴⁴ See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at para. 389 (“The Court considers that there is no compelling reason in the present case for it to depart from that approach. It accordingly finds that it is unnecessary to proceed any further with its examination of Croatia’s allegations in order to establish the actus reus of genocide within the meaning of Article II (c) of the Convention”).

¹⁴⁵ Article 20, paragraph 3, of the Statute of the Special Court for Sierra Leone, which was adopted by the United Nations and the Government of Sierra Leone pursuant to a bilateral treaty, sought to limit the prospect of conflicting judicial decisions and the fragmentation of international criminal law, by providing that the judges of the Appeals Chamber of that tribunal “shall be guided by the decisions of the Appeals Chamber of the International

certain international courts and tribunals could be seen, to some extent, as a functional equivalent to a rule of binding precedent. However, in these situations, there is no obligation under international law for the international courts or tribunals to follow previous decisions as legally binding precedents. For such an obligation to exist, it should be provided for in a specific instrument or a specific rule, as contemplated by the second sentence of draft conclusion 7.

(8) In the second sentence of draft conclusion 7, the Commission seeks to clarify the legal consequences that flow from the first sentence. It therefore expressly states that the fact that “[s]uch decisions” (i.e. those of international courts or tribunals) may in some circumstances be followed on points of law (as indicated by the first sentence) does not mean that they “constitute legally binding precedent”. The only exceptions to the general rule that decisions do not constitute legally binding precedent is indicated by the phrase “unless otherwise provided for”. The qualifier concerns two situations. First, where that possibility is contemplated in “a specific instrument” or, second, where it is provided for in a specific “rule of international law”. A combined reading of these terms reflects the Commission’s intention to capture the full range of situations where a system of bindingness to precedent in an international court or tribunal is provided for in instruments such as a treaty, statute or other constitutive or founding document of a tribunal

(9) For example, according to article 221 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, “[j]udgments of the [Caribbean Court of Justice] shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219”. The title of article 221 is “judgment of the Court to constitute *stare decisis*”.

(10) A second example is the Court of Justice of the European Union, which, in at least two situations under its statute regarding appeals and reviews, is empowered to quash the decision of the General Court in an appeal and even itself give final judgment in the matter or even choose to refer a case back to the General Court, in which case the latter tribunal “shall be bound by the decision of the Court of Justice

Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone”. The initial idea had been to avoid fragmentation of international criminal law by making the appeals court of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda the appellate court for the Special Court for Sierra Leone. But, for reasons of practicality and the workload and drawdown strategy of the former courts, it was felt that the same goal would be achieved by binding the Special Court for Sierra Leone to following the rulings of the joint International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda appellate chambers.

The Appeals Chamber of the Special Court for Sierra Leone, in interpreting the first part of that provision, took in the *Norman* case a more nuanced position that:

[w]ithout meaning to detract from the precedential or persuasive utility of decisions of the [International Criminal Tribunal for Rwanda] and the [International Criminal Tribunal for the Former Yugoslavia], it must be emphasized, that the use of the formula “shall be guided by” in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals.

The Appeals Chamber of the Special Court explained that the authority of another decision also turns on its persuasiveness, not just a formal statutory requirement, and further that, as the highest chamber in the Special Court’s two-level system, it was duty bound to ensure interpretations from those other courts would be consistent with its own specific context. The Appeals Chamber also clarified that it supported, at the same time, the intention of its founders to maintain consistency and uniformity in the interpretation and application of international criminal law (Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, Decision the Prosecutor’s motion for immediate protective measures for witnesses and victims and for non-public disclosure, 23 May 2003, Trial Chamber, para. 11).

on points of law”.¹⁴⁶ A third example is the European Free Trade Association Court, which under the agreement on the European Economic Area is under an obligation to interpret its provisions “in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this agreement”.¹⁴⁷

(11) A fourth illustration could be the Inter-American Court of Human Rights. Although its founding treaties and rules do not expressly provide for this, in a rich jurisprudence that has developed and strengthened over the years, the Inter-American Court has determined on the basis of its interpretation of its constitutive documents that:

the [j]udiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.¹⁴⁸

Later judgments have held that the application by national court judges of the rulings of the Inter-American Court is obligatory. This implies that the binding nature of decisions may not be limited to the parties to the particular case. While this interpretation has led to a lively scholarly debate,¹⁴⁹ which need not be entered into by the Commission for the purpose of providing this example of a regional court where a specific rule providing for the binding nature of its decisions has been developed through judicial decisions, it can be noted that some States in the Americas

¹⁴⁶ See articles 61, second paragraph, and 62b of the Statute of the Court of Justice of the European Union providing for the binding application of decisions including in relation to situations concerning a serious risk of the unity or consistency of Union law (available from https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf; containing the consolidated version of the Statute, incorporating the texts listed *ibid.*, p. 2).

¹⁴⁷ Agreement on the European Economic Area (Porto, 2 May 1992), United Nations, *Treaty Series*, vol. 1793, No. 31121, p. 3, art. 6.

¹⁴⁸ See, for the seminal case, Inter-American Court of Human Rights, Case of *Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, Series C, No. 154, para. 124. For examples of subsequent application and expansion of this doctrine, and its expansion to apply to other public bodies not just courts, see Inter-American Court of Human Rights: Case of Fermín Ramírez v. Guatemala and Case of Raxcacó Reyes et al. v. Guatemala, Order (Monitoring Compliance with Judgment), 9 May 2008, para. 63; Case of the “Five Pensioners” v. Peru, Order (Monitoring Compliance with Judgment), 24 November 2009, para. 35; Case of Bámaca Velásquez v. Guatemala, Order (Monitoring Compliance with Judgment), 18 November 2010, para. 33; Case of Loayza Tamayo v. Peru, Order (Monitoring Compliance with Judgment), 1 July 2011, para. 35; Case of Castillo Petruzzi et al. v. Peru, Order (Monitoring Compliance with Judgment), 1 July 2011, para. 20; Case of Lori Berenson Mejía v. Peru, Order (Monitoring Compliance with Judgment), 20 June 2012, para. 18; Case of Barrios Altos v. Peru, Order (Monitoring Compliance with Judgment), 7 September 2012, para. 24; Case of Castañeda Gutman v. Mexico, Order (Monitoring Compliance with Judgment), 28 August 2013, para. 23; 11 cases against Guatemala regarding the obligation to investigate, prosecute and, if applicable, punish those responsible for human rights violations, Order (Monitoring Compliance with Judgment), 21 August 2014.

¹⁴⁹ See, for instance, Laurence Burgogues-Larsen, “Conventionality control: Inter-American Court of Human Rights (IACtHR)”, *Max Planck Encyclopedias of International Law*, December 2018, available at <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3634.013.3634/law-mpeipro-e3634>; Pablo González Domínguez, “La doctrina del control de convencionalidad a la luz del principio de subsidiariedad”, *Estudios Constitucionales*, vol. 15 (2017), pp. 55–98; and Paolo G. Carozza and Pablo González, “The final word? Constitutional dialogue and the Inter-American Court of Human Rights: a reply to Jorge Contesse”, *International Journal of Constitutional Law*, vol. 15 (2017), pp. 436–442.

have accepted or acquiesced to the judicial interpretation given by the Inter-American Court, while several¹⁵⁰ others have expressed some doubts.

(12) In the view of the Commission, given the above practice, the general proposition contained in draft conclusion 7 that there is no system of legally binding precedent in international law remains valid. However, in some circumstances, such as those discussed above, the obligation to follow prior decisions is established in either a specific instrument or a specific rule of international law.

Conclusion 8

Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

- (a) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;
- (b) the extent to which the decision is part of a body of concurring decisions; and
- (c) the extent to which the reasoning remains relevant, taking into account subsequent developments.

Commentary

(1) Draft conclusion 8 sets out more specific criteria to guide users when employing decisions of courts and tribunals in the determination of the existence and content of rules of international law. It builds on the general criteria for the assessment of subsidiary means for determining rules of international law contained in draft conclusion 3. In other words, while draft conclusion 3 concerns the general criteria for assessing the weight to be given to subsidiary means, draft conclusion 8¹⁵¹ serves the specific purpose of clarifying how the decisions of courts and tribunals are to be assessed by adding additional relevant criteria that should be considered to carry out a proper assessment.

(2) The general criteria recommended an assessment of the degree of representativeness of the materials being used as subsidiary means, the quality of the reasoning, the expertise of those involved, the level of agreement among those involved, the reception of States and other entities, and, where applicable, the mandate conferred on the body. The Commission considers that, in the specific context of the use of decisions of courts or tribunals, only some of these general criteria should be accorded weight. Indeed, the commentary to draft conclusion 3 stating the general criteria foreshadowed this point by clarifying that “which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances”.¹⁵² The present draft conclusion seeks to specify which additional criteria the Commission deems particularly appropriate to ensure that proper weight is given to decisions of courts or tribunals as subsidiary means.

Chapeau of draft conclusion 8

(3) The draft conclusion opens with a *chapeau* followed by three subparagraphs. For consistency reasons, the *chapeau* of draft conclusion 8 is formulated in analogous language to the *chapeau* of draft conclusion 3. With minor textual adjustments, the

¹⁵⁰ Chile, Press release of the Ministry of Foreign Affairs – Ministry of Justice and Human Rights on the Inter-American human rights system, 23 April 2019 (see declaration by the Permanent Representatives of Argentina, Brazil, Colombia, Paraguay and Chile). Available at <https://www.minrel.gob.cl/minrel/noticias-antiores/comunicado-de-prensa-ministerio-de-relaciones-exteriores-ministerio-de> (Spanish only).

¹⁵¹ Paras. (2)-(3) of the commentary to draft conclusion 3, A/78/10, para. 126, at p. 85.

¹⁵² Para. (3), *ibid.*

text provides that, “when assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*”, three factors, contained in subparagraphs (a) to (c), when using decisions to determine the existence and content of rules of international law.

(4) Through their analogous formulation, although in this case referring specifically to the decisions of courts or tribunals only, instead of all subsidiary means, the *chapeau* incorporates the substantive criteria established in draft conclusion 3. For the avoidance of doubt, the scope of application of the term “decisions of courts or tribunals” is intended to apply to decisions of all types whether of international courts and tribunals or those of national courts.

(5) By expressly stating that “regard should be had to”, the Commission indicates that the three specific factors that follow in this draft conclusion, although in many cases desirable, are meant to serve as a form of guideline instead of being mandatory elements. The “*inter alia*” towards the end of the clause also confirms that the listed criteria are merely illustrative of the most likely scenarios to arise. It also seeks to account for the fact that some users, for example different courts and tribunals, may take different criteria into account and place different weight on them. For example, a tribunal may place greater weight on decisions issued by the same court than those issued by another court or tribunal.

(6) Finally, as formulated, it is made clear that the factors or considerations set out in draft conclusion 8 are to be read together with those in draft conclusion 3. That is why the Commission states that they are additional criteria for the assessment of the weight to be given to decisions of courts and tribunals. Thus, the specific factors in the present draft conclusion are intended to supplement the general criteria for subsidiary means set out in draft conclusion 3. A discussion of each of the three more specific criteria applicable to the assessment of the weight of decisions of courts and tribunals follows.

Subparagraph (a) – whether the court or tribunal has a specific competence

(7) Subparagraph (a) of draft conclusion 8 refers to the question “whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question”. This formulation is similar to the criterion contained in draft conclusion 3, subparagraph (f), referring to the specific mandate conferred on a body. In that earlier context, the Commission’s commentary already explained that a relevant consideration to take into account is whether a particular subsidiary means is produced by a body acting under an official mandate conferred by States.¹⁵³ It was further explained that this general criterion was to be used when determining, for instance, whether special regard should be given to decisions of a particular court and, if so, whether to confer greater weight on such decisions.¹⁵⁴ Several illustrations were given of specialist courts and tribunals with specific competencies in relation to various subject matter, such as those relating to the law of the sea (the International Tribunal for the Law of the Sea), international criminal and humanitarian law (the *ad hoc* international criminal tribunals and the International Criminal Court) and international trade law (Dispute Settlement Body of the World Trade Organization).¹⁵⁵

(8) In the context of the current draft conclusion, which addresses the weight of decisions of courts and tribunals specifically, the Commission considered it appropriate to reflect more directly in the draft conclusion the practice of

¹⁵³ Para. (12), *ibid.*, p. 87.

¹⁵⁴ Para. (13), *ibid.*

¹⁵⁵ *Ibid.*

international,¹⁵⁶ regional¹⁵⁷ and national¹⁵⁸ courts or tribunals under which the specific competence given to a court or tribunal to apply a particular treaty is treated as a relevant consideration in assessing the authority to ascribe to its pronouncements. In this regard, for example, the International Court of Justice has referred on at least seven occasions to the outputs, including decisions concerning individual cases, of both regional human rights courts and commissions, and human rights treaty bodies.¹⁵⁹ Thus, with this criterion, the Commission follows the practice suggesting an assessment of whether the body concerned has a specific competence with regard to the application of the rule in question. Before turning to a specific example, it is to be noted that, while for the most part assessment of the competence of a tribunal might be found in the treaty concerned, there may be jurisdictions that do not initially possess the competence referenced, but subsequent developments – including those found in a subsidiary means such as a judicial decision or a series of such decisions – may give rise to such competence.¹⁶⁰

¹⁵⁶ International Court of Justice: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Labour Fund for Agricultural Development*, Advisory Opinion, I.C.J. Reports 2012, p. 10; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022, p. 13, at para. 188.

¹⁵⁷ Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C, No. 268, paras. 189 and 191; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decision, 7 May 2001, para. 24 ("In interpreting and applying the Charter, the Commission ... is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by [United Nations] treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision, 27 October 2001, para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights"); European Court of Human Rights: *Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016, para. 141; *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see also International Law Association, Final report on the impact of findings of the United Nations Human Rights Treaty Bodies, *Report of the Seventy-first Conference, Berlin Conference (2004)*, pp. 29–38, paras. 116–155.

¹⁵⁸ International Law Association, *Report of the Seventy-first Conference* (see previous footnote), p. 43, para. 175; see, e.g., Germany, Federal Administrative Court, *Bundesverwaltungsgericht*, vol. 134, p. 1, at p. 22, para. 48; Colombia, Constitutional Court, Judgment T-077/13 (2013), 14 February 2013; India, High Court of Delhi, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, WP(C) Nos 8853 of 2008, and 10700 of 2009 (2010), Judgment, 4 June 2010, para 23; Bangladesh, High Court Division of the Supreme Court, *Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh*, Writ Petitions No 5863 of 2009, No 754 of 2010, No 4275 of 2010, ILDC 1916 (BD 2010), 8 July 2010, para. 45; Spain, Supreme Court of Spain, Judgment No. 1263/2018, 17 July 2018 (fundamento de derecho séptimo), pp. 23–24.

¹⁵⁹ See memorandum by the Secretariat on subsidiary means for the determination of rules of international law (A/CN.4/765), para. 151.

¹⁶⁰ Practice indicates that the basis for such a specific competence of a particular tribunal may not always be immediately apparent. Thus, greater investigation of the possible application of

(9) To illustrate, in the *Ahmadou Sadio Diallo* case, the International Court of Justice pointed out that, while it was in no way obliged to do so in the exercise of its judicial functions, when applying a human rights treaty, reference can be had to the works of the independent bodies that have been specifically established to supervise the application of the treaty in question for reasons of clarity, essential consistency of international law, as well as legal security for the individuals and States concerned.¹⁶¹ Thus, the Court referred to the “considerable body of interpretative case law”¹⁶² of the Human Rights Committee, which, though not a court, had been expressly mandated by States to monitor the application of the International Covenant on Civil and Political Rights.¹⁶³ The Court ultimately concluded “that it should ascribe *great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty”.¹⁶⁴

(10) Similarly, in relation to the interpretation it had given to a specific provision of the African Charter on Human and Peoples’ Rights, which was consistent with the “case law”¹⁶⁵ of the African Commission on Human and Peoples’ Rights – a quasi-judicial body established by the African Charter, the International Court of Justice emphasized the importance of taking “*due account* of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question”.¹⁶⁶

(11) Moreover, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court recalled that “in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation”,¹⁶⁷ although it

the rule in question may be warranted. For example, the East African Court of Justice determined, via a series of judicial decisions, that it was competent to exercise jurisdiction over matters touching upon human rights complaints brought by individuals even though there were no direct provisions to that effect in its founding treaty. Similarly, the regional Court of Justice of the Economic Community of West African States initially established such competence by jurisprudence before the States concerned adopted a protocol establishing such jurisdiction. For a discussion of this issue in the context of the East African Court of Justice and the evolution of the *Katabazi* doctrine, see James Thuo Gathii, “Mission creep or a search for relevance: the East African Court of Justice’s human rights strategy”, *Duke Journal of Comparative and International Law*, vol. 24 (2013), pp. 249–296.

¹⁶¹ *Diallo, Merits* (see footnote 156 above), para. 66.

¹⁶² *Ibid.*

¹⁶³ International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

¹⁶⁴ *Diallo, Merits* (see footnote 156 above), para. 66 (emphasis added).

¹⁶⁵ *Ibid.*, para. 67 (the International Court of Justice noted “[w]hen the Court is called upon ... to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question”).

¹⁶⁶ *Ibid.*, para. 67 (emphasis added), citing African Commission on Human and Peoples’ Rights *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, Decision, 26 May 2010, para. 204, and *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v. Rwanda*, Communications Nos. 27/89-46/91-49/91-99/93, Decision, 31 October 1996. See also Mads Andenas and Johann R. Leiss, “The systemic relevance of ‘judicial decisions’ in Article 38 of the ICJ Statute”, *Heidelberg Journal of International Law*, vol. 77 (2017), pp. 907–972, for a discussion of Article 38 and the International Court of Justice approach to judicial decisions.

¹⁶⁷ *Application of the International Convention ... (Qatar v. United Arab Emirates)* (see footnote 156 above), para. 77, citing *Diallo, Compensation* (see footnote 156 above), paras. 13 and 24; *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 156 above), para. 101; *Diallo, Merits* (see footnote 156 above), para. 66; *Legal Consequences of the Construction of a Wall* (see footnote 156 above), paras. 109 and 136.

also reiterated that it was not under an obligation to automatically adhere to the interpretations given by human rights treaty bodies.¹⁶⁸

(12) It is clear that a close reading of the decisions of the International Court of Justice mentioned above might suggest drawing a distinction between “great weight” and “due account”, depending on the type of body concerned: in the view of the Commission, the broader and more important point is that the decisions issued by bodies with specific competencies, however they may be characterized, deserve to be considered when interpreting instruments concerned, even if such decisions or interpretations need not be followed by other tribunals.

Subparagraph (b) – whether the decision is a part of a body of concurring decisions

(13) Subparagraph (b) of draft conclusion 8 refers to a second more specific criterion for evaluating the weight of a decision: “the extent to which the decision is part of a body of concurring decisions”. Here, the Commission accepts, based on practice, that, in some situations, a single or a few decisions could be particularly authoritative or even determinative of a particular legal question. First, the definition of a “dispute” for the purposes of adjudication before international tribunals given by the Permanent Court of International Justice in its judgment is a case in point.¹⁶⁹ A second example, the case involving *Monetary Gold*, is so well known that the name of the case is associated with the principle it espoused following the 1954 judgment of the International Court of Justice.¹⁷⁰ The third example is the judgment in the *LaGrand* case, which recognized, for the first time, the binding effect of orders for provisional measures.¹⁷¹ In all these cases, considerable weight is subsequently accorded to the decisions concerned that they would be cited in a long line of later cases by the same court and even other international tribunals.

(14) At the same time, while it seems evident that a single decision or a handful of decisions may sometimes carry considerable and even decisive weight, the Commission with this formulation of subparagraph (b) of draft conclusion 8 indicates that there is a greater likelihood in international law for a body of jurisprudence or line of authority to become authoritative. In other words, in some cases when assessing the weight of decisions of courts or tribunals, there might already be a wider body of concurring decisions (or *jurisprudence constante*) supporting a particular decision, thereby indicating that potentially the same legal reasoning could be useful to address the legal issue at hand or under consideration.

(15) In its practice, the International Court of Justice periodically refers to a basically equivalent notion of a body of concurring decisions by using terms such as “settled jurisprudence”,¹⁷² “consistent jurisprudence”¹⁷³ and “established case law”.¹⁷⁴ Out of many possible examples, the Court has determined, for instance, that in accordance with its “consistent jurisprudence ... only ‘compelling reasons’ may

¹⁶⁸ *Application of the International Convention ... (Qatar v. United Arab Emirates)* (see footnote 156 above), para. 101.

¹⁶⁹ Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, *Jurisdiction*, *Series A, No. 2*, 30 August 1924, p. 6, at p. 11.

¹⁷⁰ *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, *Judgement of June 15th, 1954: I.C.J. Reports 1954*, p. 19, at pp. 32-33.

¹⁷¹ *LaGrand* (see footnote 98 above), para. 109.

¹⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007*, p. 43, at para. 407.

¹⁷³ *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, at para. 24.

¹⁷⁴ See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, at para. 37; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at para. 30.

lead the Court to refuse [to give] its [advisory] opinion”.¹⁷⁵ In a similar manner, it referenced the “consistent jurisprudence”¹⁷⁶ and “established case law”¹⁷⁷ to adduce the meaning of a “dispute” in the *Mavrommatis Palestine Concessions* case. The Court has also determined: that it was established that jurisdiction must be examined at the time of a State’s filing of an application before it;¹⁷⁸ that, in establishing its methodology for effecting maritime delimitation, the “first stage of the Court’s approach is to establish the provisional equidistance line”;¹⁷⁹ that “a dispute must exist for a request for interpretation to be admissible”;¹⁸⁰ and that “the Court ... must examine *proprio motu* the question of its own jurisdiction” to consider the application made by a State.¹⁸¹

(16) Similarly, in the *Indus Waters* arbitration, the tribunal in the case observed that:

fewer propositions in international law can be more confidently advanced than that the non-appearance of a party does not deprive a properly constituted court or tribunal of its competence. Whether a court has been properly constituted in a specific instance is not a matter that can be subjectively determined by a party to a dispute and then resolved simply through non-appearance by that party.¹⁸²

¹⁷⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95, at para. 65, citing *Legal Consequences of the Construction of a Wall* (see footnote 156 above), para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, at para. 30; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, at para. 14.

¹⁷⁶ *Certain Property* (see footnote 173 above), para. 24.

¹⁷⁷ See *Obligations concerning Negotiations* (footnote 174 above), para. 37; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (footnote 174 above), para. 30.

¹⁷⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, at para. 41; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at para. 26.

¹⁷⁹ See *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, I.C.J. Reports 2009, p. 61, para. 118. See also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 139, at para. 98 (“In accordance with its established jurisprudence, the Court will proceed in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line”), citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 176; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at para. 268.

¹⁸⁰ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 98 above), para. 21, citing *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950*: I.C.J. Reports 1950, p. 395, at p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1985, p. 192, at para. 56. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment, I.C.J. Reports 1999, p. 31, at para. 12.

¹⁸¹ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Decision, 2 February 1973, General List No. 56, p. 49, at para. 13. See also *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, I.C.J. Reports 1973, p. 3, at para. 12; *Aegean Sea Continental Shelf, Judgment*, I.C.J. Reports 1978, p. 3, at para. 15.

¹⁸² Permanent Court of Arbitration, *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, para. 126, citing

In the same case, the tribunal determined it had a duty to satisfy itself that it had jurisdiction over the dispute, pointing out that “the wealth of judicial and arbitral decisions on the matter confirms that this duty is undoubtedly part of *jurisprudence constante*”.¹⁸³

(17) Based on the above sample of the extensive practice available, the Commission considers that, while it is not necessarily required that a decision in each case be part of a body of concurring decisions, where such concurring decisions exist and support the findings and conclusions of a particular decision, the fact that they do so will likely give it more weight, provided that such decision is well reasoned and persuasive to a later user.

Subparagraph (c) – whether the reasoning remains relevant

(18) Subparagraph (c), containing a third criterion for evaluating the decisions of courts and tribunals introduced by draft conclusion 8, indicates the requirement to take into consideration “the extent to which the reasoning remains relevant, taking into account subsequent developments”. The Commission included this criterion in order to take into account the possible evolution of international law, which might result in less weight being given to previous decisions. It should be recalled that a decision issued by a court or tribunal may apply at a certain time, but does not necessarily freeze the law or its evolution.

(19) Developments may overtake a decision with the passage of time. The phrase “subsequent developments” was therefore chosen to introduce a measure of flexibility in allowing for changes to the weight to be given to a decision or group of decisions considering new events. These include not only decisions of courts and tribunals, but also factual or legal developments, such as the emergence of a different rule following, for example, the adoption of a treaty or the subsequent practice of States, that would limit the applicability or relevance of the reasoning of a court or tribunal in an earlier decision.¹⁸⁴ Decisions may also change where a tribunal decides

Military and Paramilitary Activities in and against Nicaragua (see footnote 98 above); *South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, *Reports of International Arbitral Awards* (UNRIAA), vol. XXXIII, pp. 1–152; *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Award on Jurisdiction, 26 November 2014, UNRIAA, vol. XXXII, pp. 183–353.

¹⁸³ *Indus Waters* (see previous footnote), para. 135, citing *Military and Paramilitary Activities in and against Nicaragua* (see footnote 98 above); *South China Sea* (see previous footnote); *Arctic Sunrise* (see previous footnote); *Aegean Sea* (see footnote 181 above), para. 15.

¹⁸⁴ One example, which is also relevant for draft conclusion 3, is the rejection by States of some part of the reasoning of the Permanent Court of International Justice in the *Lotus* case (see footnote 141 above), where the Court identified customary international law in relation to the criminal jurisdiction of States in case of a high seas collision between two ships. The reasoning of the Court was successively reversed by the International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships (Brussels, 10 May 1952, United Nations, *Treaty Series*, vol. 439, No. 6330, p. 193), by the Commission in its draft articles on the law of the sea (see para. (1) of draft article 35 of the draft articles concerning the law of the sea, *Yearbook ... 1956*, vol. II, p. 265, at p. 281), and ultimately by the 1958 and 1982 United Nations Conventions on the Law of the Sea. In the said commentary to draft article 35, the Commission stated that the *Lotus* judgment, “which was carried by the President’s casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred with the decisions of the conference” (*ibid.*). As the Arbitral Tribunal in *Enrica Lexie* put it in 2020, “[i]n its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea”, which was “the precursor to Article 97 of the [United Nations Convention on the Law of the Sea concluded in 1982], the ILC explained that the provision was intended to reverse the judgment rendered by the PCIJ in the S.S. “*Lotus*” case” (Permanent Court of Arbitration, *The “Enrica Lexie” Incident*, PCA Case No. 2015-28, Award, 21 May 2020, paras. 644-645).

to change its stance to reflect more contemporary understandings of issues or as circumstances change, for example. Users of the present draft conclusions must therefore keep this in mind when evaluating the weight to accord to the decisions of courts and tribunals as subsidiary means for the determination of rules of international law.

Chapter VI

Prevention and repression of piracy and armed robbery at sea

A. Introduction

76. 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 work¹⁸⁵ and appointed Mr. Yacouba Cissé as Special Rapporteur for the topic. Also at its seventy-third session,¹⁸⁶ 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; 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.¹⁸⁷

77. 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.

78. 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.¹⁸⁸ The Commission provisionally adopted draft articles 1 to 3, together with commentaries thereto.¹⁸⁹

B. Consideration of the topic at the present session

79. At the present session, the Commission had before it 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

¹⁸⁵ 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)).

¹⁸⁶ At its 3612th meeting, on 5 August 2022 (A/77/10, para. 243).

¹⁸⁷ At its 3612th meeting, on 5 August 2022 (*ibid.*, para. 244).

¹⁸⁸ At its 3625th meeting, on 16 May 2023 (A/78/10, para. 54).

¹⁸⁹ At its 3634th, 3649th and 3651st meetings, on 2 June, 27 July and 31 July 2023, respectively (*ibid.*, paras. 55–56).

Conference on the Law of the Sea, which resulted in the adoption of the Convention on the High Seas,¹⁹⁰ 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;¹⁹¹ and writings relevant to the definitions of piracy and of armed robbery at sea. In his second report, the Special Rapporteur provided a description and analysis of the practice of international organizations involved in combating piracy and armed robbery at sea. He reviewed the regional and subregional approaches to combating piracy and armed robbery at sea, as well as the practice of States in concluding bilateral agreements. He also provided an outline of the future work on the topic. The Special Rapporteur proposed four draft articles: on general obligations, on the obligation of prevention, on criminalization under national law, and on the establishment of national jurisdiction.

80. The Commission considered the second report of the Special Rapporteur and the memorandum by the Secretariat at its 3668th to 3672nd meetings, from 21 to 28 May 2024. At its 3672nd meeting, on 28 May 2024, 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.

81. At its 3674th meeting, on 1 July 2024, the Chair of the Drafting Committee presented an interim oral report of the Drafting Committee on the general discussion regarding the topic as a whole and its future direction and on draft article 4, provisionally adopted by the Drafting Committee (see [A/CN.4/L.1000](#)). The report was presented for information only and is available on the website of the Commission.¹⁹²

82. At its 3681st meeting, on 10 July 2024, the Commission was informed that Mr. Yacouba Cissé had resigned as Special Rapporteur for the topic. The Commission expressed its deep appreciation to Mr. Cissé for his initiative in proposing the important topic of “Prevention and repression of piracy and armed robbery at sea” for its programme of work and the important contributions made in his capacity as Special Rapporteur. At its 3701st meeting, on 2 August 2024, the Commission appointed Mr. Louis Savadogo as Special Rapporteur for the topic.

1. Introduction by the Special Rapporteur of the second report

83. The Special Rapporteur recalled that the object of his second report was to deal with cooperation as provided for in the provisions of article 100 of the United Nations Convention on the Law of the Sea, which defines the general obligations of States regarding the prevention and repression of maritime piracy and which was the basis for the draft articles proposed in the report. Draft articles 4 and 5 aimed to reflect and give material content to the general obligations of article 100, while draft articles 6 and 7 concerned, respectively, criminalization under domestic law and the establishment of national competence. He stated that criminalization and establishment of competence were two requirements consistently recalled by the Security Council, the General Assembly and the International Maritime Organization (IMO), as well as more generally within the framework of the regional organizations.

84. The Special Rapporteur explained that the description and analysis of regional approaches also drew their basis from article 100 of the United Nations Convention on the Law of the Sea, given that it established cooperation as a legal obligation under which States were responsible for defining the content and determining the form. The question that arose, in the view of the Special Rapporteur, was that of knowing what

¹⁹⁰ Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.

¹⁹¹ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3.

¹⁹² https://legal.un.org/ilc/guide/7_8.shtml.

meaning or content should be given to the notion of cooperation as envisaged in article 100. He was of the opinion that the study of regional approaches to the prevention and repression of those two crimes at sea was of great relevance to understanding article 100.

85. Regarding the first part of his report, the Special Rapporteur noted that he had first dealt with the practice of international organizations involved in the fight against piracy and armed robbery at sea, such as the United Nations through the resolutions of the General Assembly and the Security Council, and then examined the resolutions of IMO, as the specialized agency of the United Nations responsible for the safety of navigation. He also recalled the examination of the practice of the North Atlantic Treaty Organization (NATO) and the Atalanta operation of the European Union – EUNAVFOR Somalia, whose operational interventions in the Indian Ocean and off the coast of Somalia had effectively contributed to the significant reduction in incidents of piracy and to the suppression of that crime.

86. The Special Rapporteur recalled that the General Assembly was seized of several issues concerning international maritime affairs, including maritime piracy, armed robbery at sea and other crimes committed at sea. He noted that the General Assembly had adopted several resolutions concerning the prevention and repression of piracy and armed robbery at sea, taking care to emphasize from the start the obligation for States to cooperate to prevent and repress such acts. He also recalled that the cooperation encouraged by the General Assembly was incumbent on all States, but more particularly on coastal States located in the affected regions, who were called upon to take all necessary measures to prevent and combat piracy and armed robbery at sea, to investigate or cooperate to investigate such incidents wherever they occurred and to bring to justice those allegedly responsible. The Special Rapporteur indicated that the General Assembly had recalled, in its resolutions, the fundamental role of international cooperation at the multilateral, regional, subregional and bilateral levels in the fight against threats to maritime security in general, and in particular against acts of piracy and armed robbery committed at sea.

87. The Special Rapporteur then described the role of the Security Council, which had adopted a series of resolutions relating to several questions of criminal law, which included the obligation to legislate by establishing piracy as a criminal offence, legal proceedings, the transfer of alleged pirates, detention, the need to conclude bilateral or regional agreements, the preservation of evidence, the conduct of investigations, the extradition of perpetrators of acts of piracy and armed robbery at sea and the administration of justice. Those questions raised by the Security Council, in the view of the Special Rapporteur, could not be effectively addressed without the necessary cooperation between States, including through mutual legal assistance procedures.

88. As for IMO, the Special Rapporteur explained, its role in that area had been of great importance in view of the resurgence of piracy. He recalled that, in addition to alerting the international community to the serious threats posed by the crimes of piracy and armed robbery at sea for maritime security, IMO had also asked the Security Council to promote a rapid and coordinated response at the national and international levels, and to call on States to put in place effective legislation to bring to justice alleged perpetrators of acts of piracy. He noted that IMO had also contributed to facilitating regional cooperation in the fight against those two crimes at sea, by providing assistance to the regional organizations concerned through the development of codes, agreements and directives on the prevention and repression of piracy and armed robbery at sea.

89. The Special Rapporteur also noted that NATO had played an important role in the fight against maritime piracy and armed robbery at sea through its naval interventions carried out pursuant to the authorization of the Security Council acting under Chapter VII of the Charter of the United Nations.

90. Turning to the second part of his report, the Special Rapporteur stated that he had focused on the practice of regional and subregional organizations in the prevention and repression of piracy and armed robbery at sea. The regions concerned were Africa, Asia, Europe, the Americas and Oceania.

91. The Special Rapporteur explained that he had focused on initiatives within the framework of cooperation at sea at the regional level. He listed the regional agreements and other legal instruments of cooperation that specifically dealt with maritime piracy and armed robbery at sea or more generally maritime security that were examined in his report, namely: the Caribbean Community (CARICOM) Maritime and Airspace Security Cooperation Agreement of 2008,¹⁹³ the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia of 2004,¹⁹⁴ the Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Function Network in West and Central Africa of 2008,¹⁹⁵ the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct) of 2013,¹⁹⁶ the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) of 2009,¹⁹⁷ and the Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) of 2016.¹⁹⁸

92. The Special Rapporteur highlighted that cooperation, through regional practices, could take several forms not defined in article 100 of the United Nations Convention on the Law of the Sea. In his view, the examination of regional practices showed that cooperation to prevent and suppress piracy under different modalities had made it possible to significantly reduce the number of acts of piracy and armed robbery at sea.

93. The Special Rapporteur recalled that, in the third part of his second report, bilateral practices related to the prevention and repression of piracy and armed robbery at sea were examined and analysed.

94. The bilateral agreements he had identified dealt with, among other issues, the question of joint patrols in territorial waters, exchange of information on suspicious activities at sea, pursuit of suspected pirates and their extradition with a view to their trial. He recalled that many States had concluded bilateral agreements for the prevention and repression of piracy and armed robbery at sea covering several legal issues, including the facilitation of the transfer and prosecution of pirates captured, detention, trial and conviction of suspected pirates, the creation of a specialized

¹⁹³ CARICOM Maritime and Airspace Security Cooperation Agreement (4 July 2008), *Law of the Sea Bulletin*, No. 68 (2008), p. 20.

¹⁹⁴ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004), United Nations, *Treaty Series*, vol. 2398, No. 43302, p. 199.

¹⁹⁵ Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Function Network in West and Central Africa (Dakar, 31 July 2008), *Law of the Sea Bulletin*, No. 68 (2008), p. 51 (Maritime Organization of West and Central Africa, document MOWCA/XIII GA.08/8).

¹⁹⁶ Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé, 25 June 2013). Available at https://www.wcdn.imo.org/localresources/en/OurWork/Security/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf.

¹⁹⁷ Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti, 29 January 2009), IMO, document C102/14, annex, attachment 1, annex to resolution 1. See also <https://www.imo.org/en/OurWork/Security/Pages/DCoC.aspx>. This Code of Conduct was revised at a high-level meeting held in Jeddah (10–12 January 2017). The revised code of conduct is known as “Jeddah Amendment to the Djibouti Code of Conduct 2017”.

¹⁹⁸ African Charter on Maritime Security and Safety and Development in Africa (Lomé, 15 October 2016). Available at <https://au.int/en/treaties/african-charter-maritime-security-and-safety-anddevelopment-africa-lome-charter>.

jurisdiction, strengthening cooperation in maritime security and the fight against piracy, exchanges of information, mutual assistance or legal assistance, coordination of maritime patrols, surveillance of waters and coordination of responses to piracy incidents.

95. By way of concluding his report, the Special Rapporteur had stated that it was necessary to strengthen regional cooperation and fight more effectively against piracy and armed robbery at sea. However, the Special Rapporteur had also noted that the efficiency and effectiveness of any cooperation in the prevention and repression of piracy and armed robbery at sea would largely depend on national criminalization laws that were harmonized and that complied with applicable rules of general international law. He also highlighted the importance of rules adopted by the member States of regional organizations fighting against all forms of maritime offences, and more particularly those preventing and repressing piracy and armed robbery in sea.

96. With regard to his future work on the topic, the Special Rapporteur had proposed to study in his third report the doctrine on different issues relating to the prevention and repression of piracy and armed robbery at sea. He explained that such study would involve reviewing doctrinal positions and academic writings on aspects that raised legal questions, in particular those concerning prevention and repression, the supervision of the activities of private maritime security companies, problems relating to national jurisdiction and the universal jurisdiction of States in the pursuit and trial of suspected pirates, the transfer of suspected or convicted pirates, their extradition or prosecution, and the question of mutual legal assistance. He also planned to examine questions concerning the adducing or admissibility of evidence before domestic courts, the application of penalties, the non-prescription of the crimes in question, respect for international human rights law in the framework of legal actions against alleged pirates and armed robbers at sea, competent courts, enforcement measures, and provisions relating to liability and compensation.

97. The Special Rapporteur explained the reasons that had led him to propose the four draft articles contained in his report. Regarding draft article 4, he considered that it was justified, since regional approaches in that area drew their legal basis from article 100 of the United Nations Convention on the Law of the Sea, which defined the general obligations of States with regard to the prevention of piracy. Given the generality of the provisions of article 100, the Special Rapporteur had examined how States in different regions concerned directly or indirectly by these crimes gave real and operational content to the concept of cooperation.

98. Moving to draft article 5, the Special Rapporteur recalled that article 100 of the United Nations Convention on the Law of the Sea established an obligation to cooperate in the repression of piracy. He also recalled that his second report had described and analysed the forms of regional cooperation that had, in one way or another, emphasized the requirement for cooperation to prevent acts of piracy. He noted that the obligation of prevention was also taken up by the Institute of International Law, which, in its last report on the topic of piracy,¹⁹⁹ tended also to include prevention within repression, and he consequently considered that it was not fundamental to distinguish between repression and prevention.

99. With respect to draft article 6, the Special Rapporteur recalled the fundamental principle of criminal law that no act could be considered a crime and no punishment could be imposed unless both the act and the punishment were clearly defined and prescribed by law. He recalled that the Security Council, the General Assembly, IMO and the regional organizations had made the criminalization and establishment of the jurisdiction of national courts a fundamental condition for the repression of piracy and armed robbery at sea.

100. As for draft article 7, the Special Rapporteur recalled the examination of the resolutions of the Security Council and the General Assembly, as well as the

¹⁹⁹ Available from <https://www.idi-iil.org/en/publications-par-categorie/resolutions/>.

instruments adopted within the framework of regional organizations, that had established the jurisdiction of national courts as a fundamental condition for the repression of piracy and armed robbery at sea. He considered it relevant and appropriate to dedicate a draft article to that question, especially given that it was a requirement under criminal law, which had been recalled on several occasions by the competent international organizations.

2. Summary of the debate

(a) General comments

101. Members generally welcomed the second report by the Special Rapporteur, highlighting the importance and complexity of the topic. Members also commended the richness of the material provided by the Special Rapporteur in outlining international and regional approaches to cooperation with regard to the prevention and repression of piracy and armed robbery at sea. Members also welcomed the memorandum prepared by the Secretariat.

102. Members reiterated that the starting point for the analysis of the topic was the provisions of the United Nations Convention on the Law of the Sea. Support was expressed for an approach that sought to develop and complement existing norms already found in the Convention. In that regard, it was noted that the Convention did not contain provisions explicitly dealing with armed robbery at sea. It was also recalled that the preamble of the Convention affirmed that matters not regulated therein continued to be governed by the rules and principles of general international law.

103. From the outset, members highlighted the importance of the freedom of the high seas in the context of the fight against piracy. The view was expressed that, if the high seas freedoms protected by the Convention and customary international law were to be real and effective, there was also a need to reflect on effective regulation addressing genuine threats to such freedoms. It was recalled that, in addition to the United Nations Convention on the Law of the Sea, several other conventions could be taken into account in the study of the topic. Members particularly noted, *inter alia*, the 1979 International Convention against the Taking of Hostages,²⁰⁰ the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the Protocol thereto for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,²⁰¹ and the 2000 United Nations Convention against Transnational Organized Crime and the Protocols thereto.²⁰² The desirability of not duplicating existing frameworks was also highlighted.

²⁰⁰ International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205.

²⁰¹ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988), *ibid.*, vol. 1678, No. 29004, p. 201.

²⁰² United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2225, No. 39574, p. 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2237, No. 39574, p. 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2241, No. 39574, p. 480; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001), *ibid.*, vol. 2326, No. 39574, p. 208.

104. It was emphasized that, in the course of the study of the topic, the Commission should aim to identify issues of common concern. In that regard, members particularly highlighted the need for strengthening international cooperation for the prevention and repression of piracy and armed robbery at sea. It was also noted that it would be desirable to promote the harmonization of national laws with international law.

105. The resolution on the topic of piracy adopted by the Institute of International Law on 30 August 2023, during the session held in Angers,²⁰³ was recalled.

Approach by the Special Rapporteur

106. Members offered the Special Rapporteur several ideas on the general direction the work on the topic could take at future sessions, while providing some insights concerning the complexity of the issues discussed in the second report. Members noted a certain degree of disconnection between the substantive issues discussed in the second report of the Special Rapporteur and the proposed draft articles. In that regard, members expressed the wish that the Special Rapporteur had explained in more detail in his second report how the practice highlighted in the report linked to the content of the proposed draft articles. In particular, there was a call for further analysis of how the practice supported the rights and obligations contained in the proposals of the Special Rapporteur.

107. The need for a cautious approach when analysing the practice was underscored. The view was expressed that the resolutions adopted by the General Assembly and the Security Council could serve as evidence of practice in cooperation and coordination. However, members warned against interpreting resolutions of the Security Council as derogations from the norms of the United Nations Convention on the Law of the Sea.

108. The view was expressed that the treatment of the topic would require a study of existing international law applicable to piracy and armed robbery at sea, especially those rules that would benefit from strengthening. It was also noted that some of the provisions proposed by the Special Rapporteur seemed to go beyond the content of the United Nations Convention on the Law of the Sea.

109. Members noted the importance of distinguishing between piracy and armed robbery at sea when analysing the practice. It was suggested that, in view of the differences between piracy and armed robbery at sea, there was a need to adopt different approaches for each crime. It was further suggested that the Commission could consider addressing each crime in separate articles or parts.

110. Members suggested that the Commission would benefit from a discussion on a road map or a general framework for the analysis of the topic. Members also offered further examples of practice that could serve as basis for future analysis by the Special Rapporteur.

(b) Draft article 4

111. Members expressed support for the inclusion of a provision concerning the general obligations of States with regard to piracy and armed robbery at sea. It was noted that the formulation used by the Special Rapporteur in paragraph 1 of draft article 4 drew upon article 100 of the United Nations Convention on the Law of the Sea. In that regard, the view was expressed that the paragraph could follow more closely the text of the Convention, including having a stand-alone draft article on the obligation of cooperation. Some members expressed uncertainty as to whether the obligation therein applied equally to armed robbery at sea, and others suggested that the paragraph should focus solely on piracy.

²⁰³ See footnote 199 above.

112. With regard to the obligation of cooperation, members suggested that there was a need for clarification of the specific areas in which States were under an obligation to cooperate for the prevention and repression of piracy and armed robbery at sea. It was also suggested that specific forms of cooperation could be enumerated, including as found in article 2 of the Institute of International Law resolution of Angers. The question was asked whether the obligation of cooperation was one of due diligence, means or results. As for the obligation to cooperate for prevention, doubts were expressed as to whether it should be included in the draft article.

113. It was noted that article 100 of the United Nations Convention on the Law of the Sea provided for an obligation to cooperate in the repression of piracy. In that regard, members questioned whether there was a legal basis for the obligation not only to cooperate but to repress piracy, as expressed in paragraph 2 of draft article 4 as proposed by the Special Rapporteur. It was also noted that some coastal States might not have the capacity to adhere to a strict obligation to repress piracy. Members also expressed doubts as to the inclusion of an obligation to repress armed robbery at sea in the draft article.

114. Members expressed the preference to omit the phrase in paragraph 2 of draft article 4 that qualified both piracy and armed robbery at sea as international crimes. Similarly, members expressed doubts as to the need to refer to armed conflict in the context of the crimes of piracy and armed robbery at sea. It was suggested that the relationship between those crimes and armed conflicts could be addressed in the commentaries.

115. With regard to paragraph 3 of draft article 4 as proposed by the Special Rapporteur, caution was expressed as to the Special Rapporteur's conclusion that no circumstances may be invoked as a justification of piracy or armed robbery at sea. While support was expressed by some members, it was noted that the content of paragraph 3 might not correspond to the national legislation of many States.

(c) Draft article 5

116. A view was expressed that the United Nations Convention on the Law of the Sea did not refer to an obligation to cooperate in the prevention of piracy. Members generally expressed support for the content of draft article 5. Members noted, however, that although the title proposed by the Special Rapporteur indicated that the obligations set forth in the draft article were those of prevention, the content discussed both elements of prevention and repression. In that regard, it was suggested that the Special Rapporteur might wish to clarify the difference between prevention and repression and address the two separately.

117. The view was expressed that the obligation of prevention in the case of piracy was different from that in the case of armed robbery at sea, at the level of jurisdiction and applicable law.

118. The suggestion was made that the Commission carefully consider the implications for the principles of the freedom of the high seas and exclusive flag State jurisdiction of draft article 5, subparagraph (a), which detailed the type of preventive measures to be adopted by States within the maritime areas under their jurisdiction and on the high seas. It was further stated that any preventive measure taken could not interfere with those principles and upset the very carefully negotiated balance found in the United Nations Convention on the Law of the Sea.

119. Members noted the call to cooperate with competent intergovernmental organizations and, as appropriate, with other organizations or non-State actors with an interest in the safety of maritime navigation, in draft article 5, subparagraph (b). While members generally welcomed the strengthening of cooperation with intergovernmental organizations, it was suggested that the term should be changed to "international organizations" to ensure coherence with the work of the Commission on other topics. Some members questioned whether the reference to non-State actors

would be welcomed by Member States, while others insisted on the need to explain which were the organizations and actors envisaged in the draft article.

(d) Draft article 6

120. Members generally agreed that there was a need to promote harmonization of national laws for the criminalization of piracy and armed robbery at sea. It was recalled that the United Nations Convention on the Law of the Sea allowed for the characterization of piracy as a crime but did not make it mandatory. In that regard, views were expressed on whether the draft articles should encourage States to criminalize acts of piracy and armed robbery at sea as defined in the draft articles. Members also welcomed the broad approach of including inciting, facilitating and other inchoate offences within the obligation to criminalize, but noted that it would be useful to detail the different elements of the acts constituting a crime to ensure clarity and accuracy.

121. The references to criminal acts committed pursuant to an order of a Government and those committed by a person performing an official function, contained in paragraphs 4 and 5 of draft article 6, were considered problematic. As the definitions adopted by the Commission at its seventy-fourth session rested on the premise that piracy and armed robbery at sea were committed for private ends, members considered that the factual scenario posited in those paragraphs was incompatible with the general understanding of both crimes. In that regard, it was suggested that the Special Rapporteur might wish to clarify that the acts had to be committed in a personal capacity, in order to avoid the implication that a public official could commit an act of piracy in an official capacity.

122. With regard to paragraph 6 of draft article 6, members expressed concerns regarding the proposal that the crimes of piracy and armed robbery at sea should not be subject to any statute of limitations. Doubts were expressed as to whether that proposal was based on the practice of States, in particular regarding armed robbery at sea.

(e) Draft article 7

123. Members expressed general support for a provision on the establishment of national jurisdiction over the crimes of piracy and armed robbery at sea. It was noted that it might be appropriate to have separate provisions for piracy and armed robbery at sea. The view was expressed that the establishment of national jurisdiction for piracy was not an obligation under the United Nations Convention on the Law of the Sea, as the Convention only authorized States to exercise jurisdiction following an arrest.

124. The view was expressed that clarification might be needed in the case of multiple claims to jurisdiction. It was suggested that an indication of order of preference for the exercise of jurisdiction be included in case of conflicting jurisdiction.

125. While some members found the inclusion of stateless persons who were habitual residents of a State for the purposes of establishing jurisdiction useful, others found the formulation problematic. It was suggested that a formulation focusing on the country of residence would be more precise.

126. Members expressed doubts as to the applicability to armed robbery at sea of a universal jurisdiction regime, as contained in paragraph 2 of draft article 7 as proposed by the Special Rapporteur. Furthermore, questions were raised as to whether paragraph 2 of draft article 7 reflected customary international law.

127. Regarding paragraph 3 of draft article 7, it was suggested that the current drafting could be interpreted to allow States to exercise jurisdiction with regard to armed robbery at sea committed in the territory of another State on the pretext of their respective national law. It was further stated that, while the provision might be

accepted for piratical acts, it extends a quasi-universal jurisdiction to armed robbery at sea that was not based on customary international law.

(f) Final form

128. Members stressed the need to determine the final form of the outcome of the work of the Commission on the topic. While some members supported the continued work of the Commission on draft articles that could be the basis for a binding instrument to be negotiated by States, other members raised the possibility of drafting guidelines directed at harmonizing the law and identifying lacunae on the topic. There was also a suggestion to wait until the third report of the Special Rapporteur before deciding on future steps.

(g) Future programme of work

129. While support was expressed for the future work on the topic as proposed by the Special Rapporteur, some members expressed doubt as to whether the future report of the Special Rapporteur should focus on the doctrine separately from the study of practice and case law. It was suggested that, rather than proceeding with a source-based approach, the Special Rapporteur might wish to conduct his analysis by theme.

130. Suggestions were made as to the possible themes that the Special Rapporteur might discuss in his third report. Members highlighted, in particular: criminal law aspects of the topic, including the applicability of universal jurisdiction; police cooperation and mutual legal assistance; root causes of piracy and armed robbery at sea; repression of those crimes by members of armed forces or by private military contractors; the consequences of technological developments in the fight against piracy and armed robbery at sea; humanitarian aspects including the assistance, compensation and repatriation of victims; the right to conduct hot pursuit across maritime zones; and the issue of the loss of flag. The view was expressed that issues related to admissibility of evidence before courts and imposition of penalties were beyond the scope of the topic.

3. Concluding remarks by the Special Rapporteur

131. In his concluding remarks, the Special Rapporteur thanked members for their comments and contributions, in particular those providing references to international agreements beyond the United Nations Convention on the Law of the Sea that could serve as a basis for the future work of the topic, namely: the International Convention against the Taking of Hostages of 1979, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 and the 2005 Protocol thereto,²⁰⁴ and the United Nations Convention against Transnational Organized Crime of 2000. He also recalled the references by members to the work of the Institute of International Law on piracy, particularly the Naples Declaration of 2009²⁰⁵ and the Angers Resolution of 2023.

132. The Special Rapporteur recalled that his first report showed that State practice was not general, constant or uniform, which had led him to conclude that a work of codification was not possible in the current topic. In that regard, he stated that the path ahead was that of progressive development in areas where the provisions of the United Nations Convention on the Law of the Sea presented some gaps or insufficiencies to be filled. The Special Rapporteur expressed his belief that the work on the topic was about advancing the law for combating piracy without fundamentally changing it.

²⁰⁴ Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (London, 14 October 2005), IMO, document LEG/CONF.15/22 of 1 November 2005.

²⁰⁵ Available from <https://www.idi-iiil.org/en/publications-par-categorie/declarations/>.

133. He noted that many members recalled the importance of maintaining the distinction between piracy and armed robbery at sea. The Special Rapporteur agreed that there were fundamental differences between the two crimes and suggested discussing in the Drafting Committee a formulation that took into account those differences. He also considered carefully the warnings of members against the duplication of existing frameworks.

134. On the question of the harmonization of national legislation, the Special Rapporteur explained that his proposal was not for a harmonization of legislation at the global level, in the sense that all the States of the world should adopt the same laws on piracy. He clarified that his proposal pertained to harmonization of legislation at the regional or subregional level, where States could seek to adopt laws that were not uniform but in harmony, i.e., more or less comparable with regard to prevention and the application of penalties.

135. Regarding the references to armed conflict in draft article 4, the Special Rapporteur explained that they had been included to place the issue in a broader context and to clarify that the legal status of piracy was the same whether in times of peace or armed conflict.

136. As for draft article 5, the Special Rapporteur noted that he wished to put forward a provision on prevention, considering that it followed naturally from the obligation to cooperate within the meaning of article 100 of the United Nations Convention on the Law of the Sea. While noting that article 100 did not mention the obligation of prevention, he recalled that the 2023 report from the Institute of International Law²⁰⁶ pointed out that the obligation of repression included or encompassed that of prevention and that it was not relevant to distinguish between them.

137. The Special Rapporteur concluded his remarks by thanking members for their observations and proposals, and by expressing the hope to have a constructive discussion regarding the topic as a whole and its future direction within the Drafting Committee.

²⁰⁶ Available from <https://www.idi-iil.org/en/publications-par-categorie/rapports/>.

Chapter VII

Immunity of State officials from foreign criminal jurisdiction

A. Introduction

138. 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.²⁰⁷ 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).²⁰⁸

139. 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).²⁰⁹ The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.²¹⁰

140. 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.²¹¹ 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).²¹²

141. 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.²¹³ 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.²¹⁴

²⁰⁷ 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).

²⁰⁸ *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](#).

²⁰⁹ [A/CN.4/601](#), [A/CN.4/631](#) and [A/CN.4/646](#), respectively.

²¹⁰ 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.

²¹¹ *Ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 266.

²¹² [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.

²¹³ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, paras. 64–65.

²¹⁴ *Ibid.*, para. 66.

142. 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.²¹⁵

B. Consideration of the topic at the present session

143. At the present session, 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). The Special Rapporteur, in his first report, examined the general comments and observations received from Governments on the draft articles, as well as the comments and observations received from Governments specifically on draft articles 1 to 6, as adopted on first reading. He made proposals for consideration on second reading in relation to draft articles 1 to 6, in light of the comments and observations made by States in both written comments and in the Sixth Committee.

144. At its 3674th to 3680th meetings, from 1 to 9 July 2024, the Commission considered the first report of the Special Rapporteur. At its 3680th meeting, on 9 July 2024, the Commission decided to refer draft articles 1 to 6 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 146 to 214 below.

145. At its 3698th meeting, on 30 July 2024, the Chair of the Drafting Committee introduced²¹⁶ the report of the Drafting Committee (see A/CN.4/L.1001). At the same meeting, the Commission took note of draft articles 1, 3, 4 and 5.

1. Introduction by the Special Rapporteur of the first report

146. The Special Rapporteur emphasized that the Commission found itself in the second reading of the topic, where both the views of States as well as new developments were central to the work of the Commission. He began by highlighting the importance of the topic, which had been a priority for the Commission since 2007. He recalled the progress achieved to date by the Commission, including the adoption at the seventy-third session (2022) of 18 draft articles along with the annex and commentaries at first reading.

147. The Special Rapporteur further elaborated on his first report, which comprised a summary of States' comments and observations on the draft articles adopted on first reading, his analysis of the subject matter discussed, and his reflections on said comments and observations. His first report covered draft articles 1 to 6. The Special Rapporteur noted two reasons for the difficulty of reviewing all the draft articles for the purpose of the second reading. First, some State submissions were delayed, which in turn led to a subsequent delay in receiving translations of those submissions. Second, the Special Rapporteur referred to the request by States for additional time to comment on the entire set of draft articles. He announced his intention to present a report on the remaining draft articles at the seventy-sixth session (2025) and expressed the hope that dividing the second reading over two sessions would allow the Commission sufficient time to consider States' views thoroughly. Additionally, he proposed to the Commission allowing a period until the first week of November for States to comment particularly on draft articles 7 to 18, to be considered at the next session.

148. The Special Rapporteur observed that, of the 35 States that had provided comments, several had underscored the promotion of friendly relations between States and the stability of international relations as the main guiding principles and rationale for the Commission's work on the topic. He also noted States' general

²¹⁵ *Ibid.*, Seventy-eighth Session, Supplement No. 10 (A/78/10), para. 250.

²¹⁶ Statement of the Chair available on the website of the Commission at https://legal.un.org/ilc/guide/4_2.shtml.

recognition of the importance of balancing the principle of sovereign equality of States with accountability for international crimes. He further observed that some States saw a need to balance those principles with the maintenance of international peace and security, a subject he recommended the Commission explore further during its consideration of draft articles 7 to 18.

149. The Special Rapporteur acknowledged the various positions of States as to whether the draft articles reflected the codification of existing customary international law or the progressive development of international law. Nevertheless, he recalled paragraph (12) of the general commentary to the draft articles, which clarified that the draft articles contained a proposal for elements of both, as appropriate, and explained that the commentary would aim to provide States with enough information to ensure transparency.

150. The Special Rapporteur also raised the differing views of States with respect to the final form of the work of the Commission, with some States favouring a draft treaty, some proposing to leave the outcome as draft articles and others suggesting a mixture of draft articles and draft guidelines. He recalled the question posed to States in paragraph (13) of the general commentary adopted on first reading and considered it important for the Commission to clarify the final form of its work on the topic at the present stage.

151. With respect to draft article 1, the Special Rapporteur explained that the provision referred to the scope of the project and limited its application to foreign criminal jurisdiction. He emphasized that special legal regimes, including States' obligations under particular international agreements, were outside the scope of the project. He also concurred with the States that requested clarification on the relationship between immunity and inviolability and expressed the intention to provide such clarification in the commentary. The Special Rapporteur proposed a new formulation of draft article 1, paragraph 3, to separate international criminal courts and tribunals established by treaties and those established by binding resolutions.

152. In connection with draft article 2, subparagraph (a), which defined the term "State official", the Special Rapporteur explained that he agreed with the suggestion to use the term "*agent de l'État*" instead of "*représentant de l'État*" to refer to State officials in French. While he also agreed with those States who thought it would be inappropriate to include a list of types of State officials in the text of the provision, he stated that he intended to include more examples in the commentary.

153. With respect to subparagraph (b), which defined the term "act performed in an official capacity", the Special Rapporteur noted the requests by States for clarification of the treatment of *ultra vires* acts. He also noted a request by a State for a definition of "criminal jurisdiction", as well as concerns about the relationship between the draft articles and the rules regarding the responsibility of States for internationally wrongful acts. He expressed his view that it was unnecessary to change the text of draft article 2, but the concerns raised by States could be addressed in the commentary to the extent that they had not already been addressed.

154. With regard to draft article 3, which identified the persons enjoying immunity *ratione personae*, the Special Rapporteur observed that States generally shared the view that the provision reflected customary international law. While noting that some States proposed extending the definition to categories of officials beyond Heads of State, Heads of Government and Ministers for Foreign Affairs, he suggested maintaining the current text of draft article 3, as he did not see sufficient legal grounds to justify such proposals. In his view, there was no evidence of consistent State practice to support the extension. He recalled that such officials might nevertheless enjoy immunity under other legal rules, such as those relating to special missions or official visits.

155. The Special Rapporteur noted that States generally agreed with the substance of draft article 4, which concerned the scope of immunity *ratione personae*, and that their suggestions primarily concerned its terminology and structure. While acknowledging the concern that the phrase “term of office” might not be appropriate to officials whose period of office was not fixed, he proposed that the question would best be addressed in the commentary. He noted the desire of some States for paragraph 3 to be structured as a “without prejudice” provision and proposed removing the words “the rules of international law concerning” from its text. He also agreed with the suggestion to use the term “cessation” instead of “extinction” in the French text of paragraph 3 of the provision. He indicated that he was open to restructuring the provision and that issues of the temporal scope of immunity *ratione personae* and inviolability would be further clarified in the commentary.

156. Regarding draft article 5, the Special Rapporteur expressed his agreement with the concerns raised by States regarding the phrase “acting as such”, which some considered could lead to confusion, while others considered superfluous. He highlighted his proposal to omit said phrase and to consider adding the phrase “in accordance with draft article 6” to the provision to link it to the following draft article.

157. With respect to draft article 6, the Special Rapporteur highlighted the support of States for the substance of the provision, while noting the view that paragraph 2 might not appropriately reflect the exceptions to immunity *ratione materiae*. He agreed with suggestions for clarifying the paragraph and proposed expressly stating in the text that immunity “*ratione materiae*” applied beyond the cessation of immunity *ratione personae* for the troika.

158. The Special Rapporteur also noted proposals to merge various provisions. He recalled a proposal to merge the definitions in draft article 2 with other substantive provisions. With respect to draft articles 5 and 6, the Special Rapporteur favoured maintaining the former as a stand-alone provision. He considered that proposals to merge the respective paragraphs 3 of draft articles 4 and 6 could be discussed by the Drafting Committee.

159. The Special Rapporteur concluded his introductory remarks by thanking his fellow Commission members and the Secretariat for their assistance.

2. Summary of the debate

(a) General comments

160. Members welcomed the first report of the Special Rapporteur. Several members expressed appreciation for his efforts to respond to the concerns raised by Governments in their written comments and observations and in the Sixth Committee. Approval was also expressed for the modesty of the changes he had proposed to draft articles 1 to 6, as adopted on first reading. In addition, several members expressed gratitude for the work of the two previous Special Rapporteurs for the topic, Mr. Kolodkin and Ms. Escobar Hernández, and for the compilation of comments and observations received from Governments.

161. Several members highlighted the importance of the topic for States and the need for the Commission to appropriately balance respect for the sovereign equality of States and ensuring accountability for the most serious crimes under international law. Others underscored the need to preserve friendly relations between States and maintain international peace and security. It was recalled that immunity of State officials stemmed from both the State character of their functions and the need for such officials to be able to represent the State. The view was expressed that immunity was a procedural bar to the exercise of jurisdiction and could not efface accountability for violations.

162. Several members observed that the content of draft article 7 would be central to the success of the draft articles as a whole. Support was expressed for the provision

and for including the crime of aggression within its scope; however, concerns regarding its content were also recalled. Recent national judicial decisions both consistent with draft article 7 and upholding immunity for crimes within its scope were cited, and the need to update the relevant commentary in that respect was highlighted. It was noted that, while draft article 7 was described as an exception to immunity, immunity itself could be seen as an exception to the general rule of territorial sovereignty of the forum State, as it was in the Commission's 1949 draft declaration on the rights and duties of States.²¹⁷ In that connection, some members questioned whether State practice supported the existence of a rule of customary international law providing for immunity in each case. Others suggested the opposite. Clarity in the commentary as to whether acts amounting to crimes within the scope of draft article 7 could be characterized as acts performed in an official capacity was requested.

163. Concerning calls by States for further clarification on whether particular provisions reflected existing rules of customary international law or represented proposals for the progressive development of the law, several members agreed with the Special Rapporteur that the Commission had adequately addressed the matter in paragraph (12) of its general commentary to the draft articles. Nevertheless, a few members encouraged the Commission to consider providing further information on those specific points where States requested it. The need to properly substantiate any statements of the law was also underscored.

164. On the approach to be taken by the Commission on second reading, a number of members considered that changes to the draft articles and commentaries thereto should be limited to those necessary to respond to comments by States and to developments since the first reading. However, the view was expressed that the Commission should not overly hesitate to make adjustments, as that would be the first opportunity for the members who joined the Commission after 2022 to work on the topic. It was recalled that the draft articles had not been amended beyond *toiletage* at the end of the first reading in 2022. The possibility of correcting any inconsistencies in the first reading text and commentaries was raised. On the other hand, it was recalled that the draft articles were adopted in 2022 and included references to jurisprudence up to that point.

165. Several members highlighted the central role that Government comments should play in the Commission's consideration at second reading. Some members recalled comments made by States before the conclusion of the first reading and suggested that those might be relevant to the Commission's present work. Other members supported the methodology of the Special Rapporteur. The importance of giving adequate and equal consideration to the views of States from all regions was emphasized. The Commission was encouraged to take into consideration relevant views expressed by States in contexts outside the formal process of consultations by the Commission. The difficulty of interpreting silence by those Governments that had not submitted observations was also noted, and the hope was expressed that more delegations would offer their views in the debate in the Sixth Committee on the present report. The goal of building consensus, taking into account the different views of States, was highlighted.

166. Members also emphasized the need to reflect new developments in State practice, jurisprudence and teachings relevant to the topic, which was especially pertinent in view of the time elapsed since the provisional adoption of draft articles 1 to 6 on first reading. The relevance of the practice of States beyond their judiciaries was also underscored. The need to review the cases cited in the commentary was also highlighted, and the pertinence of cases relating to sovereign immunity, those relating to immunity from civil jurisdiction or cases in which immunity was not invoked was questioned. Other members reiterated that draft articles 1 to 6 were provisionally

²¹⁷ *Yearbook ... 1949*, document A/925, pt. II, art. II.

adopted in 2022 and the jurisprudence referenced indicated that there had been a thorough discussion at that time.

167. Members reflected on the challenges the Commission would face as it proceeded with the second reading of the draft articles. The Commission was encouraged to seek solutions that could be applied generally in light of the subtleties of the topic and the differences in the views of States. The importance of reflecting customary international law in a technical and apolitical way was underscored, and a request that the Commission refocus its work on codification of existing rules was noted. The Commission was also encouraged to add value through progressive development. Several members cautioned that the Commission should not hinder the development of international law or propose regressive changes in the law.

(b) Draft article 1 (Scope of the present draft articles)

168. In the discussion of draft article 1, a number of questions were raised in connection with the scope of the draft articles. Some members considered that definitions of “criminal jurisdiction” and “exercise of criminal jurisdiction” were necessary, at least in the commentary. Others agreed with the Special Rapporteur that such definitions were not needed. It was noted that paragraph (5) of the commentary to draft article 9 contained reflections on the notion of exercise of criminal jurisdiction that might be better placed in the general commentary. It was recalled that the first Special Rapporteur had explained that immunity only related to “criminal procedural measures that imposed an obligation on the official or were coercive”.²¹⁸ The importance of discussing the distinction between immunity from criminal jurisdiction and immunity from other forms of jurisdiction, including civil jurisdiction and administrative jurisdiction, was raised. The view was also expressed that such distinctions should be left to national legal systems.

169. A number of members supported the proposal of the Special Rapporteur to clarify the distinction between immunity and inviolability in the commentaries. It was observed that the International Court of Justice had combined discussion of the two concepts in its decisions. The view was expressed that inviolability could be seen as comprising a form of immunity from enforcement jurisdiction. It was noted that there were acts that could concern the inviolability of a State official but fell outside the scope of the topic as they did not relate to the exercise of criminal jurisdiction. The relevance of draft articles 9 and 14 to inviolability was highlighted. It was proposed that concrete examples of allowed or disallowed procedures be added in the commentary. Some members proposed moving references to inviolability in the commentary to draft article 9 to that of draft article 1. Relevant references to the *Arrest Warrant* case,²¹⁹ the *Diplomatic and Consular Staff in Tehran* case²²⁰ and article 29 of the Vienna Convention on Diplomatic Relations²²¹ were also proposed. It was also suggested that inviolability could be dealt with by the addition of a “without prejudice” or “as appropriate” clause.

170. With respect to paragraph 1 of draft article 1, some members suggested drafting changes. It was proposed that the text refer to “current and former” State officials to reflect that former State officials could also enjoy immunity *ratione materiae*. It was also suggested that reference be made to immunity “from the exercise of criminal jurisdiction”, in particular to avoid the implication that immunity from prescriptive jurisdiction existed. However, the concern was raised that such a change might overly limit the scope of the draft articles.

²¹⁸ *Yearbook ... 2011*, vol. I, 3115th meeting, para. 44.

²¹⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3.

²²⁰ *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3.

²²¹ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

171. Members generally agreed with the Special Rapporteur that there was no need to modify paragraph 2. However, the inclusion in the commentary of more examples of special rules raised by States, including those relating to international conferences, international commissions and international judicial or arbitral proceedings, was recommended. It was suggested that the commentary explain more clearly that members of armed forces were not necessarily excluded from the scope of the draft articles, particularly when participating in an armed conflict. The view was also expressed that they were covered by the doctrine of combatant immunity. It was questioned whether immunity *ratione personae* applied as between belligerent States in situations of conflict. Furthermore, additional clarification in the commentary as to the significance of the different wording of paragraphs 2 and 3 was requested.

172. A number of members supported the inclusion of paragraph 3, as it made clear that the draft articles were without prejudice to the special regimes that apply to international criminal tribunals. The importance of the paragraph were the draft articles to become a treaty was highlighted, as without it, the rule reflected in article 30 of the Vienna Convention on the Law of Treaties that a later treaty takes precedence over an earlier one²²² would apply. However, a number of members agreed with the Special Rapporteur that the paragraph needed modification, and several of them supported his proposed amendment. It was thought that his proposals could make the paragraph both clearer and more inclusive.

173. Members discussed the scope of the terms “treaty” and “agreement” in the paragraph. Several members expressed a preference for one term or the other and generally supported the consistent use of one term or the other. Some members noted that the first reading text could be interpreted as not covering all possible modalities for the establishment of international criminal tribunals; for example, the *ad hoc* tribunals established by the Security Council. However, it was also noted that the legal basis for such tribunals was ultimately a treaty, namely the Charter of the United Nations. A single paragraph covering “treaties serving as a legal basis for establishing” international criminal courts and tribunals was proposed to bring such tribunals within the scope of the provision. A number of members suggested the terms “instruments” and “binding instruments”, in order to cover tribunals established by treaties and under the auspices of international organizations. Some members also supported the idea of referring to instruments “establishing or relating to the operation of” international criminal courts and tribunals, as some States had proposed.

174. Some members expressed concern that it was not clear whether hybrid and internationalized tribunals were included within the scope of the provision, and it was suggested that a separate subparagraph might be necessary to that end. It was also proposed that more nuance be added in the commentary concerning the factors that made a criminal tribunal an international one, a question that had been addressed by the Appeals Chamber of the Special Court for Sierra Leone in the *Taylor* case.²²³ Another approach proposed to ensure inclusivity was to use negative phrasing, for example to refer to “criminal jurisdiction[s] other than that of another State”.

175. With respect to subparagraph (a), as proposed by the Special Rapporteur, some members requested the deletion of the phrase “as between the parties to those agreements”, which was considered problematic, as it might call into question the jurisdiction of the International Criminal Court and the obligation of States parties to the Rome Statute²²⁴ to cooperate with it. Other members supported the retention of

²²² Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

²²³ See Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, Appeals Chamber, paras. 37–42.

²²⁴ Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

the phrase, which in their view restated the fundamental principle of the law of treaties that a treaty could not create obligations for States not party to it.

176. A number of members supported the proposed subparagraph (b) as a solution to some of the concerns raised regarding tribunals established other than directly by treaty. However, some members considered that further clarification was needed as to which acts of international organizations and which States were implicated by the provision. With respect to the acts, one proposal was to refer to “legally binding resolutions”. It was also suggested that the question of bindingness should be left to the rules of the organization in question. The term “acts of an international organization” was also proposed, to align the text with the previous work of the Commission.

177. Several members considered that the paragraph should specify that it only covered those States bound by the relevant resolution, and text was proposed to that effect. One solution proposed by some members was to limit the scope of the provision to decisions of the Security Council, which all Member States had agreed to accept and carry out. However, other members opposed limiting the paragraph to the Security Council, to avoid foreclosing future developments. The importance of that was highlighted in light of ongoing discussions of acceptable ways to establish international criminal courts and tribunals.

178. Some members proposed the deletion of paragraph 3. The view was expressed that such deletion was necessary to prevent the draft articles from undermining the developments restricting the scope of immunity of State officials that had coincided with the development of international criminal law. It was also suggested that the matter could be sufficiently clarified in the commentary.

(c) Draft article 2 (Definitions)

179. With regard to draft article 2, subparagraph (a), on the definition of “State official”, the discussion concentrated on the use of the term “current and former State officials”. Some members suggested omitting such terms to streamline the text and its application vis-à-vis draft article 6 on the scope of immunity *ratione materiae*. It was also proposed that the content of subparagraph (a) be moved to draft article 5 or draft article 6. Nevertheless, a number of members agreed with the proposal by the Special Rapporteur not to amend draft article 2, since any necessary clarification regarding the provision could be appropriately dealt with in the commentary and thus no textual change was required. It was also stated that the definition of State official did not relate only, or mainly, to immunity *ratione materiae* and, as a result, moving it to draft article 6 would not be appropriate. While some members supported the Commission’s decision not to provide a list with examples of State officials, it was emphasized that practical guidance should be added to the commentary for the purpose of determining whether an individual qualified as a State official. Some members were also of the view that the term “*représentants*” in French, as adopted on first reading, should be retained instead of replacing it with “*agents*”; it was recalled *inter alia* that the first reading text had been discussed and adopted in three languages in the Drafting Committee (English, French and Spanish), the applicable jurisprudence used both terms interchangeably, and the previous work of the Commission on “Jurisdictional immunities of States and their property” used the term “*représentants*”.

180. Regarding subparagraph (b), on the definition of “act performed in an official capacity”, some members favoured keeping the text as adopted on first reading, while others expressed doubts as to whether the provision was necessary or if it would be more appropriate to incorporate the provision into draft article 6. On the differences between acts performed in an official capacity, *ultra vires* acts and illegal acts, several members considered that there was still confusion on the matter and saw the need for further explanation in the commentary. Various views on the substance were expressed by members. Some members stated that immunity, as a procedural

restriction on the exercise of jurisdiction, prevented a foreign State from independently deciding whether a given action of an official fell within their official powers. While the view was expressed that immunity did not apply to *ultra vires* acts, another view was taken that there was little evidence in practice to support the conclusion that official conduct must be lawful to enjoy immunity. In that connection, it was stressed that it would be erroneous to suggest that just because an act was performed *ultra vires* it was not done in the exercise of official capacity and therefore did not attract immunity. Some members called for clarity on what the Commission meant by acts performed *ultra vires*. It was stated that the Commission ought to steer States in the direction of normative coherence by providing a set of criteria by which to judge State conduct, and providing an indicative, non-exhaustive list of acts performed in an official capacity was suggested. A view was expressed that the draft article needed to detail which acts fell under immunity *ratione materiae* in relation to *ultra vires* acts, including an expanded definition of what constituted an *ultra vires* act.

181. Several members discussed the relationship between the articles on responsibility of States for internationally wrongful acts and draft article 2, in particular rules concerning attribution. It was stated that careful consideration and a detailed analysis in the commentary of the relationship and the differences between the two regimes was needed. It was highlighted that, while the connection between the two should be recognized, the differences ought to be explained. The view was expressed that the regime of immunity and attribution under the law of State responsibility were aligned; article 7 of the articles on responsibility of States for internationally wrongful acts was cited in that regard. According to another view, there was a need to harmonize the two fields and a proposal was made to replace “in the exercise of State authority” in subparagraph (b) with “in the exercise of elements of the governmental authority”, taking into account the case *Certain Questions of Mutual Assistance in Criminal Matters*.²²⁵ Moreover, a proposal was made for a new draft article concerning the relationship between immunity and State responsibility, following the case *Certain Questions of Mutual Assistance in Criminal Matters*, to strengthen the balance between immunity and the fight against impunity.²²⁶

182. Some members proposed additional terms to be defined under draft article 2, such as “immunity”, “criminal jurisdiction”, “jurisdiction”, “exercise of criminal jurisdiction”, and “inviolability”, while noting that appropriate explanations could also be added to the commentary instead of the provision itself. The Commission was urged to take a cautious approach when considering whether to add new definitions to draft article 2, in particular regarding the difference between criminal jurisdiction and exercise of criminal jurisdiction. Greater clarity in the commentary was deemed necessary on the distinction between immunity and inviolability; the cases *Arrest Warrant*²²⁷ and *Certain Questions of Mutual Assistance in Criminal Matters* were cited in that regard. The view was expressed that, since draft article 2 dealt with definitions, its consideration should be suspended until the Commission had the entire text of the draft articles under consideration.

183. It was also proposed that cases regarding the nationality of a State official, such as where an official may be the national of a State but serve as a State official for a different State, be clarified in the commentary. It was likewise proposed that issues related to status-of-forces agreements, status-of-mission agreements and the primary responsibility of the State of nationality be made clear in the commentary.

²²⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177.

²²⁶ *Ibid.*, at para. 196.

²²⁷ See footnote 219 above.

(d) Draft article 3 (Persons enjoying immunity *ratione personae*)

184. Members generally accepted the proposal by the Special Rapporteur not to amend draft article 3 and, accordingly, not to expand immunity *ratione personae* to State officials beyond those officials envisaged in draft article 3, i.e., Heads of State, Heads of Government and Ministers for Foreign Affairs (the so-called troika). There were several reasons for that, including: (a) draft article 3 was consistent with, and reflected, settled customary international law; (b) in the light of the case *Certain Questions of Mutual Assistance in Criminal Matters*, there were no legal grounds to expand the scope of the provision;²²⁸ (c) there was nothing in recent practice that would justify the provision being amended; (d) in current international law, there was no general practice, or clear and established practice, or *opinio juris*, to expand immunity *ratione personae* to other State officials; and (e) different countries had different regimes for their high-ranking officials and it would be challenging to establish a consistent list of high-ranking officials eligible for immunity *ratione personae* outside the troika. The commentary to draft article 3, as adopted on first reading, and in-depth explanation of the issue contained therein was recalled by several members. Some members expressed the view that States that had submitted written comments suggesting that there was a need to include other high-ranking officials in the scope of draft article 3 had not justified their position on legal grounds.

185. While noting the open-ended wording in the *Arrest Warrant* case, where the International Court of Justice had used the term “such as” before referring to Heads of State, Heads of Government and Ministers for Foreign Affairs,²²⁹ some members emphasized that draft article 3 should not be amended, because any expansion of the scope of immunity *ratione personae* would require fact-specific, case-by-case analysis. Other members were of the view that, because of the use of the term “such as” by the Court, if draft article 3 was intended to reflect customary international law, the words “such as” ought to be added to the draft article when referring to Heads of State, Heads of Government and Ministers for Foreign Affairs. In that same vein, some members did not support the view that immunity *ratione personae* was limited to the troika. It was pointed out that other high-ranking officials at times were called upon to perform international functions and the current reality attested to the fact that immunity *ratione personae* extended beyond the troika, as some States had mentioned in their written comments. The *Arrest Warrant* case²³⁰ and the Convention on Special Missions²³¹ were recalled in that connection. It was stated that, should draft article 3 not be amended to expand its scope, the commentary had to at least make it clear that the provision was without prejudice to existing practice related to other officials. Conversely, it was stressed that the draft articles on the topic were without prejudice to the rules relating to immunity of special missions and thus senior State officials not within the troika would enjoy immunity *ratione personae* when they were on official business abroad. With regard to officials abroad on private visits, a view was expressed that extending such immunity to all members of the troika was already far reaching, given that the International Court of Justice in the *Arrest Warrant* case did not offer sufficient practice to place the Head of Government and

²²⁸ *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 225 above), para. 194: “The Court notes first that there are no grounds in international law upon which it could be said that the officials concerned [*procureur de la République* and Head of National Security] 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.”

²²⁹ *Arrest Warrant* (see footnote 219 above), para. 51: “The Court would observe at the outset 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”.

²³⁰ *Ibid.*

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

the Minister for Foreign Affairs in the same category as the Head of State or to conclude that it was firmly established that all three enjoyed immunity from criminal jurisdiction when abroad on private visits.

186. Calls were made for greater nuance in the commentary regarding special cases where officials who were not formally Heads of State or Heads of Government, but *de facto* occupied a comparable place in national hierarchy. A view was expressed that the commentary could benefit from explaining the immunity status of acting Heads of State, Heads of Government and Ministers for Foreign Affairs, and a request was made for further details on the temporal scope of immunity *ratione personae*. It was also considered important to strengthen the commentary to take into account recent decisions by national courts, as well as States' submissions before international courts and tribunals on immunity *ratione personae*.

187. While some members suggested merging draft articles 3 and 4 to ensure coherence between the two provisions, retaining stand-alone provisions was preferred for clarity.

(e) Draft article 4 (Scope of immunity *ratione personae*)

188. Regarding draft article 4, a number of members generally agreed with the approach by the Special Rapporteur. With respect to paragraph 1, several members preferred retaining the expression "term of office". While acknowledging that the expression might not accurately reflect certain situations in practice, those members considered that the issue would be better explained in the commentary since the current text was widely used, avoided ambiguity and circumvented challenges that could be presented with the particularities of legal and institutional practices of national law. The Advisory Opinion OC-28/21 of the Inter-American Court of Human Rights²³² was mentioned, as it addressed the question of presidential term limits for office. The view was expressed that any effort to extend personal immunity beyond the official entry into office, or before taking an oath, was invalid. Nevertheless, several members felt that the phrase "term of office" in the English version did not accurately reflect, notably, the circumstances of officials that did not have predetermined terms of office. Hence, they suggested replacing the phrase "during their term of office" with "during the time of being in office", "during the period of office" or "the fact of being in office". The current text of paragraph 1 was considered confusing due mainly to the word "term". Alignment with the *Arrest Warrant* case, which used the phrase "during the period of office", was suggested.

189. With respect to paragraph 2, a proposal was made to merge it with paragraph 1, as it would clarify the text without having an impact on the content. On paragraph 3, while several members supported the proposal by the Special Rapporteur to amend it by omitting the phrase "the rules of international law concerning", others opposed it. Members who supported it were of the view that the proposal simplified the text without affecting its content or losing the essential legal point. It was also considered that there was no doubt that the application of immunity rules presupposed the existence of the rules of international law in that domain. The importance was underlined of using the commentary to provide such clarifications and a direct reference to the relevant rules of customary international law and treaty law related to immunity, should the Commission adopt the proposed amendment. Members who opposed the proposal were of the view that deleting the phrase would have the effect of suggesting that immunity *ratione materiae* automatically applied after the cessation of immunity *ratione personae*, which was deemed to be unfounded, in particular in relation to crimes covered by draft article 7.

190. A proposal was made to delete paragraph 3 in its entirety or merge it with paragraph 3 of draft article 6, as both paragraphs 3 were considered to largely cover

²³² Inter-American Court of Human Rights, Advisory Opinion OC-28/21, 7 June 2021, Series A No. 28.

the same issue. However, some members were not convinced that merging the two paragraphs was warranted. Another proposal was made to merge paragraphs 1 and 3 into a single paragraph, since they both addressed temporal elements. In relation to the commentary, the view was expressed that it was necessary to clarify that the immunity status of family members of the troika fell outside the scope of the draft article.

(f) Draft article 5 (Persons enjoying immunity *ratione materiae*)

191. With respect to draft article 5, members generally supported the suggestion of the Special Rapporteur to delete the phrase “acting as such”. A number of them considered that the phrase duplicated the content of draft articles 2, subparagraph (a), and 6, and was therefore unnecessary. Others considered that, by using wording that differed from those provisions, the phrase added potential for confusion. It was recalled that the phrase had been included in the provision to signal the distinction between immunity *ratione personae* and immunity *ratione materiae*.

192. Furthermore, a number of members supported the addition of the phrase “in accordance with draft article 6” at the end of the provision. Some members proposed instead to use broader phrasing referring to Part Three or the draft articles as a whole, to clarify that those provisions also applied to the enjoyment of immunity *ratione materiae*. The view was also expressed that such a reference was not necessary.

193. A number of members proposed merging draft article 5 with draft article 6, and particularly with draft article 6, paragraph 1. Other members opposed such a merger. Some of them considered it useful to have a separate provision setting forth clearly the general rule on immunity *ratione materiae*. Others considered it helpful to the clarity and readability of the text overall to maintain a parallel structure between Parts Two and Three. However, the view was also expressed that a difference in structure between the two parts would help emphasize the difference between immunity *ratione personae* and immunity *ratione materiae*.

(g) Draft article 6 (Scope of immunity *ratione materiae*)

194. Support was also expressed for the content of draft article 6. It was proposed that the phrase “in accordance with international law” be added to the end of both paragraphs 1 and 2 to reflect the applicability of draft article 7.

195. With respect to paragraph 3, a number of members supported the proposal of the Special Rapporteur to add the words “*ratione materiae*” to the paragraph. However, the reasons for not including the words at first reading, explained in paragraph (13) of the commentary, were recalled as a counter to the proposal. It was also suggested to omit the words “*ratione materiae*” from both paragraphs 2 and 3, since referring to “immunity *ratione materiae* with respect to acts performed in an official capacity” might be viewed as tautological. Support was also expressed for the proposal of the Special Rapporteur to clarify in the commentary that immunity *ratione materiae* persisted after the cessation of immunity *ratione personae* for the troika, as an act in an official capacity.

196. Members highlighted several points to be further developed in the commentary to draft article 6. It was proposed that the Commission add to the commentary concrete examples of measures of constraint precluded by immunity. It was also suggested that further explanation of the implications of the inviolability of State officials on such acts of constraint would be helpful. Clarification that immunity from criminal jurisdiction also extended to immunity from measures of execution was also requested.

(h) Final form

197. Members noted the various possible final outcomes of the work of the Commission on the topic and the views of States on the question. Differing views

were expressed as to whether the final outcome of the Commission's work should be decided at the present stage or after the consideration of the draft articles on second reading. Additionally, it was suggested that clarity and consistency in the draft articles and the commentaries should be a priority, while simultaneously recognizing that the draft articles involved two types of immunity.

198. Several members expressed their support for, or openness to, a recommendation to the General Assembly to negotiate a treaty on the basis of the draft articles. It was noted that such an outcome would be consistent with the previous recommendations of the Commission, especially in the field of immunity. Some members observed that a treaty would be necessary to give effect to the safeguards contained in Part Four. It was also recognized that proposing a treaty would not deprive the draft articles of their general relevance as both evidence of State practice and of the view of the Commission itself.

199. A number of members expressed a preference not to recommend the negotiation of a new treaty. A doubt was raised as to whether the negotiation of a treaty would be politically feasible in light of the differences of view among States, and it was recalled that the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property²³³ had not yet entered into force. It was suggested that the Commission should recommend that the draft articles be brought to the attention of States, possibly leaving the question of a treaty to a later date. It was noted that, following the example of the 2001 articles on responsibility of States for internationally wrongful acts, this would allow the rules time to develop in practice.

200. Some members expressed support for the proposal of certain Governments to reflect Parts One to Three in draft articles but to frame Part Four, which they considered to reflect proposals for new legal rules, as draft guidelines. Others supported a unified outcome, and it was suggested that a split outcome would undervalue the role of the Commission in the progressive development of the law.

(i) Future programme of work

201. A number of members welcomed the decision of the Special Rapporteur to conduct the second reading over more than one session. While the timing difficulties faced by the Special Rapporteur were recognized, a number of members expressed regret that the Commission did not have before it a report on the full set of draft articles. Some members proposed that, in the future, the deadline for Government comments and observations should be in August or September of the year preceding second reading, to allow time for translation and reflection. The Special Rapporteur was encouraged to use informal methods to advance the work of the Commission on the topic during the intersessional period. The importance of keeping the whole of the draft articles in mind throughout the second reading was underscored.

3. Concluding remarks by the Special Rapporteur

202. In his summary of the debate, the Special Rapporteur extended his appreciation to the members of the Commission and welcomed the fruitful debate on the topic. The Special Rapporteur focused first on general comments made by members, followed by specific comments on draft articles 1 to 6.

203. He noted the support of some members of the Commission for his approach to the second reading and highlighted the importance for the Commission to strike a balance in reaching a conclusion on its work on the topic. The Special Rapporteur shared his intention to follow the normal practice on second reading of refining the text of the draft articles adopted on first reading and considering modifications only

²³³ United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, vol. I, resolution 59/38, annex.

for compelling reasons, that is, either on the basis of comments submitted by States or new developments in international law relevant to the topic. With respect to comments submitted by States prior to the Commission's adoption of the draft articles on first reading, the Special Rapporteur clarified that those comments had not been made based on the entire set of the draft articles and that the two former Special Rapporteurs had already taken them into account in their respective reports. Therefore, he suggested focusing on the comments submitted by States since 2022, both in writing and made orally at the Sixth Committee. He acknowledged that recent developments in national jurisprudence related to the topic should be taken into account, where appropriate.

204. Regarding comments made by members on the geographical diversity of State practice in the commentary adopted on first reading, the Special Rapporteur expressed his agreement that the draft articles ought to be representative of the practice of States of all areas of the globe. He indicated that he was conducting research on the jurisprudence and the legislative and executive practice of various States, while noting that some of the developments were connected to draft article 7, which would be the focus of his next report. On draft article 7, he acknowledged comments that the provision was central to the consideration of the Commission of the topic on second reading. He stressed that the Commission would nevertheless have the opportunity to consider draft articles 7 to 18, as well as a complete set of revised draft articles and commentaries, before adopting them on second reading. In relation to the request for clarification on the distinction between progressive development and codification of international law, the Special Rapporteur cited paragraph (12) of the general commentary to the draft articles.

205. Lastly, the Special Rapporteur reiterated that the draft articles should have a unified outcome and that he saw merit in recommending that they be used as the basis for a treaty.

206. On draft article 1, the Special Rapporteur noted the support expressed by members for retaining paragraphs 1 and 2 as they were and focused his remarks on paragraph 3 as proposed in his first report. With respect to subparagraph (a) of paragraph 3, the Special Rapporteur recognized the concerns about the phrase "as between the parties to those agreements" and its possible interpretation regarding the obligation of States parties to the Rome Statute of the International Criminal Court. He also noted the diverging views regarding the use of the term "treaties" as opposed to "agreements". On subparagraph (b) of paragraph 3, the Special Rapporteur mentioned the different proposals concerning the phrase "binding resolutions" and the request for clarification on its meaning. He also noted the suggestions to retain the first reading text, as well as to remove paragraph 3 in its entirety. The Special Rapporteur suggested discussing the matters further in the Drafting Committee.

207. The Special Rapporteur noted the call to clarify or set out a definition for certain terms, including "immunity", "criminal jurisdiction", "exercise of criminal jurisdiction", and "inviolability". The Special Rapporteur recalled the statement by the Chair of the Drafting Committee at the seventy-third session (2022) on the topic, which explained that the issues relating to those terms had been addressed in 2013 and 2022, and a decision had been taken not to define them.²³⁴ He expressed his willingness to expand the commentary on those terms, as needed.

208. As to draft article 2, subparagraph (a), the Special Rapporteur reiterated his preference to maintain the first reading text, while demonstrating his openness to discuss in the Drafting Committee the various drafting proposals made by members, in particular those concerning the expression "both current and former State officials".

²³⁴ Statement of the Chair of the Drafting Committee at the seventy-third session of the International Law Commission, 3 June 2022, pp. 6–7, available at https://legal.un.org/ilc/documentation/english/statements/2022_dc_chair_statement_iso.pdf.

He agreed with those members who expressed a preference for retaining the word “*représentant*” in French.

209. In relation to subparagraph (b) of draft article 2, the Special Rapporteur acknowledged certain overlapping terms and subject matter between the topic and the articles on responsibility of States for internationally wrongful acts, while emphasizing that they were separate legal regimes. He stated that, under the international legal regime of immunity, State officials did not enjoy immunity for *ultra vires* acts, because acts that fell outside the scope of the official’s duty and mandate were personal acts, and not acts performed in accordance with the official’s State duties. The Special Rapporteur expressed his intention to strengthen the commentary with respect to those issues. Lastly, he favoured keeping draft articles 2, 5, and 6 as standalone provisions unless the majority of the members preferred otherwise. He expressed openness to restructuring the draft articles.

210. On draft article 3, the Special Rapporteur reiterated his preference for maintaining the first reading text, most notably since the majority of the members had recognized in their statements that the provision adequately reflected customary international law. The Special Rapporteur indicated that he would continue to follow developments on pending cases before national courts that were relevant to draft article 3. An expansion of the analysis of immunity *ratione personae* and the troika would be dealt with in the commentary.

211. In relation to draft article 4, paragraphs 1 and 2, the Special Rapporteur reiterated his position on maintaining the first reading text albeit with cognizance of several inputs and issues raised by members during plenary on the expression “term of office”. He explained that those issues would be better addressed in the commentary. The Special Rapporteur appreciated comments made by members on paragraph 3, in particular on his suggested amendment to remove the phrase “the rules of international law concerning”. Given the differing views expressed by members, he suggested further discussing his proposal in the Drafting Committee.

212. On draft article 5, recalling his remarks in relation to draft article 2, the Special Rapporteur reiterated his proposal to replace the phrase “acting as such” with “in accordance with draft article 6”. He further restated his preference for avoiding merging draft article 2 with draft articles 5 or 6.

213. Regarding draft article 6, the Special Rapporteur acknowledged the various proposals made by members during the debate. Even though members had expressed broad support for paragraphs 1 and 2, he noted the differing views of members on his proposal to add “*ratione materiae*” in paragraph 3. He also noted the proposals regarding the structure of the draft articles and, in particular, draft articles 3, 4, 5 and 6. He asserted that the proposals should be seriously considered in the Drafting Committee and expressed his general flexibility to discuss them.

214. The Special Rapporteur closed his statement by expressing his gratitude for the contribution of the members of the Commission and the rich exchanges. He called for informal consultations to facilitate the work of the Commission in completing a second reading on the topic.

Chapter VIII

Non-legally binding international agreements

A. Introduction

215. 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.²³⁵

216. 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.

B. Consideration of the topic at the present session

217. At the present session, the Commission had before it the first report of the Special Rapporteur ([A/CN.4/772](#)).

218. The Commission considered the first report of the Special Rapporteur at its 3681st to 3687th meetings, from 10 to 19 July 2024.

1. Introduction by the Special Rapporteur of the first report

219. The Special Rapporteur stated that the first report was preliminary in nature and intended to enable an initial discussion with a view to defining the general direction of the Commission’s work on the topic, its scope, questions to be examined and the form of the final outcome of the work on the topic. Accordingly, no draft provisions were proposed at that stage, and therefore there was no need to establish a drafting committee.

220. The Special Rapporteur explained that his report did not address reasons for the considerable growth in the practice of non-legally binding agreements, which, as had been noted by various authors, included the need for flexibility and efficiency, as well as sometimes of confidentiality, in contemporary modes of international cooperation. In his view, the Commission should not take a position on those matters, nor should it encourage or discourage States from entering into non-legally binding international agreements. The Commission’s work on the topic was not meant to be prescriptive, but should rather clarify the nature, regime and potential legal effects of non-legally binding international agreements, in view of existing practice, jurisprudence and doctrine. He noted that it was imperative for the Commission to find the right balance between the necessary work of legal clarification and avoiding undue limitations on the freedom of States to have recourse to non-binding agreements. He also noted that the work on the topic should concentrate on its practical aspects, rather than on exclusively theoretical considerations.

221. The Special Rapporteur briefly outlined the content of chapters III to X of his first report. He observed that a growing body of practice on the subject of non-legally binding international agreements existed, which was giving rise to increasingly pressing legal questions of a practical nature. In his view, the practical importance of the topic was further confirmed by: comments made by States in the Sixth Committee of the General Assembly; recent decisions of international courts and tribunals addressing whether an agreement was a treaty or a non-legally binding international agreement; certain practical problems posed by the existence of international

²³⁵ 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).

agreements that did not create rights or obligations addressed in the work of the Commission on the law of treaties and at the United Nations Conference on the Law of Treaties; the existence of a large number of agreements whose nature and legal effects had been the subject of debate in the doctrine; the fact that non-legally binding agreements were the subject of scrutiny by various international institutions, including the Institute of International Law, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law (CAHDI); and the adoption by several States of guidelines at the domestic level on the use of non-legally binding agreements.

222. The Special Rapporteur observed that his preliminary research on the topic unambiguously demonstrated that non-legally binding international agreements were connected to international law and that the purpose of the topic was to identify the nature of such connection and the ways in which it manifested itself.

223. The Special Rapporteur concluded by highlighting the following five issues on which he invited Commission members to take a position in their plenary statements.

224. First, he emphasized the importance of ensuring that the Commission's work was as representative as possible. The Special Rapporteur recalled that contributions of all members were essential to ensure that the examples cited and materials used in the work of the Commission were geographically diverse. He invited the Commission to support the proposal contained in paragraphs 70, 79, 82 and 83 of the first report to request the Secretariat of the Commission to contact the Secretariat of the Council of Europe with a view to requesting access to the work of CAHDI on the topic, as well as to including in the Commission's annual report a request for relevant information from States and possibly also international organizations.

225. Second, he recalled that there had been proposals from some States to replace the word "agreements" in the title of the topic with another term, such as "instruments" or "arrangements". However, in the Special Rapporteur's view, and for the reasons explained in paragraphs 94 to 96 of the first report, it was imperative to keep the term "agreements".

226. Third, there were a number of questions about the scope of the topic that required further consideration. The Special Rapporteur emphasized that the scope of the topic should include only "agreements" and not other types of non-legally binding instruments. For that reason, acts adopted by international organizations and other unilateral acts were to be excluded from the Commission's purview. Equally, the scope should exclude "agreements" formed by a simple combination of two unilateral undertakings that did not together form an identifiable instrument. The Special Rapporteur noted that there was a need to determine whether to address acts adopted within the framework of intergovernmental conferences that did not have separate legal personality; he recalled his position on that question in paragraph 99 of his first report. He also recommended restricting the scope of the topic to agreements in writing and thus excluding oral or tacit agreements. With regard to the parties to the agreements, it was proposed to cover agreements concluded between States, between international organizations, and between international organizations and States. He also expressed the view that agreements concluded between a State or an international organization with a private person should be excluded. Finally, the Special Rapporteur reiterated the question contained in paragraph 113 of the first report of how to treat arrangements concluded between sub-State entities of different countries. He suggested that, given their particular nature, it was advisable to exclude such agreements from the scope of the topic.

227. Fourth, the Special Rapporteur recalled that chapter VIII of his first report identified several questions that would merit examination by the Commission under the present topic. Those questions were grouped into three general categories: (a) criteria for distinguishing treaties from non-legally binding international agreements; (b) regime of non-legally binding international agreements; and (c) (potential) legal

effects of non-legally binding international agreements. The Special Rapporteur referred to several examples of such questions and noted that those questions were exploratory, primarily indicative and did not prejudge the substantive answers to them.

228. Fifth, the members of the Commission were invited to express their views on the form of the final outcome of the work, taking into consideration the Special Rapporteur's proposal in chapter IX of the first report to prepare a set of draft conclusions.

2. Summary of the debate

(a) General comments

229. Members generally welcomed the first report of the Special Rapporteur. Several members commended the decision to focus on discussing general issues related to the topic and not propose draft provisions at that stage. Furthermore, the intention of the Special Rapporteur to focus on practical aspects of the topic, without engaging in exclusively theoretical considerations, was met favourably by a number of members. A view was expressed that theoretical discussions should only be pursued if they could contribute to developing practical recommendations for States. According to another view, engaging with certain conceptual or theoretical questions related to the topic could be beneficial at the initial stage of the Commission's work.

230. The goal of the Commission's work on the topic formulated by the Special Rapporteur – to provide legal clarification on relevant issues – was supported. Some members stated that the work on the topic should be oriented towards giving States practical guidance on the considerations they should be aware of as they considered whether or not to conclude non-legally binding international agreements, rather than encouraging or discouraging their use. The view was expressed that the Commission should refrain from creating new rules that could potentially limit the flexibility and utility of less formal forms of agreements. The view was expressed that the unique practical importance of the topic would be lost if non-legally binding international agreements were subsequently used for interpretative purposes or constituting subsequent practice with a view to giving them legal content.

231. A number of members noted the unique practical importance of the topic. It was observed that non-legally binding international agreements were a well-known phenomenon in international relations, extensively discussed by practitioners and various institutions. In that regard, the importance of using diverse and representative materials was highlighted and the Special Rapporteur's efforts in that direction were particularly welcomed. Several members emphasized that the practice examined by the Commission should be representative of regions, legal systems, forms of agreements and legal issues associated with them. It was noted that, while jurisprudence and doctrine could provide useful guidance to the Commission, it was imperative to focus primarily on State practice and legal positions taken, in particular those taken by States with regard to non-legally binding international agreements. Accordingly, support was voiced for the proposal in the first report to request information relating to the topic from States, as well as from international organizations and expert institutions. Examples of States resorting to non-legally binding international agreements and references to existing national guidelines on the drafting of non-legally binding agreements were mentioned.

232. The view was expressed that the growing number of States adopting texts in their national law to govern their international practice regarding non-legally binding international agreements were not necessarily motivated by the intention to include such agreements in the legal realm, but by the need to formalize procedures for their conclusion.

233. The explanation contained in the first report that examples of agreements cited therein were for illustrative purposes only and that there was no intention for the Commission to take a position on the nature of those agreements was welcomed.

(b) Scope of the topic

(i) “Agreements”

234. A number of members agreed with the use of the term “agreements”. It was noted that such term referred to the result of an exchange, consultation or negotiation reflecting the opinions or sentiments of the parties to it on a given issue. It was recalled that the drafting history of the Vienna Convention on the Law of Treaties,²³⁶ as well as other relevant sources, supported the position that the term “agreement” could refer to non-binding instruments. A view was expressed that the final output of the Commission on the topic would provide clarification on the various approaches on the use of the term “agreement”.

235. Several members suggested that the terms “instruments” or “arrangements” could be more appropriate for the purposes of the topic. It was noted that those terms avoided confusion, as the term “agreements” was frequently used in practice to refer to both binding and non-binding documents. A view was expressed that many States deliberately and consistently used terms such as “agreement” for the title of the document and “agree” as the operative verb to indicate bindingness.

236. It was noted that the use of the term “agreements” was not universal and certain States in their practice preferred it to the term “instruments” to designate documents of a non-binding nature. It was recalled that several States, during the debate in the Sixth Committee at the seventy-eighth session of the General Assembly, had indicated their preference for the use of the term “instruments”. The term “understandings” was also proposed as a possible alternative. According to another view, the most appropriate term to capture the intended scope of the study would be “*actes concertés non conventionnels*”.

237. It was noted that while the term “*arrangements*”, in French, could be helpful as a middle ground between “agreements” and “instruments”, it could also be linked to a very specific meaning in the context of sub-State entities and lead to confusion. It was stated that the term “instruments” might be overly broad and thus substantially widen the scope of the topic. The view was expressed that the term “understandings” was not appropriate as it created ambiguities.

238. It was emphasized that there would be a need to indicate that the title of the topic was without prejudice to the terminological choices that some States made to guide their practice.

239. The view was expressed that the term “international” was not needed in the title of the topic, as it was apparent that the Commission would only address the issue from an international law perspective.

(ii) “Non-legally binding”

240. Some members considered that agreements within the scope of the topic were of a non-legally binding nature because they entailed commitments of a political nature or because they were governed by the domestic laws of States or entities that were parties to such agreements.

241. The use of the phrase “non-legally binding” before the term “agreements” was welcomed by some members because it avoided any possible confusion with treaties, which were legally binding under international law. It was stated that the use of the phrase “non-legally binding” allowed for a possibility that an instrument could be

²³⁶ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

binding morally, politically or otherwise. At the same time, it was suggested that the phrases “legally non-binding” or “not legally binding” could be preferable, in order to clarify that the Commission only focused on the legal bindingness, and also to align the various language versions. Another proposal was made to simply refer to “non-binding agreements”, which could help to avoid the impression that such agreements were legally binding.

242. Some members expressed the view that the Special Rapporteur should clarify the use of expressions that suggest that international law could apply to non-legally binding international agreements, as they could be read as being in tension with the understanding that the Commission’s work would not transform non-legally binding international agreements into legally binding agreements. It was also stressed that the phrase “governed by international law” was a touchstone for the definition of treaties in article 2 of the Vienna Convention on the Law of Treaties.

(iii) *International agreements within the scope of the topic*

243. Members generally agreed that the scope of the topic should cover only international agreements, and should include agreements entered into between States, between States and international organizations, and between international organizations. A view was expressed that non-legally binding international agreements entered into by international organizations should be excluded from the scope of the topic.

244. Several members suggested that the work of the Commission on the topic should focus on written texts that were not treaties, intended not to be binding, but that contained an agreement between their signatories, and that might have a normative component. At the same time, a view was expressed that unwritten agreements should also be considered. Some members welcomed the view of the Special Rapporteur that provisions contained in treaties that did not contain binding text and the legal effect of treaties that had not entered into force should be excluded from the scope of the topic.

245. It was also noted that the title of the document should not be the decisive factor in including it in the work on the topic. The view was expressed that the Commission should clarify that it was dealing with agreements that contained political or moral commitments and were not intended to create legal rights and obligations. According to another view, the Special Rapporteur’s intention to limit the scope of the topic to agreements in which States agreed to make a commitment could cause some practical complications, as it could exclude from the Commission’s consideration a considerable number of documents considered by some States as non-binding international agreements.

246. Some members supported the consideration of resolutions of international organizations, as they were usually negotiated between the members of international organizations and could not be considered unilateral acts. However, several members expressed the view that the scope of the topic should exclude resolutions and other acts of international organizations. The Special Rapporteur’s intention to exclude unilateral acts of States and non-binding provisions in treaties from the scope of the topic was welcomed.

247. Several members considered that resolutions of intergovernmental conferences should not necessarily be excluded from the scope of the topic as these were agreements among multiple legal entities. While some members expressed that they would be flexible as to their exclusion from the scope of the topic, it was noted that the explanation for the decision to exclude them warranted further detail.

248. The view was expressed that the scope of the topic should not exclude agreements concluded within multilateral institutional frameworks, as they represented a large number of the non-legally binding agreements that had been concluded between multiple parties, including States and international organizations.

A view was also expressed that the Special Rapporteur could explore the role of non-legally binding agreements in inter-State interactions within the broader framework of international organizations.

249. A view was expressed that the study of the topic should include non-binding declarations annexed to some treaties, including side arrangements in the context of bilateral treaties. It was noted that some such annexes could include model texts for a future agreement, an agreed interpretation or establishing agreements for the implementation of a treaty based on a model text.

250. Several members saw a need for the inclusion of inter-institutional agreements or administrative arrangements within the scope of the topic, for example between administrative authorities, federated States or other territorial units of States and central banks of different States. It was observed that a large portion of non-legally binding international agreements was concluded at sub-State level and excluding them from the scope of the topic could hamper the Commission's work.

251. Some members noted that inter-institutional agreements were allowed by domestic law in various States and did not create internationally binding obligations, while in some domestic legal systems they might create legally binding obligations. A view was expressed that, while those agreements might be considered non-legally binding agreements between States, their study might not be appropriate. Another view was expressed that it was not advisable for the Commission to consider inter-institutional agreements, as it was noted that the nature of such documents was often dictated by the distribution of powers between the central and local authorities within States, resulting in a huge variety of forms those documents could take.

252. Some members stated that the Commission could consider agreements between States and actors other than States and international organisations, for example agreements concluded between States and rebel or insurrectional movements or non-State armed groups. It was also noted that agreements between States and non-recognized States or governments could be included in the scope of the topic. The observation was made that even if these categories of agreements were later excluded from the scope of the topic, that decision should be taken after a careful assessment.

(c) Identification of questions to be examined

(i) Criteria for distinguishing treaties from non-legally binding agreements

253. Several members considered that the purpose of the consideration of the topic in the Commission was to assist in distinguishing between legally and non-legally binding agreements. It was emphasized that the work of the Commission should begin by clearly indicating what was meant by non-legally binding international agreements, and that there would be no presumption that the use of the term "agreement" in the title of the document would mean that the text was legally binding.

254. Several members were of the view that the primary criterion should be the intention of the States as indicated in the text of the agreement. A view was expressed that the intention of the parties could be different and change over time, thus it should not be considered as the determining factor. It was noted that there were situations in which an agreement expressly stated that it was non-binding but, at the same time, contained several linguistic markers that led one to conclude that it was, in fact, a binding agreement. Several members stated that various objective elements, including the text, the form and the circumstances surrounding an agreement's formation should also be considered. It was suggested that the Commission could adopt a holistic approach, taking into account both objective and subjective criteria. The subsequent practice of parties to a non-legally binding agreement was considered to be relevant. The need to assess each instrument on a case-by-case basis was emphasized. It was noted that no indicator was individually decisive as to the

potential binding nature of the agreement, that there should be no hierarchy among the indicators or criteria, and that all factors should be considered and weighed together on a case-by-case basis.

255. With respect to the types of criteria for distinguishing treaties from non-legally binding international agreements, it was asserted that the presence of final clauses, including the need for ratification, the possibility of unilaterally revoking the agreement, and the fact that monitoring or dispute settlement mechanisms were contemplated, were not decisive in making such a distinction. Based on the definition of the term “treaty” under article (2) (1) (a) of the Vienna Convention on the Law of Treaties, a view was expressed that determining whether the parties to an agreement were subjects of international law and whether the governing law of an agreement was international law were additional criteria that would be of practical use and should be studied.

256. Some members expressed the view that the preparation by the Commission of indicators to identify the intention of States could be helpful to clarify the distinctions between legally and non-legally binding agreements, as States had increasing recourse to such agreements instead of treaties. According to some members, the work of the Commission on the topic should avoid blurring the distinction between treaties and non-legally binding agreements or equating those agreements with sources of international law. A view was expressed that the topic could add legal precision to the distinction between binding and non-binding effects of certain agreements, which had not been fully identified in some judicial decisions and could not be found in treaties such as the Vienna Convention on the Law of Treaties.

257. It was stated that drawing up criteria to distinguish between treaties and non-legally binding international agreements could cast doubt on the agreements concluded before the work of the Commission on the topic. It was thus suggested that the work of the Commission should focus on highlighting the aspects to be taken into account by States when drafting such documents and should not override the will of the parties when entering into them.

258. Some members were of the view that there should not be any presumptions on the subject, nor that, in the absence of proof to the contrary, an international agreement should or should not be presumed legally binding. According to another view, while the Commission should study possible presumptions on the subject, the general presumption should be that, in the absence of clear proof to the contrary, an international agreement that had not indicated that it was, or was meant to be, legally binding should be presumed to be non-binding.

259. Regarding the question whether judicial bodies had the power to recategorize an agreement in cases where the parties had expressly indicated in the agreement that they considered it binding (or non-binding), it was suggested that the intention of the parties, especially where they were expressed in writing, was of key importance. Some members considered that it was not for the Commission to determine whether judicial bodies could recategorize an agreement as binding where the parties indicated otherwise, and that such determination of the authority of judicial bodies was beyond the scope of the topic. Some members stated that judicial bodies should not have the power to recategorize agreements.

(ii) *Regime of non-legally binding international agreements*

260. Members generally agreed with the conclusion contained in the first report that non-legally binding international agreements were not, as such, governed by the law of treaties. Some members stated that non-legally binding international agreements were not governed by international law at all. In that regard, the use of the term “regime” was considered confusing, as it implied that international law might have rules that governed the conclusion and operation of those agreements. Nevertheless, it was suggested that the law of treaties could at times be of practical

help, for example by applying by analogy certain general rules of treaty interpretation to non-legally binding international agreements.

261. It was noted that non-legally binding international agreements did not exist in a legal vacuum and States would still be bound by rules of international law when concluding such agreements, *inter alia*, by norms of a *jus cogens* character. In the event of a conflict between a non-legally binding international agreement and a peremptory norm of general international law (*jus cogens*), such agreement would be void. A view was expressed that some of the elements contained in Part V of the Vienna Convention on the Law of Treaties relating to the validity of treaties could be included in the scope of the study of the effect of non-legally binding international agreements. According to another view, the causes for invalidity contained in Part V of the Vienna Convention on the Law of Treaties should be considered in a more nuanced manner in the context of non-legally binding international agreements, since such agreements might be chosen by States because of their flexibility.

262. Some members highlighted that States that had entered into a non-legally binding agreement were under the general obligation of good faith. It was emphasized that the legal effects of non-legally binding international agreements could arise from rules of international law and a non-binding international agreement could be part of a conduct that was inconsistent with the principle of good faith, acquiescence, estoppel, the doctrine of abuse of rights or the duty to settle disputes by peaceful means.

263. Some members expressly referred to the possibility of addressing estoppel in the context of the study of the topic. It was stated that the binding effect of estoppel would take place due to its operation separately and therefore should be excluded. The possibility of legal effects arising out of acquiescence were deemed worthy of further consideration. A view was expressed that a breach of a non-legally binding agreement could have certain consequences, including the rights of an injured party to resort to countermeasures.

264. Some members addressed a possible conflict between a treaty and a non-legally binding international agreement. A view was expressed that a conflict would arise only if both instruments were treaties. Another view was expressed that the solution in the event of a conflict would not be as straightforward as having the treaty prevail and that the circumstances of the conclusion of the treaty should be considered.

265. Some members noted that the work of the Commission on the topic should not lead to the creation of a separate legal regime parallel to that of the law of treaties.

(iii) *(Potential) legal effects of non-legally binding international agreements*

266. Some members were of the view that non-legally binding international agreements might produce direct or indirect legal effects in certain circumstances. The view was expressed that there was a need to distinguish direct legal effects from indirect legal effects. According to another view, it was advisable not to retain the distinction between direct and indirect legal effects, as it could impact on the overall clarity of the Commission's work. It was noted that the potential effects identified by the Special Rapporteur in paragraph 138 of his first report were a good starting point for the Commission's work. Some members suggested the use of alternative terms, such as "legal implications" or "legal consequences".

267. Some members considered that non-legally binding agreements could have various functions in relation to sources of international law, such as assisting in the interpretation of legally binding agreements contained in, for example, treaties on the same subject. The commentary to conclusion 12 of the conclusions on identification of customary international law, where it was stated that "other acts adopted ... at

intergovernmental conferences ... whether or not they are legally binding”,²³⁷ was recalled, as such “other acts” may be forms of evidence of the constitutive elements of a rule of customary international law. It was also stated that non-legally binding international agreements could be considered “international instruments” as possible evidence of recognition of general principles of law, as mentioned in the commentary to draft conclusion 7 of the draft conclusions on general principles of law, adopted on first reading by the Commission at its seventy-fourth session.²³⁸

268. It was suggested that non-legally binding international agreements could also be used as subsidiary means for the determination of rules of international law, or could serve as the basis for the definition of a rule of customary international law or the formulation of a provision in a treaty. Some members were of the view that the work of the Commission on the topic should explore further the use of non-legally binding agreements to determine the existence of a rule of customary international law.

269. Some members expressed reservations with considering non-legally binding international agreements as a form of subsequent agreements in the interpretation of treaties, as assimilating them to a source of international law or considering them as subsequent agreements should be avoided. The view was expressed that giving non-legally binding international agreements potential legal effects could affect their use by States by creating legal obligations that were not the intention of States to create.

270. It was considered essential to distinguish between “legally binding force” and “legal effects”. The need to distinguish between “legally binding” and “having legal effects” was also emphasized. Thus, the Special Rapporteur was requested to further explain the legal effects of non-legally binding international agreements. It was recalled that the Guide to Provisional Application of Treaties was directly relevant to the work of the Commission on the topic, as guideline 6 referred to the concept of legal effect.²³⁹

271. The view was expressed that, on occasion, the use of non-legally binding international agreements could raise questions concerning the relationship between non-binding international agreements and soft law. According to another view, the relationship between soft law and non-legally binding agreements should not be part of the scope of the topic. It was observed that soft law, although perceived to be corresponding to non-legally binding agreements, had a broader concept that included unilateral instruments and instruments adopted by private entities. Yet another view was that the notion of soft law was not particularly useful in this context, as non-legally binding international agreements were not necessarily soft.

(d) Form of the final outcome of the work

272. A number of members agreed with the Special Rapporteur’s proposal for the output of the Commission to be in the form of draft conclusions, in particular because the aim would be to state or clarify in a non-prescriptive way the existing practice without prejudging States’ freedom in relation to non-legally binding agreements. On the other hand, several members were of the view that the output should be draft guidelines, in view of the subject-matter of the topic and the fact that draft conclusions were the output used by the Commission for topics related to sources of international law, such as “Identification of customary international law” and “General principles of law”. Reference was also made to the use of draft guidelines

²³⁷ Para. (2) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), para. 66, at p. 107.

²³⁸ Para. (3) of the commentary to draft conclusion 7 on “General principles of law”, *General Assembly, Official Records, Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 41, at p. 23.

²³⁹ Guideline 6 of the Guide to Provisional Application of Treaties, General Assembly resolution 76/113 of 9 December 2021, annex.

in the Commission's work on the topics "Reservations to treaties" and "Provisional application of treaties".

273. It was also suggested that States could benefit from best practices, model clauses or other recommendations in addition to draft guidelines. Conversely, according to some members, the formulation of best practices, model clauses or other recommendations would not be appropriate. It was also suggested that a list of specific vocabulary or some limited model clauses as a practical tool to identify a non-legally binding international agreement could be of aid to States.

274. Some members stated that, as part of the study of the existing practice of non-legally binding international agreements, the Commission could sketch a possible typology or provide examples of categories of agreements for illustrative purposes. Such categories mentioned by members included peace agreements and agreements that contained modalities or conditionalities for performance of complex technical cooperation in certain areas, such as environmental law or humanitarian assistance.

(e) Future programme of work

275. The programme of work proposed by the Special Rapporteur was generally supported.

276. The view was expressed that a questionnaire concerning the practice of States should be prepared and any consideration of the potential legal effects of non-legally binding international agreements should be conducted only upon receipt of responses of States to such a questionnaire on the topic.

277. Several members expressed support for the proposal of the Special Rapporteur to request information on the practice of States, international organizations and, in particular, access to the work carried out on the subject in the context of CAHDI.

3. Concluding remarks of the Special Rapporteur

278. In his summary of the debate, the Special Rapporteur expressed his gratitude to the members of the Commission and welcomed the enriching debate concerning his first report and references to additional research materials. He considered that the debate had achieved its objective and had allowed him to identify points of agreement, gather ideas and suggestions, as well as identify points where important divergences were expressed. He emphasized that he had carefully analysed the arguments and concerns of members during the debate and welcomed the collaborative work.

279. The Special Rapporteur indicated that he took note of the comments and suggestions of members, in particular those referring to: the criteria for distinguishing treaties from non-legally binding international agreements; the potential legal effects of non-legally binding international agreements; and the elements of national practices using non-legally binding international agreements. He also stated that he would consider such observations and reflections in due course in his future reports to re-evaluate some proposals made in the first report that had received legitimate criticism during the debate, such as the issue of possible presumptions regarding the bindingness or non-bindingness of agreements, or the power of courts or tribunals to recategorize the nature of agreements.

280. Regarding the scope of the topic, the Special Rapporteur emphasized that treaties and non-legally binding international agreements were of a different nature and that it was fundamental to reassure States about such distinction. Concerning the methodology, he suggested that the Commission should follow an inductive rather than a deductive approach and reiterated that the work of the Commission would depend on it paying adequate attention to the practice of States, while maintaining robust academic discipline.

281. The Special Rapporteur noted that the discussion on the object and scope of the topic provided a road map that would enable him to present proposals for a draft text in line with the general points emerging from that discussion. In his summary, the Special Rapporteur focused on five points.

282. First, the Special Rapporteur observed that members largely converged in considering that the topic was of great practical importance and that the Commission should focus on the practical aspects. The work of the Commission should be guided by a prudent balance between two aspects, i.e., the maintenance of the freedom of States and the need for legal certainty. Thus, according to the Special Rapporteur, the work of the Commission should not seek to be prescriptive. Instead, the goal should be to reduce, as far as possible, the areas of legal uncertainty that appeared in the field.

283. Second, the Special Rapporteur referred to the materials to be studied and indicated that there was consensus around the need to ensure their representative character. He noted that many members called for the practice of States to be a starting point for the work on the topic. He also welcomed the support for the proposal contained in his first report to request information from States at the present session, while indicating that he would be favourable to requesting information from international organizations at the subsequent sessions of the Commission. The Special Rapporteur took note of the proposal by various members to prepare a questionnaire for States on the effects of non-legally binding international agreements, suggesting that said proposal should be discussed when the Commission addressed that aspect of the topic.

284. Third, the Special Rapporteur observed that questions of terminology led to multiple commentaries and that three terms posed difficulties: “agreements”, “regime” and “effects”.

285. Concerning the term “agreements”, the Special Rapporteur recalled that, as indicated in the debate, the title should adequately describe the object and scope of the work of the Commission, which in his view was the case with the current title. He stressed that the *travaux préparatoires* of the Vienna Convention on the Law of Treaties suggested that all treaties were agreements but not all agreements were treaties. He also noted the reference by some members to the work of the Inter-American Juridical Committee which proceeded accordingly.

286. The Special Rapporteur indicated that insofar as there was a trend to exclude from the scope of the topic resolutions of international organizations, the alternative term “instruments” could be misleading as it could give the impression that the topic covered any type of instrument, including the aforementioned resolutions. He also noted that the use of such a term would broaden the scope of the topic. The Special Rapporteur considered that the term “arrangements” had an administrative or operational meaning in some legal systems, and the expression “*instruments concertés non conventionnels*” in French was difficult to translate into the other official languages of the United Nations, as well as not used frequently in practice and would not allow for an immediate understanding of the object of the topic.

287. The Special Rapporteur also recalled that, contrary to what had been suggested by some members, only 10 States in the Sixth Committee had expressed a preference for a term other than “agreements”. He also considered that some States might take a different view on the use of such term after they had considered the work of the Commission at the present session.

288. The Special Rapporteur emphasized that, to avoid any misunderstanding, the commentaries to the provisions on the topic should indicate in a precise manner that the term “agreements” was understood as a meeting of the wills (mutual consent) of the parties, and that the use of said term was without prejudice to the nature and effects of the agreement and the terminological choices made by States in their practice.

289. Concerning the title of the topic, the Special Rapporteur indicated that it should be kept as it was, but noted that the English version might require an adjustment to align it with other language versions, such as French and Spanish. Such change could be to refer to “legally non-binding” agreements rather than “non-legally binding” agreements. He suggested the English language group could provide advice to the Commission in that regard.

290. The Special Rapporteur stressed that the term “legally” in the title of the topic should be kept insofar as the scope of the topic was the study of the agreements from the perspective of international law, since an agreement could be politically binding without being legally binding.

291. As to the use of the term “regime” in his first report, the Special Rapporteur agreed with the views of members that the use of said term had been imprudent and had not been intended to suggest that the Commission would prepare a new legal framework for non-legally binding agreements. This was without prejudice to the possibility of applying by analogy some provisions from the law of treaties that reflected general rules or fundamentals of international law. The Special Rapporteur acknowledged that some members had expressed doubts as to the practical use of that issue.

292. The Special Rapporteur indicated that the use of the term “potential legal effects” might also have been imprudent and highlighted suggestions by some members for alternatives, such as “implications” or “consequences”.

293. Fourth, the Special Rapporteur was of the view that the scope of the topic should not include the reasons why States decided to use non-legally binding international agreements. The work of the Commission should cover only written agreements and exclude non-binding provisions in treaties and unilateral acts. He clarified that agreements resulting from an exchange of letters would be included as an agreement in the scope of the study, and that the topic would cover bilateral, regional and multilateral agreements.

294. The Special Rapporteur stated that agreements with private persons should be excluded from the scope of the topic, as they would lead to the study of instruments of a different nature, while agreements with international organizations should be included. As to the normative component of the agreements to be studied, the Special Rapporteur indicated that the proposed starting point for the study would be to refer to agreements that included an undertaking to do something and that were not limited to the enunciation of facts or positions.

295. Additionally, the Special Rapporteur noted that, while he had proposed in his report to exclude inter-institutional agreements, several members had supported their inclusion. He considered that the types of inter-institutional agreements to be covered should be defined more specifically, for example, by limiting the scope to those that were relevant under international law. He also noted that the consideration of such agreements should not be perceived as validating practices that were not necessarily authorized by the national authorities in charge of foreign affairs.

296. The Special Rapporteur stated that there was a tendency in the views of members towards excluding the acts of international organizations acting as such, and noted that some members considered that resolutions of international organizations should not be excluded categorically from the topic. As to acts of intergovernmental conferences, the Special Rapporteur noted that the views expressed by members seemed to suggest openness to their consideration, as they represented the bulk of the non-legally binding international agreements at multilateral level. He proposed including them in the future work.

297. Fifth, concerning the final form of the work of the Commission, the Special Rapporteur observed that members had expressed differing views, albeit with a slight preference for draft conclusions. He recalled that members had generally agreed that the work of the Commission should not be prescriptive. He also noted that the

practice of the Commission showed that the difference between draft conclusions and draft guidelines was slight and the general commentaries of recent work of the Commission in both formats used similar terms interchangeably to describe their respective functions.

298. The Special Rapporteur concluded that the choice between draft guidelines or draft conclusions was essentially related to the message that the Commission would like to convey. He considered that draft guidelines seemed more prescriptive than draft conclusions. He noted that in French the term “*directives*” had a stronger sense than the term “guidelines” in English and suggested that the term “*lignes directrices*” could be used in French, should the Commission decide to adopt draft guidelines.

299. The Special Rapporteur proposed provisionally presenting the work of the Commission as draft conclusions in his next report and revisiting that decision in accordance with the comments from States at the Sixth Committee. He also took note of the interest expressed by some members in having model clauses or identifying best practices.

300. The Special Rapporteur stated that the programme of work suggested in his first report would be followed and the second report would focus on the scope of the topic and what had been identified by some members as the most important aspect of the topic, i.e., the criteria for distinction between treaties and non-legally binding internationally agreements. The Special Rapporteur recalled that he had not specified in the first report an expected date for conclusion of the first reading, noting that when the first reading would take place depended on the progress of the work on the topic.

Chapter IX

Succession of States in respect of State responsibility

A. Introduction

301. 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.²⁴⁰ 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.

302. The Special Rapporteur submitted five reports from 2017 to 2022.²⁴¹ 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.²⁴² 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).

303. 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.

304. 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.

305. At its seventy-fourth session (2023), the Commission had no report before it on the topic, as the Special Rapporteur was no longer with 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 (see section C.1 below).

B. Consideration of the topic at the present session

306. At the present session, the Commission re-established the working group, with Mr. August Reinisch as Chair. The working group held two meetings, on 20 May and 8 July 2024.

307. At its 3694th meeting, on 26 July 2024, the Commission considered and took note of the report of the Working Group (A/CN.4/L.1003), which is reproduced, in part, in section C below.

²⁴⁰ 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)*).

²⁴¹ [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.

²⁴² [A/CN.4/730](#).

308. At the same meeting, the Commission, having considered the recommendations of the Working Group:

(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 next session, in close collaboration with interested members.

C. Report of the Working Group

1. Introduction

309. The International Law Commission, at its 3621st meeting on 10 May 2023, decided to establish a Working Group on the topic “Succession of States in respect of State responsibility” and appointed Mr. August Reinisch as its Chair. The purpose of the Working Group was to consider the future of the work of the Commission on the topic, as the Special Rapporteur was no longer with the Commission. The Working Group held four meetings at the seventy-fourth session (2023).

310. 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.

311. 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.

312. On 20 December 2023, the Chair of the Working Group convened an online meeting of interested members of the Commission in order to discuss issues to be addressed by the Working Group. During that intersessional meeting, a number of issues were identified as requiring further reflection by the Commission. One prominent question was whether there existed sufficient State practice in the field and, in particular, whether the State practice identified by the Commission so far was sufficiently wide and representative in order to draw any conclusions about the existence of applicable rules of customary international law. In view of the usefulness of negotiated solutions among the affected States in any given situation, the question was raised as to whether such specifically tailored solutions could form the basis for the identification of rules of customary international law.

313. Members recognized that it might be necessary to develop more fully the necessity and possibility of distinguishing between a transfer of responsibility as such, and a transfer of rights and obligations arising from the responsibility of a predecessor State. The question appeared to be particularly important in view of what could be perceived as differences in the provisions considered by the Commission thus far with regard to rights, on the one hand, and obligations, on the other.

314. It seemed appropriate to distinguish more clearly between what the Commission might consider to be codification and what would be progressive development of international law in the field of State succession with regard to State responsibility. It also appeared important to more clearly emphasize the underlying

policy justifications for the proposed draft guidelines. Such justifications had been made clear in the work of the Institute of International Law,²⁴³ but were less explicit in that of the Commission.

315. It also appeared necessary to devote further thought to the question of the extent to which a parallel might be drawn between the rules concerning succession to State debts and the question of succession in respect of State responsibility. Such parallels were partly alluded to in the Commission's work to date. However, the extent to which they provided a sufficient justification for the proposed draft guidelines was unclear.

316. It seemed necessary to devote more attention to the principle of unjust enrichment, which was referred to in justifying specific draft guidelines, but which might underlie, in a broader, conceptual sense, the current draft guidelines as formulated. It also appeared that some of the draft guidelines provisionally adopted by the Drafting Committee required further clarification and harmonization.

317. Finally, further reflection on the outcome of the Commission's work was considered necessary by the interested members, in particular, as regards the possibility of the Commission opting to prepare a final report covering the topic.

318. Further to the Commission's recommendation, adopted at its seventy-fourth session, a working paper was prepared by the Chair of the Working Group, with the assistance of interested members. It contained a procedural summary of the work on the topic to date, together with an outline of the issues to be addressed by the Working Group as identified in the intersessional meeting, as well as an indication of the options open to the Commission for its future work on the topic.

2. Work undertaken at the present session

319. The Working Group on succession of States in respect of State responsibility was reconvened at the 3658th meeting, held on 29 April 2024. The Working Group held two meetings at the present session of the Commission, on 20 May 2024 and 8 July 2024, respectively. It had before it the working paper prepared by the Chair of the Working Group. The Working Group considered and approved its report at its second meeting.

(a) Discussion within the Working Group

320. At the first meeting of the Working Group, its members expressed their gratitude to the Chair for the intersessional work he had led and the working paper he had prepared on that basis. They also thanked the members of the Commission who had participated in such work, especially Mr. Patel for his extensive contribution to the working paper.

321. The Working Group engaged in a discussion of the difficulties that would face the Commission in its further consideration of the topic, especially those identified in the working paper. Members highlighted the overall complexity and sensitivity of the topic. Many members recalled the lack of State practice relevant to the topic, which impeded the identification of rules of customary international law. A number of them noted that such State practice as had been identified was not consistent, and several noted that the practice from various regions of the world, particularly with regard to African and Asian States, had been insufficiently reflected. It was also recalled that much of the practice identified took the form of treaties between the States concerned, and members pointed to the difficulty in establishing the relationship between such practice and rules of customary international law. Several members suggested that continuing study of the topic would require thorough consideration of the widest possible range of State practice.

²⁴³ See https://www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_14_en-1.pdf.

322. Members also recalled a number of outstanding substantive aspects of the topic that the Commission had not yet addressed fully. Those included the questions of: whether it was responsibility or the rights and obligations that arose therefrom that would be transferred upon a succession of States; whether a parallel with cases of succession to State debts was appropriate; and the relationships between both the topic and the law concerning unjust enrichment, and the rules governing the legal consequences of internationally wrongful acts. It was noted that several delegations in the Sixth Committee had called on the Commission to distinguish more clearly between instances of codification and progressive development in its work on the topic. It was further advised that the Commission would need to approach such work cautiously.

323. The importance of ensuring consistency with the prior work of the Commission, in particular that on other aspects of the succession of States and the articles on responsibility of States for internationally wrongful acts, was emphasized. The need to assess the policy justifications for various legal solutions and the achievability of a universally applicable outcome was also raised.

(b) Options for the way forward

324. In the light of the issues and difficulties discussed, the Working Group also considered various possible ways forward to complete the work of the Commission on the topic. It was generally agreed that it was necessary to determine the way forward at the present session. Members recalled that several States had expressed an interest in the conclusion of the work in a timely manner. A number of possibilities were considered.

325. One proposal was for the Commission to establish a working group to proceed with the further substantive study of the topic. It was noted that a number of delegations in the Sixth Committee had expressed interest in the continuation of work. Several members highlighted the possibility of additional research being undertaken into the practice of States, with a focus on those in Africa and Asia. It was also proposed that such a working group could examine outstanding substantive aspects of the topic. The report could also include a comprehensive and multilingual bibliography for the topic.

326. Another possibility raised was the establishment of a working group with the mandate to prepare a procedural report that could bring the work of the Commission to a close at its next session. It was proposed that such a report could summarize the work of the Commission on the topic to date. It was suggested that the report could contain a detailed explanation of why the Commission was ending its work on the topic by surveying the difficulties encountered and the issues the Commission was not in a position to study. Several members expressed support for such outcome.

327. Members further discussed the incorporation of the provisions already worked out by the Commission and the Drafting Committee in the report of a possible working group. It was proposed that the draft guidelines could be simplified and incorporated into the report of such a working group, or simply reproduced in an annex. However, the need to treat the draft guidelines with care to avoid confusion as to how the Commission interpreted their status was highlighted.

328. It was noted that the Commission could also continue its work on the topic by proceeding to the appointment of a new special rapporteur. Such possibility did not attract significant support, as members considered that the time and resources of the Commission would be more efficiently used by undertaking work on other topics.

329. It was also noted that the Commission could opt to discontinue its work simply by deciding not to pursue further its work on the topic and reflect such decision in its report. It was recalled that the Commission had taken such a route in respect of the topic “Relations between States and international organizations (second part of the topic)” at its forty-fourth session (1992). Such an option was not supported by members, many of whom emphasized the need to acknowledge and take into account

the work achieved by the Commission and the former Special Rapporteur, Mr. Pavel Šturma, thus far.

330. In summing up the discussion in the Working Group, the Chair observed that the prevailing tendency of its members was in favour of a summary report that would describe the difficulties faced in the work on the topic but would not go into their substance, and would be prepared with a view to concluding the work on the topic at the next session of the Commission.

Chapter X

Sea-level rise in relation to international law

A. Introduction

331. 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,²⁴⁴ Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. The Study Group discussed its composition, its proposed calendar and programme of work, and its methods of work. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.²⁴⁵

332. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic,²⁴⁶ which had been issued together with a preliminary bibliography.²⁴⁷ 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.²⁴⁸

333. At its seventy-third session (2022), the Commission reconstituted the Study Group, and considered the second issues paper on the topic,²⁴⁹ which had been issued together with a preliminary bibliography.²⁵⁰ At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at the seventy-third session.²⁵¹

334. At its seventy-fourth session (2023), the Commission reconstituted the Study Group, and considered the additional paper to the first issues paper on the topic,²⁵² which had been issued together with a bibliography.²⁵³ At its 3655th meeting, on 3 August 2023, the Commission considered and adopted the report of the Study Group on its work at the seventy-fourth session.²⁵⁴

B. Consideration of the topic at the present session

335. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria.

336. In accordance with the agreed programme of work and methods of work, the Study Group had before it the additional paper to the second issues paper on the topic

²⁴⁴ At the present session, Mr. Aurescu was no longer with the Commission, as he had been elected to the International Court of Justice.

²⁴⁵ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 265–273.

²⁴⁶ [A/CN.4/740](#) and [Corr.1](#).

²⁴⁷ [A/CN.4/740/Add.1](#).

²⁴⁸ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10)*, paras. 247–296.

²⁴⁹ [A/CN.4/752](#).

²⁵⁰ [A/CN.4/752/Add.1](#).

²⁵¹ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, paras. 153–237.

²⁵² [A/CN.4/761](#).

²⁵³ [A/CN.4/761/Add.1](#).

²⁵⁴ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/78/10)*, paras. 128–230.

(A/CN.4/774), prepared by Ms. Galvão Teles and Mr. Ruda Santolaria. A selected bibliography, prepared in consultation with members of the Study Group, was issued as an addendum to the additional paper (A/CN.4/774/Add.1).

337. The Study Group, which at the present session comprised 27 members,²⁵⁵ held 10 meetings, from 30 April to 9 May and from 2 to 8 July 2024.

338. At its 3694th meeting, on 26 July 2024, the Co-Chairs, Ms. Galvão Teles and Mr. Ruda Santolaria, introduced the report of the Study Group (A/CN.4/L.1002). At the same meeting, the Commission took note of the report. At its 3698th meeting, on 30 July 2024, the Commission considered and adopted the report of the Study Group on its work at the present session, as reproduced below.

1. Introduction of the additional paper (A/CN.4/774 and Add.1) to the second issues paper by the Co-Chairs

(a) Procedure followed by the Study Group

339. At the first meeting of the Study Group, held on 30 April 2024, the Co-Chair (Ms. Galvão Teles) indicated that the purpose of the six meetings scheduled in the first part of the session was to allow for an exchange of views on the additional paper to the second issues paper and any other matters related to the two subtopics under consideration. The outcome of the first part of the session would be a draft interim report of the Study Group, to be considered and complemented during the second part of the session. The draft report would then be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission.

(b) Presentation of the additional paper to the second issues paper

340. At the first meeting of the Study Group the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) made a general presentation of the additional paper. It was noted that the topic “Sea-level rise in relation to international law” had generated increasing interest among members of the Commission and Member States. Reference was made to the progress that had been achieved so far on all three subtopics under consideration, through in-depth discussions within the framework of the Study Group and the Commission, which had been further enriched by comments conveyed by Member States either in the Sixth Committee or in response to questions raised by the Commission. It was also emphasized that some States, including those most affected by the phenomenon, had been particularly active in drawing attention to the urgency of addressing the multiple challenges ahead and in identifying potential legal solutions. Particular attention was drawn to the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, adopted by the leaders of the States, countries and territories of the Pacific Islands Forum on 9 November 2023 (2023 Pacific Islands Forum Declaration).²⁵⁶ Furthermore, it was noted that, in addition to the Commission, the Security Council, the General Assembly and various other United Nations bodies had addressed the topic of sea-level rise; it was also being considered by international and regional courts and tribunals in the context of the advisory proceedings relating to climate change, namely by the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea and the International Court of Justice.

341. The Co-Chair (Ms. Oral) further reiterated the importance of the topic and emphasized its immediate relevance to Member States around the world. She presented the Study Group with an overview of events addressing the issue of sea-

²⁵⁵ Following the resignation of Mr. Huikang Huang (see A/CN.4/776), the Study Group comprised 26 members during the second part of the present session.

²⁵⁶ See 2023 submission by the Pacific Islands Forum, available at https://legal.un.org/ilc/guide/8_9.shtml.

level rise that had taken place in 2023. In particular, she recalled that the Security Council had held a meeting on 14 February 2023 on the subject of “Sea-level rise: implications for international peace and security”, under the agenda item “Threats to international peace and security”, at which Mr. Aureescu, who was a Co-Chair of the Study Group at that time, had delivered a briefing on the progress of the Commission’s work. She also noted that the President of the General Assembly had convened an informal plenary meeting of the General Assembly on existential threats of sea-level rise amidst the climate crisis, on 3 November 2023. Finally, it was recalled that the General Assembly had decided to convene a high-level plenary meeting on 25 September 2024 to address existential threats posed by sea-level rise.

342. The Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) indicated that the purpose of the additional paper was to supplement and develop the content of the second issues paper (2022) on the basis of a number of suggestions by the Co-Chairs and members of the Study Group that were proposed during the debate on that paper during the seventy-third session of the Commission. Positions of Member States on both subtopics, including as expressed during the debates in the Sixth Committee of the General Assembly and submitted to the Commission for consideration, had been duly considered and reflected in the additional paper.

343. Introducing the subtopic on statehood, the Co-Chair (Mr. Ruda Santolaria) reiterated that, while sea-level rise was a phenomenon with different impacts around the globe, the problem it posed was of an existential character, with threats to low-lying coastal States, archipelagic States, small island States and small island developing States, as their land surface might be totally or partially submerged or rendered uninhabitable. The additional paper analysed the following points: the configuration of the State as a subject of international law and the continuity of its existence; scenarios linked to statehood in the context of sea-level rise and the right of the State to provide for its preservation; and eventual alternatives to face the phenomenon in relation to statehood.

344. With respect to the subtopic on the protection of persons affected by sea-level rise, the Co-Chair (Ms. Galvão Teles) firstly recalled some of the preliminary observations contained in the second issues paper on the topic, noting in particular that the current international legal frameworks that were potentially applicable to the protection of persons affected by sea-level rise were fragmented, mostly not specific to sea-level rise and required further development. She further recalled that relevant State practice was sparse at the global level and was not always specific to sea-level rise. Following the discussions in the Study Group in 2022, a number of elements for legal protection had been identified for further exploration in the additional paper, without prejudice to the possibility of further examining other issues as appropriate.

2. Summary of the exchange of views

(a) General comments on the topic and the additional paper

345. Members of the Study Group expressed gratitude to the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) for a very well-documented and structured additional paper. They also welcomed the memorandum by the Secretariat identifying elements in the previous work of the Commission that could be relevant for its future work on the topic ([A/CN.4/768](#)).

346. Commenting on the topic in general terms, members of the Study Group reiterated the topic’s relevance and the crucial importance of the Commission’s discussion to the international community in general and particularly to States that are directly affected by sea-level rise. Some members also expressed a sense of urgency given the issues at stake and the gravity of the situation. It was highlighted that the phenomenon affected persons in vulnerable situations, as well as having the effect of placing persons in such situations. It was also noted that sea-level rise was

a direct consequence of the global climate change, with some members underlining the anthropogenic nature of the phenomenon.

347. Members recalled recent developments in the practice of Members States and international organizations, including those mentioned by the Co-Chairs, as well as the ongoing proceedings before various international and regional courts and tribunals, and emphasized the need for the Study Group to duly reflect such developments in its work.

348. While some members noted the need to draw from the past work of the Commission, the Study Group was cautioned against drawing too many parallels, in particular with the draft articles on the protection of persons in the event of disasters adopted by the Commission in 2016.²⁵⁷ The connection between all three subtopics under consideration and the need to ensure coherence between them was emphasized.

(b) Reflections on statehood

349. The Study Group considered Part One of the additional paper, entitled “Reflections on statehood”, at the first to third meetings of the Study Group, held on 1, 2 and 7 May 2024.

(i) Introduction by the Co-Chair

350. In introducing Part One of the additional paper, the Co-Chair (Mr. Ruda Santolaria) observed that while climate change-induced sea-level rise was a global phenomenon with differentiated impacts in the distinct regions of the world, it posed a particularly serious threat to small island developing States, whose land surface might be totally or partially submerged or rendered uninhabitable by rising sea levels. In his view, there existed a strong presumption of continuity in the case of States whose land surface might be totally or partially submerged or rendered uninhabitable by rising sea-levels caused by climate change. Accordingly, the continuity of statehood was linked to security, stability, certainty and predictability, as well as to considerations of equity and justice, and, as such, served as a manifestation of the applicability of the principles of self-determination, protection of the territorial integrity of the State, sovereign equality of States, permanent sovereignty of States over their natural resources, the maintenance of international peace and security, and the stability of international relations and international cooperation.

(ii) General comments

351. Members of the Study Group discussed the central question concerning the continuity of statehood in circumstances where the land surface becomes totally or partially submerged or rendered uninhabitable by rising sea levels. They supported in general terms the approach taken by the Co-Chair on that issue in the additional paper. It was observed that the conclusion drawn therein flowed also from the debate held at the previous session of the Commission on the implications of sea-level rise for the law of the sea. It was also noted by some members that the protection of persons affected by sea-level rise was linked to the question of the continuation of statehood, in that the potential loss of statehood raised the spectre of statelessness. Reference was made to the 1928 Arbitral Award in the *Island of Palmas case*,²⁵⁸ which had placed emphasis not only on the rights of States and the creation of rights or entitlements, but also on corollaries such as duties with regard to the protection of certain key interests.

352. Reference was made to the various views expressed by States during the debates in the Sixth Committee, as also detailed in the additional paper. Some members of the Study Group noted the need to carefully identify the precise rationale

²⁵⁷ *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.

²⁵⁸ *Island of Palmas case (Netherlands, U.S.A.)*, Award, 4 April 1928, *Reports of International Arbitral Awards*, vol. II, pp. 829–871.

for those statements, without reading into them views that States had potentially consciously chosen not to put forward, since the topic of statehood was of relevance to many fields of international law. It was further observed that those States that supported the continuity of statehood could have made claims of several kinds, including: (1) that there existed an established positive international law rule on the point; (2) that there could be flexibility in the application of a vague but still positive rule to address the point; (3) that there existed reasons why developing international law in a certain direction would go with the grain of the legal system, particularly when invoking situations by analogy; and (4) that they were taking no position on the existence or desirability of positive rules at all and were simply indicating a policy preference.

(iii) *Creation of a State as a subject of international law and continued existence of the State*

a. Distinction between the criteria for the creation of a State and those for its continuity

i. Introduction by the Co-Chair

353. The Co-Chair (Mr. Ruda Santolaria) recalled that, when considering the legal basis for the continuation of statehood, the key reference point was article 1 of the Montevideo Convention on the Rights and Duties of States²⁵⁹ of 1933, which had established a set of criteria for an entity to qualify as a State that had since come to be generally accepted in establishing the existence of a State as a subject or person of international law. In the view of the Co-Chair, a distinction could be drawn between situations where the provisions of article 1 of the Montevideo Convention were applicable in order for the State to be considered a subject of international law and situations in which circumstances arose in relation to existing States in which one or more of the criteria of article 1 of the Montevideo Convention ceased to be present. He observed that the Convention did not address the question of the loss of statehood but included, instead, the right of each State to preserve its continued existence and independence. Such position had been confirmed as recently as in the 2023 Pacific Islands Forum Declaration. The Declaration presumed the continuity of statehood regardless of the impact of sea-level rise.

ii. Summary of the debate

354. During the ensuing discussion in the Study Group, support was expressed for the position taken in the additional paper that the Montevideo Convention criteria did not address as such the question of continuing statehood. It was suggested that a distinction could be drawn between the creation of a right and its continuation. Reference was made again to the *Island of Palmas* Award which stated that “[a] distinction must be made between the creation of rights and the existence of rights”.²⁶⁰ The view was expressed that the Montevideo Convention was not decisive in any way with regard to the issue of the continued existence of rights. It was observed that the object of the Montevideo Convention was the rights and duties of States, and not the question of statehood or the recognition of statehood. The matter, therefore, was not whether the Convention applied to continuity, but rather whether the Convention reflected customary international law regarding the continuity of statehood. State practice seemed to suggest that the Convention did not do so. It was recalled that for a number of States in the twentieth century some of the requirements of the Montevideo Convention had either not been present at some point or only marginally so, but they had, nonetheless, continued to be recognized as States. Such overall assessment had been further substantiated by the fact that several States in the Sixth

²⁵⁹ Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.

²⁶⁰ *Island of Palmas* (see footnote 258 above), p. 845.

Committee had called on the international community to confirm the continuity of statehood in situations where the land surface of a State becomes totally submerged or rendered uninhabitable due to sea-level rise.

355. The view was expressed that advances in science and technology had, in fact, allowed for uninhabitable territory to be used and thus still continue to contribute to satisfying the elements of statehood. Likewise, it was recalled that, under the law of the sea, uninhabitability did not *a priori* affect the status of territory as territory of a State. Reference was made, by way of substantiation, to article 121 of the United Nations Convention on the Law of the Sea²⁶¹ of 1982 under which rocks that could not sustain human habitation or economic life of their own could nonetheless still generate a territorial sea.

356. The view was also expressed that the most important consideration was that States had the right to preserve their existence.²⁶² Such understanding underpinned the notion that the Montevideo Convention criteria applied only to the creation of a State and could not be applied *a contrario* to deny the continuation of a State's existence. At the same time, the view was expressed that the permanence of the situation facing States at risk because of sea-level rise could be distinguished from that of the temporary loss of, for example, government, such that the considerations that arose in relation to the latter circumstances might not entirely apply to the permanent loss of one of the Montevideo Convention criteria, even if in practice the two situations might not be markedly different. While the relevance of the practice concerning governments in exile, referred to in the additional paper at paragraph 112, was questioned in light of the fact that it dealt with scenarios that were typically temporary in nature, the view was also expressed that such practice (for example, that in the context of the continuity of the Baltic States between 1940 and 1990) demonstrated the openness of international law to longstanding juridical continuity with limited or no factual control of territory, especially when anchored in continuing membership of universal international institutions.

357. A similar view was expressed that an analysis was warranted of the role of the recognition by other States of the continuity of statehood of a State whose land surface was submerged under the sea in part or in whole. Reference was made to views of James Crawford, who had described statehood as being not simply a factual situation, but a legally circumscribed claim of right, specifically to the competence to govern a territory. Whether such right was justified depended both on the facts and on whether it was disputed. This suggested that there existed a role for recognition in concluding whether an entity, even if it no longer fulfilled one of the relevant criteria, remained an entity that States continued to consider as a member of the international community, and one with whom they dealt on equal terms and which enjoyed international legal personality.

358. It was also suggested that the Montevideo Convention criteria could be understood as reflecting a general requirement of effectiveness. As such, the question being confronted by the Commission was whether the traditional conception of statehood as effectiveness applied in the situation being considered, or whether a modern conception of effectiveness might not necessarily require the spatially, geographically, coextensive application of all elements of statehood. A further view was that it was important, when considering the question of continuity of statehood, to focus on the viability of statehood when a large proportion of the affected State's land surface was submerged by sea. The view was expressed that it was important to establish criteria for the continuity of statehood in order to ensure that it be maintained in the face of any legal challenges that might emerge in circumstances where key elements of statehood ceased to exist permanently.

²⁶¹ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

²⁶² See draft Declaration on Rights and Duties of States with commentaries, para. (49). *Yearbook ... 1949*, vol. I, pp. 287-290.

359. Furthermore, it was observed that the application of the right of self-determination of peoples and the right of each State to defend its territorial integrity and independence would serve to constrain States from prematurely withdrawing recognition granted to a State whose land surface could be totally submerged by rising sea levels. It was recalled that the additional paper had identified the existence of sovereignty or independence as being the key criteria with regard to the continuity of statehood, even if they were concepts usually conceived of by reference to a territory.

360. Another possible legal basis identified for the continuation of statehood was consent, which was a well-known concept in international law. It was observed that, in the period since the adoption of the Charter of the United Nations, there had been very few cases of extinction of States, and almost none of involuntary extinction. All the various scenarios and alternatives for States facing a loss of habitable land territory described in the additional paper had assumed consent on the part of the affected State.

b. Presumption of the continuation of statehood

i. Introduction by the Co-Chair

361. It was recalled by the Co-Chair (Mr. Ruda Santolaria), among other members, that, as had been indicated in the second issues paper, considered in 2022, there existed a strong presumption of the continuity of statehood of States whose land surface could be partially or fully submerged by the sea or become uninhabitable because of sea-level rise caused by climate change. Such presumption arose from the fact, as discussed above, that fundamental changes in one or more of the requirements laid down in the Montevideo Convention for the establishment of a State did not traditionally result in the State ceasing to exist, in the sense of it being assumed that the State concerned could no longer maintain relations of various kinds with other members of the international community, including diplomatic relations, nor the treaty-making power or gain membership in universal and regional international organizations.

ii. Summary of the debate

362. General support was expressed in the Study Group in favour of the continuity of statehood. It was noted that non-continuity would have significant implications, including: the sudden creation of a legal vacuum with the disappearance of nationality, rendering the prior bearers of such nationality stateless; the implosion of resource management agreements for the seas concerning environmental or sustainable management of living resources; and the introduction of insecurity or instability, which could threaten international peace and security, for example, by calling into question the validity of existing maritime boundaries. Nor did international law envisage the possibility of the entire disappearance of international legal obligations as a consequence of anthropogenic developments for which small island developing States, in particular, held no responsibility. Terminating statehood solely because of the consequences of sea-level rise caused by climate change would be a profound injustice. The international community had a collective responsibility to support such States in preserving their territory and territorial integrity and safeguarding their people. It was suggested that even referring to the possibility of the “discontinuation” or “extinction” of statehood would be misleading, since such outcomes were inaccurate as a matter of existing law.

363. Different views were, however, expressed as to whether it was preferable to describe the prevailing legal situation as giving rise to a “presumption” of continuity or whether it was preferable to refer to the existence of a “principle” of continuity. Some members preferred admitting the existence of a “principle” out of concern that a presumption could be rebuttable. The question then would be under what circumstances could such rebuttal arise? It was conceivable that it could arise in situations where submergence had advanced to such an extent that the question of the

continuance of statehood became contested. The view was expressed that, in such scenario, the possible bases for departing from the presumption of continuity included: the position taken by the directly affected States themselves, such as in circumstances where an affected State chose not to continue, in one way or another, to exist because it decided to associate with another State; or the cessation of recognition by States. The view was further expressed that there would be practical difficulties in ascertaining definitively whether and when a presumption was rebutted.

364. A different view was that the affirmation of a principle of continuity of statehood in general terms seemed to suggest that States had unlimited continuity in time. Such outcome would contradict the historical fact that States had ceased to exist. Furthermore, while the loss of land territory owing to sea-level rise would in and of itself not be sufficient to negate or rebut a presumption of continuity, a reference to the existence of such a “presumption”, as opposed to that of a “principle”, was nonetheless considered by some members as being more legally appropriate precisely because loss of statehood was conceivable in extreme cases where there arose an almost total loss of both territory and population. Furthermore, the concern was expressed that governments in different forums might become wary of the unintended collateral consequences of the existence of such a “principle”, in contexts which had nothing to do with those States that were actually facing a possible loss of statehood.

365. The Study Group was encouraged to stick to the narrow focus of the additional paper on the two categories of States that were vulnerable or susceptible to losing statehood because of sea-level rise. Those were the States whose land surface could be totally submerged, and the States whose land surface could be partially submerged or rendered uninhabitable by rising sea levels. Another view was that focusing only on the relatively small number of States that might be most directly affected risked minimizing the extent of the threat they faced, potentially leading to solutions that might not meet the needs of those particularly affected States.

366. The view was also expressed that it was not clear what the framing of the issue in terms of a claim of presumption of continuity, as distinguished from a claim to continuity or claim to statehood, added. Other framings were possible, including simply recognizing the continuity of statehood. Another suggestion was to focus on the lack of legal impediment to continuity, which avoided the question of whether a legal presumption or principle existed, but rather emphasized the principles of stability, certainty and predictability, as well as those of equity and fairness, especially where the causes of sea-level rise were not primarily of the making of the State affected. It was recalled that, in the 2023 Pacific Islands Forum Declaration, beyond the fact that it was affirmed that international law supported a presumption of continuity of statehood, it was also recognized that international law did not contemplate the demise of statehood in the context of climate change-related sea-level rise. Another view was that it was not clear how the absence of a legal impediment for the continuation of a legal status was different from a positive rule of continuity. It was also pointed out that it was precisely because the question of whether a State might or might not continue to exist in circumstances where it did not meet some of the criteria for the creation of a State as a subject of international law, depending on the circumstances, that a presumption in favour of continuity provided a useful starting point.

367. Nonetheless, the view was expressed that, regardless of the approach taken, what was important was to have a clear basis in international law for the notion of the continuity of statehood. It was pointed out that, while a temporary loss of one of the criteria established by the Montevideo Convention, such as in the case of the absence of a government, was tolerable – as discussed earlier, so as to maintain the presumption of the continuity of statehood – the situation was not entirely comparable to the permanent loss of one of those criteria. While it would be premature to assume loss of statehood in such circumstances, the question was posed as to how long the presumption would continue to apply and under what circumstances? Furthermore, what would happen if the State were to become extinct over time, or if States were to

have differences as to the presumed continuity of a particular State? As such, it was considered necessary to develop a more objective set of elements supporting such presumption of continuity in international law by way of providing guidance.

368. Several ideas to be taken into account when ascertaining the legal basis for the continuity of statehood in situations where the land surface of the State was completely submerged or rendered uninhabitable as a result of sea-level rise were proposed, including:

- the need to prioritize legal stability, security, certainty and predictability in international relations.
- the application of the principles of territorial integrity, sovereign equality of States and permanent sovereignty over natural resources, the maintenance of international peace and security, and the application of the right to self-determination.
- considerations of equity, such as the fact that the effects of an anthropogenic phenomenon such as sea-level rise were not caused by those States suffering its consequences the most.
- the possibility of the existence at the national level of a general principle related to the presumption of continuity of statehood transposable to international law.
- the possibility of deducing a principle of continuity of statehood, regardless of whether in relation to partial or total submergence of the land surface of a State, from the interpretation of existing treaties. The combined application of the Montevideo Convention, the United Nations Convention on the Law of the Sea and the Vienna Convention on the Law of Treaties²⁶³ of 1969 was suggested. It was observed that neither the Montevideo Convention nor the United Nations Convention on the Law of the Sea explicitly addressed the potential disappearance of the State and that, under the law of the sea, once delineated the outer limit of the continental shelf remained permanent regardless of any change to the land to which it was connected, and maritime boundaries were not affected by the successful invocation of a fundamental change of circumstances, in accordance with article 62 of the Vienna Convention on the Law of Treaties.
- the fact that membership of a State in international bodies established under the United Nations Convention on the Law of the Sea was assumed to continue and not to be automatically forfeited.
- the fact that international law did not prescribe an established pattern for statehood.²⁶⁴
- the fact that there existed in international law an acceptance of a degree of flexibility as to what amount of public authority should be exercised in order to demonstrate a title.
- the fact that State practice had revealed a degree of flexibility in the application of international law to the issues of statehood in the context of submergence of land surface due to sea-level rise.

369. The view was expressed that the Commission should not seek to address questions of statehood in general terms, which went beyond the mandate of the Study

²⁶³ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

²⁶⁴ Reference was made to the Advisory Opinion of the International Court of Justice in the 1975 *Western Sahara* Advisory Opinion (“No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern”), and there may well be States of a special character. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 43–44, paras. 94–95.

Group, nor to stray too far from the traditional criteria for statehood, including that of territory, since there existed certain fundamental rules of international law that could not be isolated from territory or statehood, for example, those concerning the exercise of jurisdiction. As such, any discussion as to the modification of the established criteria of statehood should be undertaken with caution, in particular in relation to that of territory.

(iv) *Scenarios relating to statehood in the context of sea-level rise and the right of the State to provide for its preservation*

a. Introduction by the Co-Chair

370. In introducing Part One, chapter III, section B, of the additional paper, the Co-Chair (Mr. Ruda Santolaria) observed that it was important to emphasize the right of the affected State to preserve its existence, as had been mentioned earlier in the discussion, by adopting different measures to ensure its continuity, by which it was understood its continuation of its sovereignty and sovereign rights, encompassing the land surface and the sea surface composed of the maritime areas under its jurisdiction, while conserving and sustainably using the natural resources existing there, as well as preserving biodiversity and ecosystems for the benefit of present and future generations of its population.

371. As had been discussed during the debate on the continuity of statehood, two scenarios were being envisaged. The first was where the land surface of the State concerned was affected by erosion, salinization and partial submergence, potentially becoming uninhabitable, despite only being partially submerged by the sea, due to the unavailability of a sufficient fresh water supply and thus resulting in the population having to move elsewhere within the territory of the affected State or migrating to another State or States. The second scenario was that of total submergence where the land surface of the affected State was completely covered by the sea.

372. It was observed that several coastal States had already been adopting measures to reduce the impacts of sea-level rise, including the installation or reinforcement of dikes, barriers or coastal defences, as well as the construction of artificial islands in the maritime areas under their jurisdiction, where parts of their population could settle. Various options were envisaged, including the possibility of combining the installation or reinforcement of coastal barriers or artificial islands with the use of natural means, such as the establishment of mangroves, which were more environmentally sustainable, the relocation of persons affected by sea-level rise to other places, as well as the installation of desalination plants to process seawater.

373. In addition, international cooperation through the provision of technical or logistical assistance, qualified human resources or financial assistance to States particularly affected by the phenomenon that lacked sufficient capacity of their own was considered essential. In addition to the interpretation and application of existing instruments, consideration needed to be given to the possibility of concluding new bilateral or plurilateral agreements between the most directly affected States and third States or instruments that could be adopted within the framework of regional or universal international organizations, particularly in the context of the United Nations system. In concluding such instruments, it was important to ensure that the formulas to be employed transcended short-term needs, while respecting individual rights and the right to self-determination of the peoples of the affected States.

b. Summary of the debate

374. During the ensuing debate, agreement was expressed with the assessment that the process was likely to be gradual and that a distinction could be drawn between the situations of partial and total submergence of the land surface. In both situations, affected States retained the right to provide for their preservation, which could take

many forms. A view was expressed that it was advisable to focus on the question of the legal consequences of the uninhabitability of a territory due to partial submersion owing to sea-level rise, which would occur before full submersion of the land surface.

375. Some members expressed agreement with the view taken in the additional paper that a State whose land surface had become totally submerged as a result of sea-level rise continued to exist as a State; a position that was closely related to the discussion on the law of the sea aspects of the topic undertaken at the Commission's session in 2023. It was further pointed out that the link between jurisdiction and territory was historically very recent and had not always necessarily been a prerequisite for the application of law. As had been mentioned during the earlier discussion, the need to ensure legal security and stability was an important consideration when addressing the issues and interests at stake.

376. Another view was taken that it was more advisable to focus on both the notion of preservation of legal entitlements and the protection of certain interests that were worthy of legal protection. In doing so, it was important to go beyond a State-centred approach to the preservation of rights and to also consider indigenous identities, languages and all the various elements that might, in certain contexts, go beyond the notion of cultural heritage or protection of cultural heritage, but nonetheless had to do with legal norms that should be respected. As such, what was called for was less the right to ensure the maintenance of territory, which related more to the establishment of physical barriers and other mitigation efforts, but more the preservation of legal entitlements to land and maritime spaces under the affected State's jurisdiction. It would thus be necessary to consider the precise duties of States in relation to such preservation of legal entitlements and statehood. It was maintained that such issues were best dealt with at regional or local levels, with a view to devising arrangements, which could take into consideration, for instance, the different approach to considering applications from individuals who wanted to be relocated versus taking a collective approach. It was important to adopt innovative and expeditious solutions in order to avoid competing interests. It was also suggested that the Study Group analyse the notion of acquired rights and its relationship with international human rights law.²⁶⁵

377. Agreement was also expressed with the view that it was essential for the Commission to focus on the duty of cooperation, whether as a general principle of law or as a rule of customary international law. Reference was made to the provisions on cooperation in the United Nations Convention on the Law of the Sea that merited further consideration in the present context. It was recalled that the obligation to cooperate had also featured in some of the Commission's earlier work.

378. It was pointed out that there existed multiple obligations to cooperate, some expressed in a "softer" form, as in the case of draft article 7 of the draft articles on the protection of persons in the event of disasters, than others that were formulated in more stringent terms, as in the case of article 197 of the United Nations Convention on the Law of the Sea.

(v) *Possible alternatives for addressing the phenomenon in relation to statehood*

a. Introduction by the Co-Chair

379. In introducing the question of possible scenarios, the Co-Chair (Mr. Ruda Santolaria) recalled the observation of the Secretary-General that the far-reaching effects of the phenomenon of sea-level rise on the legal and human rights spheres required innovative legal and practical solutions. In the view of the Co-Chair, as long as the land surface was not totally covered by the sea, the State's Government could be installed or could function from some point on the unsubmerged land surface,

²⁶⁵ International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

where a portion of the population, however small, could be symbolically maintained. The population of the affected State would be considered to be those persons who could continue to reside somewhere within the territory of the State, as well as those who possessed the nationality of the State, despite being physically located in the territory of another State. It was not a matter of attributing new rights to the States affected by sea-level rise, but of ensuring the preservation of existing rights that the affected States legitimately possessed under international law.

380. Furthermore, in order to ensure that the nationals of a State affected by the phenomenon of sea-level rise who reside in other States have adequate assistance or protection and efficient access to certain basic services and documentation that would usually be provided by the affected State, it was necessary to strengthen assistance through consular offices in States where the largest number of individuals moving from that State were concentrated, as well as to organize or strengthen digital platforms connecting nationals of the State scattered around the world with the affected State.

381. In addition, consideration had to be given to the possibility that, by virtue of amendments to domestic legislation or bilateral or plurilateral agreements between the affected State and other States, nationals of the former could be granted longer residence rights and/or the nationality of one of the latter States without losing their nationality of origin or that, in the context of a broader agreement in the framework, for example, of a possible confederation of States, they could acquire the citizenship of the latter without losing their nationality of origin.

382. Reference was made to the example of the European Union, as a possible further model for the establishment of common citizenship of belonging to more than one State, existing in addition to the nationality of origin, and giving rise to new and specific rights, such as those existing within the framework of the European Union whereby, if no diplomatic or consular representation of a particular European Union State exists, another State member of the Union could provide assistance and protection on the basis of the existence of a common European Union citizenship. In such circumstances, it was not that the common citizenship replaced the nationality of the State, but that it existed in addition to the nationality of the State on the basis of membership in the European Union.

383. The point of departure is the strong presumption of the continuity of the statehood and the international legal personality of the State directly affected by the phenomenon. The sovereignty of the State over its territory should be preserved, including the land surface covered or not by the sea and the sovereign rights in its maritime zones, as well as the natural resources therein in favour of the present and future generations of its population. It was explained that some of the options set out in the additional paper envisaged a State whose land surface had become uninhabitable or totally submerged by rising sea level nonetheless retaining its legal status, while other alternatives envisaged the State being integrated into another State, but preserving the core aspects of its identity and retaining a sufficient degree of autonomy and the authority to exercise certain powers despite becoming part of that other State. In addition, it would be necessary to consider the legal aspects relating to the possible establishment in another State's territory of the Government of the State directly affected by the rise in sea level, as well as other issues related to the preservation of the international legal personality of that State.

384. With a view to respecting the self-determination of the peoples of the States and countries affected by the phenomenon, the formula used in each case should be subject to a consultation procedure with the population concerned. Among the various modalities envisaged was the possibility that an affected State could acquire, with or without transfer of sovereignty, a portion or extension of land in the territory of another State, or enter into an association agreement with other States or into a confederation through agreements that would make possible the continuity of the affected State and its international legal personality. A further scenario was

integration into a federation with another State, where, although the affected State would no longer exist as such, it could nonetheless retain a high degree of autonomy. A similar option was unification with another State, where some form of autonomy could also be contemplated in favour of the affected State, and which would imply that it had ceased to exist as an independent State. Finally, the additional paper identified the possibility of the resort to *ad hoc* legal formulas or regimes allowing affected States to preserve their international legal personality, and their rights with respect to maritime spaces and the resources existing therein.

b. Summary of the debate

385. During the ensuing discussion in the Study Group, it was noted that the progressive inability to perform State functions could present a critical challenge well before the land surface was totally covered by the sea. The question thus arose as to what would happen to the natural resources of a State that had lost its ability to exercise its functions, and how people could access the benefits of such resources in the future.

386. It was suggested that the international community could assist with the restoration of territorialized statehood. As such, the Commission could envisage interim forms of administration that could assist affected States to recuperate the effectiveness required for the preservation of their statehood. It was likewise important to consider the practices that existed within the United Nations system, although not fully transferrable to the sea-level rise context, such as those related to United Nations-administered territories, or the governance of resources by an appropriate international organization on behalf of the affected State and/or its peoples.

387. The view was expressed that, while the modalities outlined in the additional paper, such as land acquisition, association, confederation, federation, unification and *ad hoc* legal regimes offered feasible avenues for affected States, a more in-depth analysis was required. It was necessary to comprehend the implications of each option, particularly concerning national security and the ongoing functioning of government administration, including aspects like defence capacity, border control, resource management and the ability to maintain essential services for citizens. Only through such a nuanced examination could it be ensured that such modalities truly supported the long-term security and well-being of affected States.

388. The reference in the additional paper to a nation *ex situ* as a legal framework for States whose land surface was totally submerged was mentioned as a step towards addressing what were unprecedented challenges. While it disrupted the traditional territorial basis for statehood, such an innovative approach compelled the consideration of new solutions in the face of a rising sea level. Nonetheless, further study and consideration of the concept of States *ex situ* was called for, with a view to considering the possibility of developing a new legal regime for those States. Further reflection would also be needed as regards the question of the impact on ongoing negotiations with neighbouring States on maritime boundaries.

389. It was suggested that the emphasis should be placed on the interpretation and innovative application of existing treaties and arrangements, since it was not realistic to expect that an entirely new treaty, or even amendments to existing treaties, would be adopted to cover the issues under consideration by the Study Group. Nonetheless, it was pointed out that some issues mentioned in the additional paper, such as the availability of digital solutions for the provision of diplomatic and consular rights, visas, privileges and immunities etc., were already a reality for some States.

390. It was suggested that a distinction be drawn between three different sets of issues: the legal entitlements relating to the nature of the sovereignty or relating to the statehood of the State that continued to exist (concerning the competencies and entitlements in relation to the land surface which might be submerged); the practical arrangements around the nationality of the members of the community in question

(practical arrangements concerning government etc.); and the possibilities that might arise where the State actually ceased to exist on the basis of unification with another State or merger with another State into a federation (where the international legal personality of the State ceased).

391. The concern was expressed that the Study Group was going beyond its mandate by proposing essentially political solutions, which were more appropriately considered by States. In particular, some members of the Study Group cautioned against making proposals that could prove difficult to implement (such as promoting the notion of a digital nation) or which raised sensitive political considerations (such as proposing the modification of laws relating to nationality). It was also important to guarantee that the results of the Commission's work in the Study Group did not threaten in any way existing legal provisions, for example in a situation where persons opted to preserve their nationality of origin. A view was expressed that it was advisable to draw a sharper line between legally relevant considerations and desirable policies, with the Commission being better suited to consider the former than the latter. Any discussion of alternatives was considered by some members to be inherently speculative, since it was not possible to suggest a one-size-fits-all solution.

392. It was proposed that the Commission could, instead, focus on certain basic parameters, including the requirement of ensuring the consent of the affected peoples, proposing the adoption of bilateral, regional, or multilateral agreements and emphasizing the obligation to cooperate. The following parameters were also proposed by members of the Study Group in the course of the debate:

- the sovereignty and sovereign rights of a State over its territory and in the surrounding maritime zones should be preserved; these would comprise the land territory, any land territory that had become submerged owing to sea-level rise to which sovereignty still applied, and the maritime areas under its jurisdiction.
- the right to self-determination of the affected peoples should be preserved, in keeping with the unity and territorial integrity of the State concerned.
- the right to self-determination of the affected peoples extended to the rights of indigenous peoples in the context of sea-level rise, and included their right to organize themselves and to handle their own affairs, as well as the right to participate in decision-making.
- consultations with the relevant persons, including indigenous peoples, were essential, since the interests and needs of affected persons were a fundamental consideration to be taken into account in any future arrangements.
- States affected by sea-level rise retained the responsibility for ensuring the protection of their population affected by sea-level rise, including with respect to human rights duties, political status, culture, cultural heritage, identity and dignity, and meeting essential needs.
- in order to preserve cultural, social and political identity, the State must consult with its population on any future arrangements, including those remaining on the territory, and those that might have had to move elsewhere.
- any arrangements for the relocation of a Government to another State or regarding the political status of relocated peoples should be set out in an agreement addressing issues such as the establishment and functioning of the Government, its independence, the manner in which it would operate, the scope of its functions or competences, the modalities for consulting its nationals, the administration of the maritime areas under its jurisdiction, financial arrangements, the protection and preservation of cultural heritage, and the conduct of international relations.

- any such arrangements must uphold the human rights of the affected persons and preserve the culture, cultural heritage, identity and language of the affected populations.
- any such arrangements would need to give consideration to the nationality of affected persons, the status of persons who no longer resided in a State affected by the impacts of sea-level rise, and to the consular assistance and diplomatic protection of affected populations.
- in addressing the impacts of sea-level rise, international cooperation was required between affected States and other members of the international community; cooperation had to be based on the sovereign equality of States, as well as considerations of equity and fairness.
- agreements and modalities adopted by States should recognize the importance of legal stability, security, certainty and predictability in international relations and should respect the human dignity of persons directly facing the impacts of sea-level rise.

393. As regards the right to self-determination of indigenous peoples in particular, reference was made to article 4 of the United Nations Declaration on the Rights of Indigenous Peoples²⁶⁶ which referred to self-governance and autonomy as being the central element of self-determination. The question then was how to guarantee such autonomy in situations related to the detrimental impact of sea-level rise and how such rights were to be transferred to new States in which affected persons could find themselves. Furthermore, it was recalled that the right of self-determination had been principally related to the process of decolonization and its applicability should be linked to the application of other principles of international law, such as that of territorial integrity and the non-interference in the internal affairs of other States, since the application of the right to self-determination outside of the context of decolonization had given rise to disputes in practice.

394. In connection with the question of nationality, it was suggested, in contrast with the possibility of considering experiences of common citizenship such as in the European Union, that the Commission take into account its own prior work in the context of the articles on nationality of natural persons in relation to the succession of States.²⁶⁷ It was recalled that those articles, although applicable in a context different from sea-level rise, where there was a strong presumption of the continuity of statehood, operated under an imperative to avoid statelessness, and that the corresponding commentary provided interesting practical solutions, including the right to opt for the nationality of the predecessor State or that of the successor State, as well as the conclusion of international agreements between States to regulate the question of nationality with a view to avoiding statelessness. In addition, attention was drawn, in particular, to article 5 and the commentary thereto, as well as to articles 12 and 13. Another view was that those articles were not directly relevant as they, by their own terms, limited their applicability to situations of succession, which was conceptually opposite to that of the continuity of statehood.

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

395. The Study Group considered Part Two of the additional paper, entitled “Protection of persons affected by sea-level rise”, at its fourth and fifth meetings, held on 7 and 8 May 2024.

²⁶⁶ General Assembly resolution 61/295 of 13 September 2007.

²⁶⁷ The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47-48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

(i) *Introduction by the Co-Chair*

396. During the general introduction of Part Two, at the first meeting of the Study Group, the Co-Chair (Ms. Galvão Teles) had explained that the additional paper examined selected developments in State practice and in the practice of international organizations, as well as the relevant legal issues identified in the second issues paper that could form possible elements for legal protection of persons affected by sea-level rise. She had noted that the additional paper analysed possible elements for the legal protection of persons affected by sea-level rise, *inter alia*, highlighting the different obligations of distinct duty bearers, the importance of combining a needs-based and a rights-based approach, as well as the importance of international cooperation. In terms of possible outcomes for the subtopic, the Co-Chair observed that elements identified in the additional paper could be either used for the interpretation and application of hard and soft-law instruments that were applicable *mutatis mutandis* to the protection of persons affected by sea-level rise, and/or could be included in further such instruments concluded at the regional or international levels.

397. At the fourth meeting, the Co-Chair (Ms. Galvão Teles) also observed that the list of the 12 elements for possible legal protection of persons, as proposed in the additional paper to the second issues paper, was mostly based on the findings of the second issues paper, and the discussions thereof in the Study Group. She noted that one additional element related to the protection of cultural heritage had been included at a later stage, with a view to the importance that had been given to cultural rights and cultural heritage in the 2023 Pacific Islands Forum Declaration. She further recalled the relevance of the Commission's past work, recalling that the additional paper should be read in conjunction with the memorandum by the Secretariat on the two subtopics (A/CN.4/768). The Co-Chair also referred to the Committee on International Law and Sea-Level Rise of the International Law Association, noting the natural synergy between its work and that of the Study Group. She then reiterated the importance of recent judgments and decisions of the European Court of Human Rights, as well as the upcoming advisory opinions by the International Court of Justice, the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights. The Co-Chair then gave brief introductions to each of the possible elements for legal protection of persons affected by sea-level rise, making references to the relevant parts of the additional paper.

(ii) *Summary of the debate on possible elements for legal protection of persons affected by sea-level rise*

a. General comments

398. Members of the Study Group agreed with the conclusion contained in the additional paper that the current international legal frameworks that were potentially applicable to the protection of persons affected by sea-level rise were fragmented and mostly not specific to sea-level rise. It was further noted that sea-level rise presented new challenges that the current legal frameworks were not fully equipped to resolve. The absence of specialized protection mechanisms within international law for persons internally displaced due to sea-level rise or environmental migrants was emphasized. A view was expressed that it was important to incorporate an eco-centric approach into the analysis, reflecting upon the need to repair damage to ecosystems affected by sea-level rise.

399. The analysis in the additional paper of possible elements for the legal protection of persons affected by sea-level rise was welcomed. Some members observed that the list of elements was very broad and that it was not possible for the Study Group to explore them in depth. It was also noted that such elements required further development and specification, as they were of varying legal relevance and in that regard could be restructured.

400. Some members considered it crucial for the Study Group to closely consider the positions of Member States, as well as the practice of relevant international organizations. It was regretted that only a limited number of States had submitted information in response to the Commission's requests. The importance of keeping track of ongoing proceedings before various international and regional courts and tribunals was also emphasized. Similarly, the potential relevance of decisions of domestic courts was also noted.

401. Differing views were expressed as to whether the Commission's 2016 draft articles on the protection of persons in the event of disasters²⁶⁸ could serve as a good basis for the Commission's work on the subtopic on the protection of persons affected by sea-level rise. Support was voiced for the use of the draft articles as the basis for future work of the Commission, given that the draft articles could be applicable to sea-level rise as a slow onset disaster, and thus it would be more efficient to build upon the broader framework of the protection of persons in the event of disasters. According to another view, the draft articles should not be a reference point for the Study Group, as disaster legal frameworks typically prioritized the obligation of the affected States to seek assistance and provided a limited set of obligations for third States, while in the context of climate change-induced sea-level rise, affected States were more likely to request assistance and third States had a wider array of responsibilities under international law. It was suggested, as a middle-ground approach, that while the sea-level rise phenomenon might not be fully classified as a disaster, within the meaning of the draft articles, many of its manifestations did fall under such category. Therefore, such manifestations, including the consequences of sea-level rise, could be considered as a disaster on a case-by-case basis.

b. Human dignity as an overarching principle

402. Agreement was expressed with the conclusion of the additional paper that human dignity should constitute a guiding principle for any action to be taken in the context of sea-level rise. It was noted that the qualification of this principle in the additional paper as "overarching" should be understood to mean that the principle had influenced and underpinned various international instruments. Examples of international agreements and jurisprudence reflecting the principles of human dignity and humanity were recalled. Some members were of the view that human dignity was an overly general concept and questioned whether it could be of practical use. It was suggested that the Study Group could determine the normative value and functions of the principle with a view to operationalizing it. Some members also noted that the principle of human dignity brought up the question of the extraterritorial application of human rights.

c. Combination of needs-based and rights-based approaches

403. Support was voiced for the conclusions of the additional paper on the question of the combined needs-based and rights-based approaches as the basis for the protection of persons affected by sea-level rise. Several members emphasized that the approaches were not mutually exclusive, so that it was not necessary to seek a compromise between them. A question was raised, however, as to how to quantify the needs-based approach. It was noted that the origins of the legal status of the needs-based approach and its relationship to human rights was not fully clear and required further consideration. A concern was also raised that there existed a risk in conflating the complex policy matters related to needs with legal rights and obligations. It was further noted that diluting the border between legal rights and obligations and policy could diminish the significance of the former. A proposal was made to consider incorporating the capacity-based perspective to take into account the resources and capacities of both the affected and assisting States.

²⁶⁸ The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49.

d. General human rights obligations

404. Members of the Study Group noted the importance of general human rights obligations in the context of the protection of persons affected, including by sea-level rise. Some members highlighted the applicability of civil and political rights, including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to property. A view was expressed that the Study Group should prioritize the consideration of economic, social, and cultural rights, as they were more likely to be impacted. According to another view, it was preferable to avoid drawing any hierarchy between civil and political and economic, social, and cultural rights, as that could result in their misapplication. The need to highlight the indivisibility of human rights was also emphasized. It was proposed that the Study Group should shift its focus from considering general human rights obligations to exploring more closely the work of United Nations specialized agencies and other relevant specialized institutions. It was emphasized that States affected by sea-level rise bore primary responsibility to proactively protect rights of people under their jurisdiction. A suggestion was made to list separately human rights obligations of States on their territory and those that also existed extraterritorially. Some members noted the importance of addressing the applicability of collective rights. A suggestion was also made to further explore the relevance of the right to participation. Some members made references to relevant judgments and decisions of international and regional human rights courts and tribunals, addressing the general human rights obligations of States. It was also proposed that the Commission should explore the relationship between sea-level rise and the issue of poverty.

e. Different human rights duties and different human rights duty bearers

405. While addressing the section of the additional paper on different human rights duties and different human rights duty bearers, the need to analyse the distribution of obligations between States and the substantive content of such duties was emphasized by some members of the Study Group. In particular, it was noted that in the context of migration induced by sea-level rise, it was necessary to determine and delineate the duties of States of origin and transit, as well as of receiving States. The question of extraterritorial applicability of human rights was again considered to be of high relevance. It was noted that the conclusion made in paragraph 215 of the additional paper that the exercise of jurisdiction over a person, irrespective of whether it was exercised territorially or extraterritorially, was the criterion for determining that the duty bearer, while generally correct, could be not applicable to certain human rights treaty regimes and required further consideration. It was also noted that derogations and limitations of human rights should not apply in the sea-level rise context since, unlike other emergency situations, sea-level rise constituted a permanent threat. The need for affirmative action in the sea-level rise context was emphasized. The decision of the Human Rights Committee in *Billy et al. v. Australia*²⁶⁹ was recalled and highlighted as a significant step forward in the development of legal frameworks that specifically addressed human rights challenges presented by sea-level rise.

f. Protection of persons in vulnerable situations

406. With respect to the issue of protection of persons in vulnerable situations, the Study Group was urged to adopt a granular approach and distinguish the vulnerability of areas potentially exposed to climate-related hazards, the vulnerability of particular groups or regions, and individual vulnerability of persons. A suggestion was made to develop an illustrative list of vulnerable groups to avoid leaving the term “vulnerable persons” to be interpreted by decision makers. The Sixth Assessment Report from the

²⁶⁹ [CCPR/C/135/D/3624/2019](#).

Intergovernmental Panel on Climate Change,²⁷⁰ containing a list of groups and persons susceptible to the impacts of climate change, was suggested as an example.

g. Principle of *non-refoulement*

407. Members agreed that the principle of *non-refoulement* was well established in international law and that it could be relevant for the protection of persons affected by sea-level rise. The importance of the Views adopted by the Human Rights Committee in *Teitiota v. New Zealand*²⁷¹ was recalled. At the same time, a question was raised as to whether the principle was useful and capable of providing a lasting solution, as it generally applied to individual cases, and not to mass migrations. Accordingly, given that the law was still developing, it was suggested that the Study Group take a cautious approach when considering the general applicability of the principle of *non-refoulement* to persons who had been affected by climate change and sea-level rise.

h. Guidelines in the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments

408. The importance of relevant soft-law instruments, including the Guidelines in the Global Compact for Safe, Orderly and Regular Migration,²⁷² was noted. At the same time, some members underlined that it was crucial to draw a clear distinction between *lex lata* and *lex ferenda*. It was considered necessary to explicitly indicate that soft-law instruments were not legally binding and were of a policy nature.

i. Applicability of complementary protection

409. On the issue of complementary protection, it was recalled from the outset that the Convention relating to the Status of Refugees²⁷³ in 1951 limited access to international protection to five grounds of persecution, thus excluding many other typical drivers of forced migration, such as natural disasters and sea-level rise. It was suggested that the Study Group could consider approaches adopted in different regional contexts and reflect on how this could influence the general framework of refugee protection in international law. The examples of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa²⁷⁴ and the Cartagena Declaration on Refugees²⁷⁵ were recalled.

j. Humanitarian visas and similar administrative policies

410. Questions related to humanitarian visas and similar administrative policies were considered to be relevant to the subtopic. In that regard, several examples of regional international cooperation in the area of humanitarian visas were recalled, with a special focus on Latin America, the Caribbean and Pacific regions, where climate change mobility had become part of international arrangements. At the same time, it was noted that matters of admission of foreign nationals fell under the purview

²⁷⁰ Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva, 2023).

²⁷¹ CCPR/C/127/D/2728/2016.

²⁷² General Assembly resolution 73/195 of 19 December 2018, annex.

²⁷³ Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.

²⁷⁴ OAU [Organization of African Unity] Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

²⁷⁵ 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.

of domestic authorities. Furthermore, the Study Group was cautioned against assuming that people affected by sea-level rise would always want to relocate.

k. Tools for the avoidance of statelessness

411. Some members noted the primary way to avoid statelessness in the context of sea-level rise was to provide for the continuity of States. However, it was noted that in situations where the land surface of a State would be totally covered by the sea, there would in any event be a general obligation to prevent statelessness. The relevance of the 1954 Convention on the Status of Stateless Persons²⁷⁶ and the 1961 Convention on the Reduction of Statelessness²⁷⁷ was noted.

l. International cooperation

412. Several members of the Study Group recalled the importance of international cooperation in the sea-level rise context, as previously discussed. Several members were of the view that there should be a general duty to provide assistance and discussed whether such duty was already grounded in international law. It was suggested that the Commission's draft articles on the protection of persons in the event of disasters, in particular draft article 7, could be used as a potential basis for developing a substantive duty to cooperate in the context of sea-level rise. According to another view, the duty to cooperate contained therein was limited and insufficiently specific to sea-level rise. It was suggested that the Study Group could consolidate and further develop the existing rules on cooperation, also by providing for procedural measures, such as the exchange of information. At the same time, given the significant divergence of the scope and content of the principle of cooperation, a call for caution was made against inferring a general rule. Several members emphasized the need to address the relationship between cooperation and the principle of common but differentiated responsibilities. It was also suggested that the relevance of the principles of solidarity, equity, and prevention be considered.

m. Protection of the cultural heritage

413. It was noted that the issue of the protection of the cultural heritage of individuals and groups that might be affected by sea-level rise was closely linked to the rights of indigenous peoples. It was recalled that the case law of the Inter-American Court of Human Rights had recognized a connection between the cultural heritage and indigenous lands. A question was raised as to how it would be possible to achieve the transfer of cultural rights of peoples relocated due to sea-level rise, in particular to States with limited protection of such rights. Reference was made to the need to consult and cooperate in good faith with indigenous peoples, as contained in article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

(d) Working methods of the Study Group and future work on the topic

(i) Summary of the debate

414. In connection with the Study Group's future work and working methods, a concern was expressed that the scope of the subtopics was too broad and it was suggested that the number of questions under examination be reduced. The limits set forth in the syllabus prepared in 2018 on the scope of the topic were recalled. It was also observed that the Study Group had raised a large number of pertinent questions but was yet to provide definitive answers to most of them. According to another view, the added value of the Study Group had been precisely in raising questions and that its work had already had significant influence on State practice.

²⁷⁶ Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117.

²⁷⁷ Convention on the Reduction of Statelessness (New York, 30 August 1961), United Nations, *Treaty Series*, vol. 989, No. 14458, p. 175.

415. Several members supported the plan for the Study Group to consider a joint final report on the topic as a whole, in 2025, to be prepared by the Co-Chairs consolidating the work undertaken on the three subtopics, with a set of draft conclusions to be discussed by the Study Group. The importance of analysing the possible linkages between the three subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – in the joint final report was emphasized. It was suggested that the final report should address duties and responsibilities of States and possible consequences of sea-level rise, without attempting to rewrite the existing international legal frameworks. Some members recalled that the Commission had agreed, in the syllabus prepared in 2018,²⁷⁸ to limit the Study Group's mandate so that it would not propose any amendments to the United Nations Convention on the Law of the Sea. At the same time, questions were raised with regard to the overall role of the Study Group. It was noted that it should aim to identify and develop rules of international law relevant in the context of sea-level rise, and not engage in policy discussions.

416. In addition to the proposals voiced during the previous sessions, various proposals were made concerning the possible outcome of the Study Group's work, including drafting a framework convention on issues related to sea-level rise or seeking to introduce the sea-level rise dimension into the ongoing negotiations about the possible elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters. It was proposed that the Study Group could finalize its mapping exercise, group the existing legal principles and indicate areas that were in need of further development. It was suggested that the views of States, particularly the ones most affected by sea-level rise, should play an important role in defining the direction of the Study Group's future work.

(ii) *Conclusion by the Co-Chair*

417. Concerning the future work of the Study Group, the Co-Chair (Ms. Galvão Teles) made reference to paragraphs 307 to 314 of the additional paper and reiterated that a joint final report on the topic as a whole, consolidating the work undertaken so far on the three subtopics, with a set of conclusions, would be submitted by the Co-Chairs for consideration of the Study Group at the Commission's seventy-sixth session (2025).

²⁷⁸ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, annex B.

Chapter XI

Other decisions and conclusions of the Commission

A. Special memorial meeting

418. At its 3697th meeting, held on 30 July 2024, the Commission convened a memorial meeting in honour of the memory of former member Mehmet Güney.

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

419. At its 3701st meeting, on 2 August 2024, Mr. Louis Savadogo was appointed Special Rapporteur for the topic “Prevention and repression of piracy and armed robbery at sea” to replace Mr. Yacouba Cissé, who had resigned as Special Rapporteur for the topic.

C. Programme, procedures and working methods of the Commission and its documentation

420. On 13 May 2024, the Planning Group was constituted for the present session.

421. The Planning Group held six meetings on 14 and 31 May and 4, 16 and 18 July 2024. It had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-eighth session, prepared by the Secretariat ([A/CN.4/763](#)); General Assembly resolution 78/108 of 7 December 2023 on the report of the International Law Commission on the work of its seventy-fourth session; General Assembly resolution 78/112 of 7 December 2023 on the rule of law at the national and international levels; and the proposed programme budget for 2025, Programme 6, Legal affairs, subprogramme 3, concerning the progressive development and codification of international law. The Planning Group also received a proposal by Mr. Bimal N. Patel entitled “Survey of International Law in relation to the work of the International Law Commission”. The Planning Group, however, did not have sufficient time to consider such proposal, which will be returned to next year.

1. Working Group on the long-term programme of work

422. At its 1st meeting, on 14 May 2024, 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 interim oral report of the work of the Working Group to the Planning Group, at its 2nd meeting, on 31 May 2024. The Planning Group took note of the interim oral report. On 16 July 2024 at the 4th meeting of the Planning Group, Mr. Juan José Ruda Santolaria, on behalf of the Chair of the Working Group, presented an oral report on the work of the Working Group, including proposals for topics being considered at the current session to the Planning Group. The Planning Group took note of the oral report.

423. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission:

- (a) compensation for the damage caused by internationally wrongful acts; and
- (b) due diligence in international law.

424. 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.²⁷⁹ The Commission considered that the topics chosen would constitute useful contributions to the progressive development of international law and its codification. The syllabuses of the topics selected appear as annexes I and II to the present report.

425. The Commission recalls that eight other topics remain on the long-term programme of work from previous quinquennia, namely: (a) ownership and protection of wrecks beyond the limits of national maritime jurisdiction;²⁸⁰ (b) jurisdictional immunity of international organizations;²⁸¹ (c) protection of personal data in transborder flow of information;²⁸² (d) extraterritorial jurisdiction;²⁸³ (e) the fair and equitable treatment standard in international investment law;²⁸⁴ (f) evidence before international courts and tribunals;²⁸⁵ (g) universal criminal jurisdiction;²⁸⁶ and (h) reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law.²⁸⁷

2. Working Group on methods of work and procedures of the Commission

426. At its 1st meeting, on 14 May 2024, the Planning Group decided to reconvene the Working Group on methods of work and procedures of the Commission, with Mr. Charles Chernor Jalloh as Chair. The Working Group held two meetings on 24 and 27 May 2024.

427. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group at its 4th meeting, on 16 July 2024.

428. The Planning Group took note of the oral report. The Working Group continued with the consideration of its standing agenda, made up of the following three items:

1. Revitalization of the working methods and procedures of the International Law Commission.
2. Relationship of the International Law Commission with the General Assembly and other bodies.
3. Other issues.

429. Owing to time limitations this year, including stemming from the shortening of the approved General Assembly session of 12 weeks to 10 weeks, only two formal meetings of the Working Group took place. The two meetings of the Working Group largely focused on the first agenda item, even though preliminary discussions were also carried out on the last two agenda items. In particular, the question of the relationship between the Commission and the General Assembly, especially the Sixth Committee, was subject to discussion along with the need to strengthen cooperation

²⁷⁹ *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553. See also *Yearbook ... 1997*, vol. II (Part Two), para. 238.

²⁸⁰ *Yearbook ... 1996*, vol. II (Part Two), para. 248 and annex II, Addendum 2.

²⁸¹ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and annex II.

²⁸² *Ibid.*, annex IV.

²⁸³ *Ibid.*, annex V.

²⁸⁴ *Yearbook ... 2011*, vol. II (Part Two), para. 365 and annex IV.

²⁸⁵ *Yearbook ... 2017*, vol II (Part Two), para. 267 and annex II.

²⁸⁶ *Yearbook ... 2018*, vol II (Part Two), para. 369 and annex I.

²⁸⁷ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 290 and annex II.

between the Commission and other bodies, such as the codification bodies in Africa, Asia, Europe and Latin America and the Caribbean. It was the view of the Working Group that the consideration of the proposals for improvement of the methods of work and procedures of the Commission should be done in the context of the preparation of a handbook. Such handbook on the methods of work and procedures of the Commission would be an official document, with the proviso that some elements could be kept as an informal document of the Commission. The official document would be aimed at enhancing transparency and providing greater understanding to States and other observers of the Commission of its internal working methods and procedures. During the session, the Working Group considered a draft outline for such handbook, prepared by the Secretariat, and recommended that the Commission request the preparation of draft sections by the Secretariat to serve as the basis for such handbook, including elements from the proposals for improvement made by the members in the last quinquennium.

430. The Commission requests the Secretariat to prepare draft sections of a handbook on the methods of work and procedures of the Commission, containing relevant material drawn from the *Work of the International Law Commission*, vol. I, and the reports of the Commission addressing methods of work from 1996 and 2011, as well as proposals for improvement made by members in the previous quinquennium, to be considered by the Working Group throughout the present quinquennium. The Secretariat prepared initial drafts of one of the chapters of the handbook, which were then presented to members for their comments and input. It is expected that, depending on the amount of time allocated to the Working Group meetings next year, the above-mentioned work will continue. The hope is to advance the work on the handbook, possibly alongside other elements, such as the consideration of the nomenclature and forms of output by the Commission, which topic had been extensively discussed in the last quinquennium with the idea of adopting a recommendation on that issue for sharing with States. The importance of allocating more time for the Working Group to accomplish its ambitious mandate, already brought to the attention of States in the Commission's 2023 report to the General Assembly, was also emphasized. It was recalled, in this regard, that time constraints had partly led to the inability of the Working Group to submit a substantive report in the previous quinquennium.

3. Consideration of General Assembly resolution 78/112 of 7 December 2023 on the rule of law at the national and international levels

431. The General Assembly, in its resolution 78/112 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 report²⁸⁸ remain relevant and reiterates the comments made at its previous sessions.²⁸⁹

²⁸⁸ *Yearbook ... 2008*, vol. II (Part Two), pp. 146–147.

²⁸⁹ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231; *Yearbook ... 2010*, vol. II (Part Two), pp. 202–204, paras. 390–393; *Yearbook ... 2011*, vol. II (Part Two), p. 178, paras. 392–398; *Yearbook ... 2012*, vol. II (Part Two), p. 87, paras. 274–279; *Yearbook ... 2013*, vol. II (Part Two), p. 79, paras. 171–179; *Yearbook ... 2014*, vol. II (Part Two) and Corr.1, p. 165, paras. 273–280; *Yearbook ... 2015*, vol. II (Part Two), p. 85, paras. 288–295; *Yearbook ... 2016*, vol. II (Part Two), pp. 227–228, paras. 314–322; *Yearbook ... 2017*, vol. II (Part Two), pp. 149–150, paras. 269–278; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, paras. 372–380; *ibid.*, *Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 293–301; *ibid.*, *Seventy-sixth Session, Supplement No. 10 (A/76/10)*, paras. 304–312; and *ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*, paras. 258–269; and *ibid.*, *Seventy-eighth Session, Supplement No. 10 (A/78/10)*, paras. 262–274.

432. 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.

433. 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.

434. 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.²⁹⁰

435. 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)",²⁹¹ 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.²⁹²

436. 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.

437. The Commission notes that technological innovations may both pose challenges and provide opportunities for international law. For example, as evidenced by the work on the topic of prevention and repression of piracy and armed robbery at sea, which was considered in the present session, technology has changed the way in which these crimes are carried out. The Commission in its debate considered current and emerging technologies and the role that they may play in both combating piracy and armed robbery at sea, as well as facilitating the international cooperation essential to ensuring justice and access to justice for those affected by these crimes. The Commission is consistently mindful of technological challenges faced by the various nations of the world and works to ensure that the outcomes of Commission topics are sufficiently inclusive and practical to be of greatest possible value now and in the future. Accordingly, the Commission wishes to reiterate the great value of input from States and international organizations, particularly on how they are using

²⁹⁰ General Assembly resolution 67/1 of 24 September 2012 on the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, para. 41.

²⁹¹ Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, [S/2013/341](#), para. 70.

²⁹² General Assembly resolution 77/276 of 29 March 2023, entitled, "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of Climate Change". See International Tribunal for the Law of the Sea, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law, 12 December 2022, and *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. See also Inter-American Court of Human Rights, Request for an advisory opinion on the climate emergency and human rights submitted by Chile and Colombia, 9 January 2023.

technologies to improve access to justice for all within their own States and within their international partnerships. The Commission stressed the importance of its website to disseminate its work.²⁹³ The Commission pays due regard to issues directly linked to technological advances, such as those related to artificial intelligence. The Commission is of the opinion that, when new technologies are placed at the service of the law enshrined in multilateral treaties, the rule of law benefits.

438. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,²⁹⁴ 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.

439. The Commission will give its full attention to the subtopic of the seventy-ninth session of the General Assembly on “The full, equal and equitable participation at all levels in the international legal system”.²⁹⁵ Technological innovations may facilitate such participation. Moreover, the Commission considers obtaining broadest possible input on State practice to be essential to its work. It thus encourages active participation of States in providing both information and comments in this regard.

440. In keeping with its long-standing vocation, the Commission will continue to anchor 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.²⁹⁶

441. In the course of the present session, the Commission continues to make its contribution to the promotion of the rule of law, including by working on the topics in the programme of work for the present session: “Immunity of State officials from foreign criminal jurisdiction”; “Succession of States in respect of State responsibility”; “Sea-level rise in relation to international law”; “Settlement of disputes to which international organizations are parties”; “Prevention and repression of piracy and armed robbery at sea”; “Subsidiary means for the determination of rules of international law”; and “Non-legally binding international agreements”.

442. The Commission reiterates its commitment to the promotion of the rule of law in all of its activities.

4. Commemoration of the seventy-fifth anniversary of the International Law Commission

443. The Commission, at its seventy-fourth session (2023), recommended that anniversary events be held during its seventy-fifth session, in 2024. The General Assembly took note with appreciation of these recommendations.²⁹⁷

444. Due to the liquidity crisis facing the United Nations, the Commission’s session, as approved by General Assembly resolution 78/108, was reduced from 12 to 10 weeks. Therefore, the commemoration of the seventy-fifth anniversary of the Commission was held in a reduced format, with an event organized with the generous assistance of the Geneva Graduate Institute of International and Development Studies and the Federal Department of Foreign Affairs of Switzerland on 24 May 2024.²⁹⁸

²⁹³ See section 10, below, and <https://legal.un.org/ilc/>.

²⁹⁴ General Assembly resolution 78/112 on the rule of law at the national and international levels, paras. 2 and 19.

²⁹⁵ *Ibid.*, para. 24.

²⁹⁶ See, more specifically, *Yearbook ... 2015*, vol. II (Part Two), para. 294.

²⁹⁷ General Assembly resolution 78/108 of 7 December 2023.

²⁹⁸ For the programme and further information on the event, see: <https://legal.un.org/ilc/sessions/75/index.shtml#a8>.

445. The commemorative event in Geneva was enriched by other events, in which the members of the Commission and representatives of States, international organizations and academic institutions participated. Such events included: a commemorative seminar organized by the Rashtriya Raksha University in India with the generous assistance of the Ministry of External Affairs of India on 29 February and 1 March 2024, in which several members of the Commission, senior officials from the Codification Division of the United Nations Office of Legal Affairs, legal advisers and officials from various countries, including the Asian-African Legal Consultative Organization, participated; and a conference entitled “Unlocking opportunities: UN Convention on the Law of the Sea and dry port development in landlocked developing countries” organized by the Ministry of Foreign Affairs of Mongolia held on 25 and 26 March 2024.

5. Honoraria

446. 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.²⁹⁹ 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

447. The Commission underscored once more the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission 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. 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

²⁹⁹ 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; and *ibid.*, *Seventy-eight Session, Supplement No. 10 (A/78/10)*, para. 277.

Assembly.³⁰⁰ The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages, ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission 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.

448. 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 United Nations.

449. The Commission recognizes the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.³⁰¹ 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. The Commission expressed its appreciation for the issuance of the tenth edition in English of *The Work of the International Law Commission* in Arabic, Chinese, French, Russian and Spanish this year, which is a vital tool in the Commission's work.

450. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English 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. 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 was working 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.

451. The Commission expressed its gratitude to all Services involved in the processing of documentation, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work. The work done by all Services was all the more appreciated under the current conditions.

452. 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

³⁰⁰ 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.

³⁰¹ See *Yearbook ... 2007*, vol. II (Part Two), paras. 387–395. See also *Yearbook ... 2013*, vol. II (Part Two), para. 185.

languages of the United Nations, which had been emphasized in General Assembly resolution 76/268 of 10 June 2022.³⁰²

453. The Commission expressed its gratitude for the effective research support services, including the online information package and multilingual bibliographies, prepared by the United Nations Library in Geneva especially for the Commission and expressed its satisfaction for the support provided by the Library despite the measures put in place at the United Nations Office at Geneva due to the liquidity crisis of the United Nations in 2024.

454. The 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, as well as the importance of providing appropriate means to the Library to implement its mandate and maintain its collections and services. The Commission expressed appreciation for the efforts made by the administration of the United Nations Office at Geneva to arrange for a partial return to the Library for part of the session of the Commission, following feedback received from members.

455. The Commission noted the commitment of the Director-General of the United Nations Office at Geneva to ensure that Library spaces and services will be available in 2025 for the entirety of its seventy-sixth session ahead of renovations planned in the Library and Archives building under the Strategic Heritage Plan.

456. Regarding the continuing evolution of the United Nations Library and Archives in Geneva, the Commission supported the ongoing development of the capacity of the Library and Archives to act as a centre for research with focus on international law and multilateralism. In this context, the Commission highlighted the need for diversity of resources and multilingualism, as well as the value of the Library, not only in supporting directly the work of the Commission, but also as a resource for researchers and current and future international law researchers and practitioners.

7. *Yearbook of the International Law Commission*

457. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 78/108, 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.

458. The Commission recommends that the General Assembly, as in its resolution 78/108, express its satisfaction with the remarkable progress achieved in recent years in catching up with the backlog of the *Yearbook of the International Law Commission* in all six languages, and welcome the efforts made by the Division of Conference Management of the United Nations Office at Geneva, especially its Editing Section, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

³⁰² 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 and 78/108.

8. Trust fund on assistance to Special Rapporteurs of the International Law Commission, established by General Assembly resolution 77/103, and matters ancillary thereto

459. In resolution 78/108 of 7 December 2023, 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 of 7 December 2022, 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. Following the establishment of the trust fund, in 2023 contributions were received from Austria (\$3,341.70), the Czech Republic (\$2,201.29) and Cyprus (\$5,500), and, in 2024, Finland (\$21,574.97) and the United Kingdom of Great Britain and Northern Ireland (\$3,094.50). The fund balance on 30 June 2024 was \$35,712.46.

9. Assistance of the Codification Division

460. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs, and Co-Chairs of the Study Group, and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for the preparation of memorandums on settlement of disputes to which international organizations are parties (A/CN.4/764); subsidiary means for the determination of rules of international law (A/CN.4/765); prevention and repression of piracy and armed robbery at sea – writings relevant to the definitions of piracy and of armed robbery at sea (A/CN.4/767); sea-level rise in relation to international law – elements in the previous work of the International Law Commission that could be particularly relevant to the topic (A/CN.4/768); and the compilations of comments and observations received from Governments on immunity of State officials from foreign criminal jurisdiction (A/CN.4/771 and Add.1 and Add.2). 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.

10. Websites

461. The Commission expressed its appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.³⁰³ The Commission reiterated that the website and other websites maintained by the Codification Division³⁰⁴ 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 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 recordings of the plenary meetings of the Commission. The Commission expressed 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.

³⁰³ <http://legal.un.org/ilc>.

³⁰⁴ In general, available from: <http://legal.un.org/cod/>.

11. Webcast

462. The Commission expressed 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 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.

12. United Nations Audiovisual Library of International Law

463. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law³⁰⁵ 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 expressed concern about the impact of the liquidity crisis on the functioning of the United Nations Audiovisual Library of International Law, in particular, delays to the addition of new content.

13. Consideration of the convening in the present quinquennium of the first part of the seventy-seventh session of the Commission in New York

464. Further to paragraph 281 of the report of its seventy-third session (2022) and paragraph 291 of the report of its seventy-fourth session (2023), the Commission reiterated its recommendation to hold the first part of the seventy-seventh session (2026) 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. The Commission requests the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate the holding of that part of the session in New York. Particular attention was drawn to the need to ensure access to 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 also emphasized.

14. Date and place of the seventy-sixth session of the Commission

465. Owing to the impact of the liquidity crisis of the United Nations on the activities of the Commission at the seventy-fifth session, and taking into account the volume of work anticipated for the seventy-sixth session, including two topics at the second reading stage (“Immunity of State officials from foreign criminal jurisdiction” and “General principles of law”) and the final report on the topic “Sea-level rise in relation to international law”,³⁰⁶ the Commission stressed the importance of having at a minimum a 12-week session for its seventy-sixth session.

466. The Commission decided that its seventy-sixth session would be held in Geneva from 14 April to 30 May and from 30 June to 31 July 2025.

³⁰⁵ http://legal.un.org/avl/intro/welcome_avl.html.

³⁰⁶ The following topics in the Commission’s programme of work are at the first reading stage: “Settlement of disputes to which international organizations are parties” and “Subsidiary means for the determination of rules of international law”, as well as “Prevention and repression of piracy and armed robbery at sea” and “Non-legally binding international agreements”.

D. Cooperation with other bodies

467. At the 3685th meeting, on 17 July 2024, Judge Nawaf Salam, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.³⁰⁷ An exchange of views followed.

468. Due to the liquidity crisis facing the United Nations, the Commission's session, as approved by General Assembly resolution 78/108, was reduced from 12 to 10 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.

469. On 11 July 2024, 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. Welcoming remarks were made by Mr. Gilles Carbonnier, Vice-President of ICRC, and opening remarks by Ms. Cordula Droege, Chief Legal Officer and Head of the Legal Division, ICRC, and Mr. Marcelo Vázquez-Bermúdez, Chair of the Commission. A presentation was made on the work of the Commission on the topics "Immunity of State officials from foreign criminal jurisdiction" by Mr. Claudio Grossman Guiloff and "Non-legally binding international agreements" by Mr. Mathias Forteau, Special Rapporteurs on the respective topics. A presentation on "Non-binding documents in international humanitarian law – EWIPA Declaration, Paris Commitments to Protect Children from Unlawful Recruitment or Use and the Safe Schools Declaration, Montreux Document" was made by Ms. Abby Zeith, Ms. Vanessa Murphy and Mr. Matt Pollard, Legal Advisers, ICRC. The presentations were followed by an exchange of views. Concluding remarks were made by Ms. Droege.

E. Representation at the seventy-ninth session of the General Assembly

470. The Commission decided that it should be represented at the seventy-ninth session of the General Assembly by its Chair, Mr. Marcelo Vázquez-Bermúdez.

F. International Law Seminar

471. Pursuant to General Assembly resolution 78/108 of 7 December 2023, the fifty-eighth session of the International Law Seminar was held at the Palais des Nations from 1 to 19 July 2024, during the present session of the Commission. The Seminar is intended for young jurists specializing in international law, and young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their countries.

472. Twenty-seven participants of different nationalities, from all regional groups, took part in the session.³⁰⁸ The participants attended plenary meetings of the

³⁰⁷ The statement is recorded in the summary record of that meeting.

³⁰⁸ The following persons participated in the Seminar: Ms. Rashida Abbas (Pakistan); Mr. Oscar Orlando Casallas Mendez (Colombia); Mr. Carlos Antonio Cruz Carrillo (Mexico); Mr. Abel Mbaihouaroua Djetourané (Chad); Ms. Tuulaikhuu Enkhee (Mongolia); Ms. Ligia Lorena Flores Soto (El Salvador); Ms. Karima Ftiss (Tunisia); Mr. Yusuke Hatakeyama (Japan); Mr. Sanitya Kalika (Nepal); Mr. Matúš Košuth (Slovakia); Ms. Alis Lungu (Romania); Mr. Cham Riphath Prince Matsiona Kinkoulou (Congo (the)); Ms. Thirusa Naidoo (South Africa); Ms. Elizabeth Nwarueze (Nigeria); Ms. Miora Tanteliniaina Randrianirina (Madagascar); Mr. Juan Manuel Ruiz Ballester (Argentina); Ms. Paulina Rundel (Germany); Ms. Sarra Sefrioui (Morocco); Mr. Luis Alberto Serrano Molinos (Chile); Ms. Mariyam Shaany (Maldives); Ms.

Commission and specially arranged lectures, and participated in working groups on specific topics.

473. Mr. Marcelo Vázquez-Bermúdez, Chair of the Commission, and Mr. Huw Llewellyn, Director of the Codification Division, opened the Seminar. The Legal Office of the United Nations Office at Geneva was responsible for the administration, organization and conduct of the Seminar. Mr. Vittorio Mainetti, international law expert and consultant, acted as Coordinator, assisted by Ms. Letícia Machado Haertel and Ms. Yitong Sun, legal assistants.

474. Mr. Huw Llewellyn delivered a lecture entitled “The UN and the Progressive Development of International Law and its Codification”, providing participants with a comprehensive overview of the work of the International Law Commission.

475. The following lectures were given by members of the Commission: “Immunity of State officials from foreign criminal jurisdiction” by Mr. Claudio Grossman Guiloff; “Prevention and repression of piracy and armed robbery at sea” by Mr. Keun-Gwan Lee; “The ILC as seen from the outside” by Mr. Giuseppe Nesi; “Subsidiary means for the determination of rules of international law” by Mr. Charles Chernor Jalloh; “Non-binding agreements” by Mr. Mathias Forteau; “Settlement of disputes to which international organizations are parties” by Mr. August Reinisch. In addition, a round table was organized with the three Co-Chairs of the Study Group on the topic “Sea-level rise in relation to international law”, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

476. Participants attended a conference organized in cooperation with the Geneva Water Hub on “Water, peace, and international law”, where speakers including Ms. Laurence Boisson de Chazournes, Professor at the University of Geneva, Mr. Mark Zeitoun, Professor at the Geneva Graduate Institute of International and Development Studies and Director of the Geneva Water Hub, Ms. Sonja Koeppel, Secretary of the Water Convention, Mr. Mutoy Mubiala, Professor at the University of Kinshasa, and Ms. Mara Tignino, Senior Lecturer at the University of Geneva, shared their insights on various aspects of water law.

477. Participants also visited the World Trade Organization (WTO) and attended presentations by Ms. Gabrielle Marceau, Senior Counsellor at the Research Division, and Mr. Juan Pablo Moya Hoyos, Dispute Settlement Lawyer at WTO.

478. Participants attended a workshop hosted by the University of Geneva on the topic “The ITLOS Advisory Opinion on Climate Change and International Law”, with the participation of Mr. Frédéric Bernard, Professor and Director of the Department of Public Law of the University of Geneva, Mr. Lucius Caflisch, honorary professor of international law at the Geneva Graduate Institute of International and Development Studies, former Judge of the European Court of Human Rights and former member of the International Law Commission, Ms. Mara Tignino, Senior Lecturer at the University of Geneva, Mr. Vittorio Mainetti, Adjunct Professor of International Law at the University of Milan and Coordinator of the International Law Seminar, and Mr. Rolf Einar Fife, Mr. Mario Oyarzábal and Ms. Penelope Ridings, members of the Commission.

479. A workshop was organized to facilitate participant exchanges, where 14 persons presented on a diverse range of international law issues.

480. Two working groups, on “Immunity of State officials from foreign criminal jurisdiction” and “Prevention and repression of piracy and armed robbery at sea” were organized and participants were assigned to one of them. Two members of the

Shelly-Ann Thompson (Jamaica); Ms. Akshita Tiwary (India); Ms. Filomena Medea Tulli (Italy); Mr. Nattachaat Urairong (Thailand); Ms. Julia Vassileva (Bulgaria); Mr. Kiswendsida Marius Zongo (Burkina Faso); Mr. Marek Zukal (Czech Republic). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 3 May 2024 and selected 27 candidates from 221 applications.

Commission, Mr. Claudio Grossman Guiloff and Mr. Keun-Gwan Lee, respectively, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

481. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Hôtel de Ville. Seminar participants visited the Alabama room and the premises of the cantonal authorities, guided by the Protocol Service of the Republic and Canton of Geneva.

482. The first Vice-Chair of the Commission, the Coordinator of the International Law Seminar and Ms. Elizabeth Nwarueze (Nigeria), on behalf of participants attending the Seminar, addressed the Commission during the ceremony of diplomas. Each participant was presented with a diploma.

483. The Commission noted with concern 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 from States that the Seminar has now secured on a regular basis. However, the Seminar must nonetheless reflect on ways and means to broaden its financial base in the future. In 2024, 17 fellowships were granted (13 for travel and subsistence, 4 for subsistence only).

484. Since its inception in 1965, 1,334 participants, representing 178 nationalities, have taken part in the Seminar. Some 814 participants have received a fellowship.

485. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2025 with as broad a participation as possible, and with an adequate geographical distribution.

Annexes

Annex I

Compensation for the damage caused by internationally wrongful acts

by Mārtiņš Pāparinskis*

Introduction

1. Compensation under the international law of responsibility, particularly State responsibility, is a topic of considerable pedigree in public international law.¹ The traditional position on compensation was set out in *Factory at Chorzów* by the Permanent Court of International Justice, as part of the discussion of the principle of reparation:

“payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”²

At the 1930 League of Nations Conference for the Codification of International Law held in The Hague, States expressed general approval of the idea of reparation but

* The author wishes to thank his research assistants Marcie Rotblatt, Luis Felipe Viveros and Yanwen Zhang for their help in preparing the present proposal.

¹ *Alabama claims of the United States against Great Britain, Award of 14 September 1872*, UNRIIAA, vol. XXIX, pp. 125–134, at pp. 133–134; and Institute of International Law, “Responsabilité internationale des États à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers”, *Yearbook*, vol. 33-III (1927), pp. 330 *et seq.*, at pp. 333–334, arts. 10–11 (and pp. 81–168, and *ibid.*, vol. 33-I, pp. 455–562). See also G. Salviooli, “La responsabilité des États et la fixation des dommages et intérêts par les tribunaux internationaux”, *Collected Courses of The Hague Academy of International Law*, vol. 28 (1929-III), pp. 231 *et seq.*; W. Buder, *Die Lehre vom völkerrechtlichen Schadensersatz*, Begach, 1932; A. Roth, *Schadensersatz für Verletzungen Privater bei völkerrechtlichen Delikten*, Heymann, 1934; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (PhD thesis, Université de Genève), Liège, G. Thone, 1938; J. Personnaz, *La réparation du préjudice en droit international public*, Paris, Recueil Sirey, 1939; and M. M. Whiteman, *Damages in International Law*, vols. I–II, Washington D.C., United States Government Printing Office, 1937, and vol. III, 1943.

² *Factory at Chorzów, Judgment No. 13 (Claim for Indemnity) (Merits)*, P.C.I.J., Series A, No. 17 (1928), p. 47.

mostly without entering into the detail of compensation,³ which in pre-Second World War practice was rather addressed in decisions of international arbitral tribunals.⁴

2. The contribution of decisions of international courts and tribunals to the topic of compensation was more limited in the post-War international legal order in the second half of the last century. By way of example, the 1949 judgment in the first contentious case of the International Court of Justice, the *Corfu Channel case*, remained its sole award of compensation in the twentieth century.⁵ When the issue of compensation was raised in some form in later cases, States variously did not request the Court to determine the quantum of damages due,⁶ failed to provide detailed evidence⁷ or, in the one case where a thorough legal and factual argument was presented,⁸ discontinued the proceedings⁹ (and even the *Corfu Channel case* provides virtually no guidance on the judicial methodology of determination of compensation).¹⁰ When the Commission turned to compensation in the 1990s, it could therefore draw upon only “relatively few recent reasoned awards dealing with the assessment of material damage as between State and State”.¹¹

3. The Commission addressed rules on compensation in its draft articles on the responsibility of States for internationally wrongful acts,¹² recognized to be reflective of customary international law.¹³ In article 36 of the draft articles, compensation is

³ See the text of articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), *Yearbook ... 1956*, vol. II, document A/CN.4/96, Annex 3, p. 225, art. 3 (“The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation”). See also basis of discussion No. 29 of the Bases of Discussion Drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) in *ibid.*, Annex 2, pp. 223–225, at p. 225; League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Ser. L.o.N. P. 129.V.3), document C.75.M.69.1929.V), pp. 75 *et seq.*, at pp. 146–151; and League of Nations, *Acts of the Conference for the Codification of International Law held at The Hague from March 13th to April 12th, 1930*, vol. IV: *Minutes of the Third Committee* (document C.351(c).M.145(c).1930.V.), pp. 129–142.

⁴ See, generally, Whiteman (footnote 1 above).

⁵ *Corfu Channel case, Compensation, Judgment of 15 December 1949, I.C.J. Reports 1949*, p. 244.

⁶ See *Gabčíkovo-Nagymaros Project (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81, para. 152.

⁷ See *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 204–205, para. 76.

⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Memorial of Nicaragua of 29 March 1988*, available from the website of the International Court of Justice: www.icj-cij.org, *Cases*.

⁹ *Ibid.*, *Order of 26 September 1991, I.C.J. Reports 1991*, p. 47.

¹⁰ *Corfu Channel case* (see footnote 5 above), p. 248 (“It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions [of the United Kingdom] are well founded”), and p. 249 (“The Court considers that the figures submitted by the United Kingdom Government are reasonable and that its claim is well founded”).

¹¹ Third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 48, para. 155.

¹² See article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98 *et seq.* See also articles 31, 34 and 38–39, *ibid.*, pp. 91 *et seq.*

¹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 232–233, para. 460; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at p. 342, para. 49; *M/V “Norstar” (Panama v. Italy)*, Judgment, International Tribunal for the Law of the Sea, *ITLOS Reports 2018–2019*, p. 10, at p. 116, para. 431; and *The “Enrica Lexie” Incident (Italy v. India), PCA Case No 2015-28, Award of 21 May 2020*, Permanent Court of Arbitration, p. 305, para. 1087, note 1934.

expressed in terms of a general principle, rather than detailed criteria (similarly to the approach taken earlier in the first reading):¹⁴

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.¹⁵

While the drafting of article 36 was prudent in light of the available materials, and the provision has to be read alongside its very thorough commentary,¹⁶ some have suggested since then that the Commission did not go far enough in addressing the “many and complex” “real-life issues”.¹⁷ The Secretariat noted in a somewhat similar vein in its 2016 Working Paper on the long-term programme of work that, “[w]hile States often prefer compensation to other forms of reparation, the 2001 articles provide only limited guidance on the quantification of compensation”.¹⁸ Certain decisions of international tribunals seem to be in line with the concerns about insufficient detail of the Commission’s work on the topic, for example when they turn instead to domestic tort law scholarship to articulate the international rules on compensation.¹⁹

4. There is now significantly more relevant practice than when the Commission adopted the draft articles on the responsibility of States for internationally wrongful acts in 2001. Compensation is addressed in a rich body of reasoned decisions by inter-State courts and tribunals as well as bodies considering claims brought by individuals and other non-State entities.²⁰ The International Court of Justice has dealt with compensation in three cases relating to varied fields of international law: in *Ahmadou Sadio Diallo*, the field of human rights;²¹ in *Certain Activities Carried out by Nicaragua in the Border Area*, regarding environmental damage;²² and in *Armed Activities on the Territory of the Congo*, concerning the use of force, humanitarian law, human rights, and environmental and macroeconomic damage²³ (and yet further

¹⁴ See the third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 50–51, paras 158–160. See also the second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, chap. II, pp. 8 *et seq.*; and article 44 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63.

¹⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98 *et seq.*, art. 36. The title of the topic is based on paragraph 1 of draft article 36.

¹⁶ *Ibid.*, pp. 98–105.

¹⁷ R. Higgins, “Overview of Part Two of the articles on State responsibility”, in J. Crawford, *et al.* (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 537–544, at p. 539. See also D. Shelton, “Righting wrongs: reparations in the articles on State responsibility”, *American Journal of International Law*, vol. 96, No. 4 (October 2002), pp. 833–856; and C. Gray, “Remedies”, in C. P. R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, pp. 871, 873 and 881.

¹⁸ Working Paper prepared by the Secretariat on the long-term programme of work: possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments (A/CN.4/679/Add.1), para. 36.

¹⁹ See *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014*, Iran–United States Claims Tribunal, pp. 23–25, paras. 51–52, and p. 37–38, para. 93; and *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020*, Iran–United States Claims Tribunal, pp. 459–460, paras. 1793 and 1795.

²⁰ United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts*, 2nd ed. (United Nations publication, Sales No.: E.23V.36), 2023, pp. 396–414.

²¹ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above).

²² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15.

²³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13.

decisions may be rendered in subsequent phases of proceedings of currently pending cases).²⁴ In addition, reasoned decisions on compensation have been rendered since 2001 in inter-State cases on law of the sea,²⁵ human rights,²⁶ and by the Iran–United States Claims Tribunal²⁷ and the Eritrea–Ethiopia Claims Commission,²⁸ as well as in cases brought by individuals and other non-State entities before African, American and European regional human rights courts and investor–State arbitral tribunals.²⁹ Compensation in the field of human rights has also been addressed in the works of international organizations³⁰ and expert bodies established by States and international organizations.³¹ Relevant practice may also be provided by registers of damage, particularly when established by the United Nations.³²

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- ²⁴ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, para. 231, available from the website of the International Court of Justice, www.icj-cij.org, Cases. See also the recently instituted proceedings claiming compensation, discussed in footnote 87 below.
- ²⁵ See *The M/V “Virginia G” Case (Panama/Guinea-Bissau)*, Case No. 19, Judgment of 14 April 2014, International Tribunal for the Law of the Sea, *ITLOS Reports 2014*; *Arctic Sunrise, Award on Compensation of 10 July 2017*, UNRIAA, vol. XXXII, pp. 183–353, at p. 317; *M/V “Norstar” (Panama v. Italy)*, Judgment (footnote 13 above); *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Case No. 2014-07, Award on Reparation of 18 December 2019, Permanent Court of Arbitration, *Oxford Reports on International Courts of General Jurisdiction*, p. 535. See also the United Nations Convention on the Law of the Sea (signed at Montego Bay on 10 December 1982, entered into force on 16 November 1994), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, at p. 494, art. 235, para. 3; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, International Tribunal for the Law of the Sea, *ITLOS Reports 2011*, p. 10, at p. 31, para. 67, and, by analogy, *“Hoshinmaru” (Japan v. Russian Federation)*, Prompt Release, Judgment, International Tribunal for the Law of the Sea, *ITLOS Reports 2005–2007*, p. 18, at p. 45, para. 82 (“the reasonableness of the bond”).
- ²⁶ *Cyprus v. Turkey*, Application no. 25781/94, Judgment of 12 May 2014 on Just Satisfaction, Grand Chamber, European Court of Human Rights; *Case of Georgia v. Russia (I)*, Application no. 13255/07, Judgment of 31 January 2019 on Just Satisfaction, Grand Chamber, European Court of Human Rights; and *Case of Georgia v. Russia (II)*, Application no. 38263/08, Judgment of 28 April 2023 on Just Satisfaction, Grand Chamber, European Court of Human Rights.
- ²⁷ *The Islamic Republic of Iran v. the United States of America*, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014 (see footnote 19 above); and *The Islamic Republic of Iran v. the United States of America*, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020 (see footnote 19 above).
- ²⁸ *Final Award (Eritrea’s Damages Claims)*, 17 August 2009, Eritrea–Ethiopia Claims Commission, UNRIAA, vol. XXVI, pp. 505–630; and *Final Award (Ethiopia’s Damages Claims)*, 17 August 2009, *ibid.*, pp. 631–770.
- ²⁹ See, generally, United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414.
- ³⁰ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, para. 20.
- ³¹ Human Rights Committee, General comment No. 31 [80]: the nature of the general legal obligation imposed on States parties to the Covenant, adopted on 29 March 2004, Report of the Human Rights Committee, vol. I, *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 40 (A/59/40)*, annex III, p. 178, para. 16; Committee against Torture, General comment No. 3 (2012): implementation of article 14 by States parties, adopted on 13 December 2012, Report of the Committee against Torture, vol. I, *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 44 (A/68/44)*, annex X, p. 255, paras. 9–10; Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), pp. 12–13, para. 41, and p. 15, para. 53; and Committee on the Elimination of Discrimination against Women, General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration (CEDAW/C/GC/38), p. 10, para. 43, and pp. 20–21, paras. 101 and 108.
- ³² See Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, General Assembly resolution ES-10/17 of 15 December 2006; and most recently Progress report of the Board of the United Nations Register of Damage Caused by

5. The argument for why the topic of compensation fits the programme of work of the Commission is twofold. First, it would enable the Commission to address compensation in terms that are general in scope and also sufficiently detailed in substance to reflect its importance in the law of responsibility.³³ The argument would follow the Commission's work on State responsibility in particular³⁴ (addressing compensation in terms of secondary rules regarding one form of reparation for the injury caused by the internationally wrongful acts),³⁵ while moving in the focus and depth beyond what was possible in the earlier, broader engagement with responsibility.³⁶ An analogy in the past work of the Commission for providing legal granularity to accepted rules of State responsibility is the 2006 draft articles on diplomatic protection, which were also intended to "give content to [a] provision" of the draft articles on the responsibility of States for internationally wrongful acts.³⁷ Second, the topic would be approached with a practical orientation, building on the increase and diversification of decisions of international courts and tribunals concerning compensation since the adoption of the draft articles on the responsibility of States for internationally wrongful acts, noted in the previous paragraph, that have provided further material to make the topic sufficiently feasible and concrete for codification and progressive development.³⁸ In both respects, the proposal takes as the starting point the position expressed in the 2016 Working Paper, the strength of which has only been further increased by the developments of the intervening eight years.³⁹

6. The next chapters will consider in turn the scope of the proposed topic and issues to be addressed (chapter I), how the proposed topic fits the criteria for selecting new topics (chapter II), the past work of the Commission on the proposed topic (chapter III) and the possible form of output of the Commission (chapter IV). A select bibliography is also provided.

the Construction of the Wall in the Occupied Palestinian Territory, enclosed in annex to the Letter dated 26 May 2023 from the Secretary-General addressed to the President of the General Assembly (A/ES-10/949). See also Furtherance of remedy and reparation for aggression against Ukraine, General Assembly resolution ES-11/5 of 14 November 2022, para. 4; and Council of Europe, Committee of Ministers, Resolution establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine, adopted on 12 May 2023, (CM/Res(2023)3). On the practice of bodies established by the United Nations, in particular the United Nations Compensation Commission, see the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 101, paragraph (14) of the commentary to article 36, and p. 108, paragraph (4) of the commentary to article 38.

³³ See the Working paper prepared by the Secretariat (footnote 18 above), paras. 36 and 38.

³⁴ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 31, paragraph (1) of the general commentary; and the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 27, paragraph (2) of the commentary to article 1.

³⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, art. 31, p. 91, art. 34, p. 95, and art. 36, p. 98.

³⁶ *Ibid.*, art. 36, p. 98; and article 36 of the draft articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), p. 79.

³⁷ Paragraph (2) of the general commentary to the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 26 (referring to article 44 of the 2001 draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 120).

³⁸ See the Working Paper prepared by the Secretariat (footnote 18 above), para. 38.

³⁹ *Ibid.*, paras. 36 and 38.

I. The scope of the proposed topic and issues to be addressed

7. The topic would be firmly situated within the Commission's work on responsibility and follow its conceptual framework and analytical distinctions, particularly in two respects. First, it will take as a given the distinction between primary and secondary rules in general, and in particular between, on the one hand, compensation for conduct which is internationally wrongful and, on the other hand, where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited under international law ("liability").⁴⁰ Second, the new legal relations that arise from the commission by a State of an internationally wrongful act, including in terms of reparation for any injury done, will be assumed to have a general character and not vary with the nature of the underlying primary rule in question (in the absence of *lex specialis*).⁴¹

8. This chapter considers in turn the title of the proposed topic, its scope and identification and application of the rules of international law on compensation. The distinction between identification and application replicates the approach of the recent judgments of the International Court of Justice on compensation, which pose the legal question in terms of general principles of, or consistent with, the draft articles on the responsibility of States for internationally wrongful acts,⁴² and answer it by reference to diverse authorities that constitute the best examples in the particular field of international law.⁴³

A. Title of the proposed topic

9. The title of the proposed topic is "Compensation for the damage caused by internationally wrongful acts". The formulation takes as the starting point the suggested title in the 2016 Working Paper ("Compensation under international law"),⁴⁴ and adjusts it in line with article 36, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby").⁴⁵ The title situates the topic within the conceptual framework of the Commission's past work on international responsibility, with a clear focus on issues addressed in article 36. The title emphasizes the wrongful act and not the type of

⁴⁰ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 31–32, para. (4) (c) of the general commentary. See also the draft articles on prevention of transboundary harm from hazardous activities, *ibid.*, p. 148, paras. (1)–(2) of the general commentary, and p. 150, para. (6) of the commentary to article 1; paragraph (6) of the commentary to principle 1 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), pp. 62–63; and A. Boyle, "Liability for injurious consequences of acts not prohibited by international law", in J. Crawford, *et al.* (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, p. 95.

⁴¹ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 31, paragraph (3) (f) of the general commentary, and p. 140, paragraph (4) of the commentary to article 55.

⁴² See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 331, para. 13; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), pp. 25–28, paras. 29–35 and 41; and *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 50, paras. 99–102.

⁴³ See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 331, para. 13, p. 334, para. 24, p. 337, para. 33, pp. 339–340, para. 40, and p. 342, para. 49; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 31, para. 52, and, generally, Part III, pp. 28 *et seq.*; and *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 137, para. 407, and, generally, Part III, pp. 58 *et seq.*

⁴⁴ Working Paper prepared by the Secretariat (see footnote 18 above), sect. II.E.

⁴⁵ See paragraph 1 of article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 98.

entity responsible for it so as to permit engagement with the responsibility of States as well as international organizations.⁴⁶ The focus on the wrongful act also reflects the exclusion from the scope of the topic of compensation required by primary rules in the absence of internationally wrongful acts (“liability”).⁴⁷

B. Scope of the proposed topic

10. The topic focuses primarily on article 36 of the draft articles on the responsibility of States for internationally wrongful acts and also addresses other issues necessarily implicated by identification of rules on compensation and commonly involved with their application in practice. The topic covers compensation for damage caused by the internationally wrongful acts regardless of the origin and character of the applicable primary rules;⁴⁸ in that sense, it differs from the treatment of compensation in relation to breach of specific primary rules.⁴⁹ It also considers only compensation and is without prejudice to the other consequences of an internationally wrongful act such as other forms of reparation (restitution and satisfaction), cessation, and guarantees of non-repetition.⁵⁰ The focus of the topic is fully in line with and does not undermine the customary and treaty obligations of full reparation,⁵¹ providing for various forms of reparation of which compensation is but one.⁵² The topic does not address issues in Part One of the draft articles on the responsibility of States for internationally wrongful acts (“The internationally wrongful act of a State”), such as international obligations in force for a State or compensation for any material loss caused by the act in relation to which a circumstance precluding wrongfulness has been invoked.⁵³ Nor does it address issues in Part Three of the draft articles (“The implementation of the international

⁴⁶ See the discussion in paragraph 13 below.

⁴⁷ See footnote 40 above.

⁴⁸ See article 12 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 54.

⁴⁹ See article 12, paragraph 3, of the draft articles on prevention and punishment of crimes against humanity, and paragraphs (17)–(23) of the commentary to thereto, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, para. 45; C. Grossman Guiloff, “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, *ibid.*, Annex B, para. 23 (a); conclusion 19, paragraph 4, and paragraph (18) of the commentary to draft conclusion 19 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. IV, sect. E.2, para. 44; and principle 9, paragraph 1, and paragraphs (5)–(8) of the commentary to principle 9 of the draft principles on the protection of the environment in relation to armed conflicts adopted by the Commission on second reading, *ibid.*, chap. V, sect. E.2, para. 59.

⁵⁰ See articles 30, 35 and 37 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 88, 96 and 105, respectively.

⁵¹ See *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 43, para. 70.

⁵² *Ibid.*, p. 50, para. 101. See also rehabilitation, *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), separate opinion of Judge Cançado Trindade, p. 347, at pp. 377–380, paras. 81–85; and Basic Principles and Guidelines ... (footnote 30 above), para. 21.

⁵³ See articles 13 and 27 (b) of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 57 and 85, respectively. See also *CMS Gas Transmission Company v. Argentine Republic, Case No. ARB/01/08, Decision on Annulment of 25 September 2007*, International Centre for the Settlement of Investment Disputes (ICSID), paras. 146–147; and *EDF International SA et al. v. Argentine Republic, Case No. ARB/03/23, Decision on Annulment of 5 February 2016*, ICSID, para. 330.

responsibility of a State”), such as invocation of responsibility or countermeasures, or enforcement more generally.⁵⁴

11. The scope of the topic is delineated by reference to two elements: entities to which the right to compensation accrues, and entities that are obliged to provide compensation.

12. First, the topic addresses compensation owed in the inter-State setting,⁵⁵ as well as situations where the right to compensation accrues directly to any person or entity other than a State.⁵⁶ This is in line with the routine reliance on materials not limited to the inter-State setting in the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts⁵⁷ and *Ahmadou Sadio Diallo*,⁵⁸ as well as the fact that many recent decisions on the topic are rendered in cases brought by individuals and other non-State entities before regional human rights courts and investor–State arbitral tribunals.⁵⁹

13. Second, the topic addresses compensation arising under the law of responsibility of States as well as international organizations.⁶⁰ This is consistent with the identical expression of rules on compensation in the 2011 draft articles on the responsibility of international organizations⁶¹ and the possibility that further relevant materials may be provided by the Commission’s work on the settlement of disputes to which international organizations are parties.⁶² The topic would address those aspects of the law of responsibility of international organizations that do not raise issues distinct from State responsibility, and frame the inquiry so as to build upon and supplement, and not overlap with, the Commission’s work on other topics. For greater certainty, the topic would not address reparations to, or in respect of, victims, by a person convicted by an international court or tribunal such as the International Criminal Court.⁶³

⁵⁴ Plurality of responsible actors may also be relevant for the determination of content of responsibility, *Armed Activities on the Territory of the Congo* (see footnote 23 above), pp. 49–50, para. 98 (also referring to the commentary to article 47 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 124).

⁵⁵ See article 33, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts, *ibid.*, p. 94.

⁵⁶ See *ibid.*, art. 33, para. 2, and p. 95, paragraph (4) of the commentary to article 33.

⁵⁷ *Ibid.*, pp. 99–100, paragraph (6), p. 102, paragraph (19), and pp. 104–105, paragraphs (27) and (32) of the commentary to article 36, as well as pp. 99 *et seq.*, footnotes 515–516, 520–522, 524, 546–547, 549, 550, 553, 555–560, 564–566, 570, 576 and 579. See also the third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 50–51, paras. 156–158.

⁵⁸ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 331, para. 13, and declaration of Judge Greenwood, p. 391, at p. 394, para. 8.

⁵⁹ United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414. See also Grossman Guiloff (footnote 49 above), para. 20.

⁶⁰ See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 181; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

⁶¹ Except for replacing the term “State” by “international organization”: see the draft articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), p. 80, paragraph (4) of the commentary to article 36. These articles were also followed with minimal changes on other points of content of responsibility relevant for compensation, see *ibid.*, p. 77, paragraph (8) of the commentary to article 31, and p. 81, commentary to article 38 and paragraph (1) of the commentary to article 39.

⁶² See Settlement of disputes to which international organizations are parties, memorandum by the Secretariat (A/CN.4/764).

⁶³ *The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15-2074, Reparations Order of 28 February 2024*, Trial Chamber IX, International Criminal Court, paras. 56–58 and 77–87.

C. Identification of the rules of international law of compensation

14. Taking the 2016 Working Paper as the starting point, one group of issues that could be considered relates to identification and clarification of rules applicable to compensation, expressed in article 36 and other provisions related to reparation more generally. First, the conditions of applicability of compensation would be addressed, confirming that it is neither the primary nor the sole form of reparation.⁶⁴ Second, “damage” would require consideration of article 36 and article 31, paragraph 2, and discussion of material and moral damage as well as confirmation of the impermissibility of punitive damages.⁶⁵ The Commission may also address the question left open by the International Court of Justice in *Armed Activities on the Territory of the Congo*, “whether a claim for macroeconomic damage resulting from a violation of the prohibition of the use of force, or a claim for such damage more generally, is compensable under international law”.⁶⁶ Third, “caused”, in line with article 36 and article 31, paragraph 1, would call for discussion of the factors that may be relevant for application of causality, and the distinction between factual causation and legal causation, as well as the effect of mitigation of damage and concurrency of several factors or actors.⁶⁷ Fourth, the Commission may want to (re)consider another question left open in *Armed Activities on the Territory of the Congo*, “whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition”.⁶⁸ Fifth, the topic could address the relevance of equity⁶⁹ and general principles of law.⁷⁰ Sixth, the related questions of interest and contribution to injury, expressed in respectively articles 38 and 39, could also be considered, since they play an important role in the practice of determination of compensation.⁷¹ The final question relates to the broader perspective of compensation before different courts and tribunals, and has two aspects. One aspect relates to the extent, if any, that the applicable secondary rules may be affected by the character of the entity invoking responsibility, particularly

⁶⁴ Draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 91, article 31, paragraph 2, and p. 111, paragraph (5) of the general commentary to Part Two, chapter III. See also, on the choice of the form of reparation, *ibid.*, p. 119, article 43, paragraph 2 (b).

⁶⁵ *Ibid.*, p. 91, article 31, paragraph 2, and p. 99, paragraph (4) of the commentary to article 36.

⁶⁶ *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 130, para. 381, and separate opinion of Judge Robinson, p. 165, at p. 183–184, paras. 44–46.

⁶⁷ Draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 91, article 31, paragraph 1, and pp. 100–101, paragraphs (9)–(13) of the commentary to article 36; and the Working Paper prepared by the Secretariat (see footnote 18 above), para. 41. On the bearing of the law of occupation on the requisite causal nexus, see *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 44–45, para. 78, and separate opinion of Judge Yusuf, p. 145, at pp. 146 *et seq.*, section II.

⁶⁸ *Ibid.*, p. 137, para. 407, and separate opinion of Judge Yusuf, p. 154, para. 23. See also *Final Award (Eritrea’s Damages Claims)* (footnote 28 above), paras. 19–23; *Final Award (Ethiopia’s Damages Claims)* (*ibid.*), paras. 19–23; and *The Duzgit Integrity Arbitration* (footnote 25 above), dissenting opinion of Judge Kateka, paras. 24–26.

⁶⁹ See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), pp. 334–335, para. 24, and declaration of Judge Greenwood, p. 391, at pp. 393–394, paras. 5, 7 and 9; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), pp. 26–27, para. 35; and *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 51–52, para. 106, pp. 70–71, paras. 164 and 166, p. 76, para. 181, p. 79, para. 193, p. 83, para. 206, pp. 88–89, para. 225, p. 98, para. 258, and p. 127, para. 365.

⁷⁰ See the second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, pp. 10–11, paras. 27 and 29; and *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (footnote 19 above), p. 459, paras. 1793–1794, pp. 461–462, para. 1797, p. 505, para. 1946, and pp. 542–543, para. 2087.

⁷¹ P. Nevill, “Award of interest by international courts and tribunals”, *British Year Book of International Law*, vol. 78, No. 1 (2007), pp. 255–341; and D. Dreyssé, *Le comportement de la victime dans le droit de la responsabilité internationale*, Paris, Dalloz, 2021.

(certain) non-State entities. Another aspect considers the uniformity of approaches in different settings, and whether “those principles [are] capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just ... by comparison with other cases”.⁷²

D. Application of the rules of international law of compensation

15. Again taking the 2016 Working Paper as the starting point, another group of issues relate to application of the rules and the determination of quantum of compensation, with an eye to article 36, paragraph 2, and also article 38 (“Interest”). Relevant legal questions would include, first, the determination of applicable standards of compensation and the different methods to assess fair market value, including their interrelationships.⁷³ The second question is the determination of lost profits.⁷⁴ The topic could explore how decisions since 2001 have addressed the negative aspects of the rule (the general caution against claims with inherently speculative elements,⁷⁵ specifically against awarding loss of profits and interest over the same period of time to avoid double recovery),⁷⁶ as well as the categories of lost profits identified as “covered”.⁷⁷ An additional question, not prominently considered by the Commission, is whether double recovery takes place by award of loss of profits if valuation of income-producing assets has already taken into account their effectiveness in producing future profits.⁷⁸ Third, the choice of interest rate and the application of simple interest and compound interest could be addressed,⁷⁹ reflecting on the sceptical attitude to compound interest in the commentary to article 38 in light of post-2001 practice.⁸⁰ Finally, in line with the approach of the International Court of Justice outlined in paragraph 8 above, the Commission would identify the best practices and methods of determination of compensation in particular specialist fields, just as the commentary to article 36 did.⁸¹ By way of one example of what that exercise would entail, the award of a global sum in *Armed Activities on the Territory of the Congo* gave rise to a rich variety of judicial views, which could inform the

⁷² *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), declaration of Judge Greenwood, p. 391, at pp. 393–394, para. 7, also paras. 8–9. See also *Arctic Sunrise, Award on Compensation* (footnote 25 above), p. 338, para. 73.

⁷³ Working Paper prepared by the Secretariat (see footnote 18 above), para. 41.

⁷⁴ *Ibid.*

⁷⁵ See paragraphs (27) and (32) of the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 104–105 (endorsed in *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 342, para. 49).

⁷⁶ See paragraph (33) of the commentary to article 36 and paragraph (11) of the commentary to article 38 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105 and 109, respectively.

⁷⁷ See paragraphs (27)–(31) of the commentary to article 36, *ibid.*, pp. 104–105.

⁷⁸ See A. C. Smutny, “Some observations on the principles relating to compensation in the investment treaty context”, *ICSID Review – Foreign Investment Law Journal*, vol. 22 (2007), p. 1, at pp. 11–14.

⁷⁹ Working Paper prepared by the Secretariat (see footnote 18 above), para. 41.

⁸⁰ See paragraphs (8)–(9) of the commentary to article 38 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 108–109. In post-2001 inter-State cases, compound interest has been awarded in law of the sea disputes, rejected by the Iran–United States Claims Tribunal, and not requested before the International Court of Justice; in investor–State arbitration, compound interest is increasingly, although not invariably, awarded when requested, see M. Paporinskis, “Article 38”, in P. Bodeau-Livinec and P. Galvão Teles (eds.), *Articles on State Responsibility for Internationally Wrongful Acts: a Commentary*, Oxford University Press, forthcoming.

⁸¹ See paragraphs (7)–(34) of the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 100–105; and paragraphs (5)–(8) of the commentary to principle 9 of the draft principles on the protection of the environment in relation to armed conflicts, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. V, sect. E.2, para. 59.

discussion regarding its legal rationale as well as conditions and practicalities of implementation.⁸²

II. The proposed topic and the criteria for selecting new topics

16. The proposed topic meets the criteria for selection of new topics set by the Commission.⁸³

17. First, the proposed topic reflects the needs of States.⁸⁴ Secondary rules of responsibility regarding compensation continue to be of increasing practical importance for States in different fields of international law and before different international courts and tribunals, reflected in the frequency of explicit invocation of article 36 of the draft articles on the responsibility of States for internationally wrongful acts and related provisions before and in the decisions of international courts and tribunals.⁸⁵ All States may face claims regarding compensation *and* may invoke responsibility of other States themselves or have nationals that directly invoke it. The introduction has outlined the richness of developments since 2001, including the decisions of the International Court of Justice, tribunals adjudicating claims under the United Nations Convention on the Law of the Sea, the Iran–United States Claims Tribunal, the Eritrea–Ethiopia Claims Commission, regional courts and universal expert bodies dealing with human rights, investor–State arbitration tribunals, and registers of damages.⁸⁶ Recently instituted contentious proceedings before the International Court of Justice specifically seeking compensation suggest that the general importance of compensation is likely to continue in future.⁸⁷ In these circumstances, States would seem to have a shared interest in greater clarity regarding the content of applicable rules and the better instances of their application, to further peaceful settlement of international disputes before international courts and tribunals, as well as by other means in less formalized settings where compensation claims – or

⁸² *Armed Activities on the Territory of the Congo* (see footnote 23 above), pp. 51 *et seq.*, paras. 106–107, 166, 181, 193, 206, 221, 225–226, 253, 258, 298, 310, 322, 332, 344, 363, 365–366, 392 and 405; declaration of Judge Tomka, p. 140, at pp. 142–143, para. 9; separate opinion of Judge Yusuf, p. 145, at pp. 153–164, sections III–IV; separate opinion of Judge Robinson, p. 165; declaration of Judge Salam, p. 185, at p. 189, para. 17, and p. 191, para. 23; separate opinion of Judge Iwasawa, p. 192, at p. 193, paras. 4–5, and p. 195, para. 10; and dissenting opinion of Judge *ad hoc* Daudet, p. 200, at pp. 207–208, paras. 27 and 29.

⁸³ *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238; and Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. X, sect. C, para. 252.

⁸⁴ Working Paper prepared by the Secretariat (see footnote 18 above), para. 38 (“Such developments illustrate both the need and the potential for a more general approach to the determination of quantum in the law of international responsibility”).

⁸⁵ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 383–414 (art. 36). See also *ibid.*, pp. 320–354 (art. 31), 362–369 (art. 34), 422–437 (art. 38) and 438–445 (art. 39).

⁸⁶ See the discussion in footnotes 20–32 above.

⁸⁷ *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, *Joint Application Instituting Proceedings filed with the Registry on 8 June 2023*, International Court of Justice, available from the Court’s website: www.icj-cij.org, *Cases*, para. 60 *f*; *Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)*, *Application Instituting Proceedings filed in the Registry of the Court on 27 June 2023*, *ibid.*, para. 26 *f*; and *Aerial Incident of 8 January 2020 (Canada, the Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland v. the Islamic Republic of Iran)*, *Application Instituting Proceedings concerning a Dispute under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation filed with the Registry on 4 July 2023*, *ibid.*, para. 41 *c*(ii).

defences against such claims – are considered, prepared and settled.⁸⁸ The Commission’s work on international responsibility is at the core of these developments, and it is the Commission, taking into account the important contributions by courts and tribunals as well as by specialised organizations, that would be best placed to address the topic at the general and universal level.⁸⁹

18. Second, the topic is at a sufficiently advanced stage in terms of State practice and decisions of courts and tribunals to permit progressive development and codification. The Commission could rely on its earlier work on State responsibility, the responsibility of international organizations and protection of the environment in relation to armed conflicts, as well as the decisions of international courts and tribunals in different fields of international law.⁹⁰ The richness and representativeness of the body of decisions, particularly since the adoption of the draft articles on the responsibility of States for internationally wrongful acts,⁹¹ may permit, after careful assessment, identification of genuinely universal rules on compensation that reflect the perspectives from the various legal systems and regions of the world.⁹² The key recent decisions have been rendered in intra-African and intra-Latin American disputes⁹³ (and in other cases Western European and other States have often been respondents),⁹⁴ and recent rules have been strongly shaped by the contributions of African and American regional institutions.⁹⁵ The leading teachings on compensation and reparation also reflect a high degree of gender diversity.⁹⁶

⁸⁸ Brattle Group, *The Report on Reparation for Transatlantic Chattel Slavery in the Americas and the Caribbean*, 8 June 2023, available from: <https://uwitv.global/news/reparations-symposium-brattle-paper>.

⁸⁹ UNCITRAL, Summary of the intersessional meeting on investor–State dispute settlement (ISDS) reform submitted by the Government of Belgium (A/CN.9/WG.III/WP.242), para. 46 (“ensuring that the draft provision [on assessment of damages and compensation] would align with the customary international law principles of full reparation for internationally wrongful acts was mentioned”). See also UNCITRAL, Possible reform of investor–State dispute settlement (ISDS): assessment of damages and compensation, Note by the Secretariat (A/CN.9/WG.III/WP.220), paras. 8, 15–17, 31, 35, 38, 43, 49, 57 and 61; Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022), (A/CN.9/1124), chap. VI; and Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9–13 October 2023) (A/CN.9/1160), chap. IV.C.

⁹⁰ Working Paper prepared by the Secretariat (see footnote 18 above), para. 39.

⁹¹ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414.

⁹² See conclusion 3 of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, Report of the International Law Commission on the work of its seventy-fourth session, *Official Records of the General Assembly, Seventy-eighth session, Supplement No. 10 (A/78/10)*, chap. VII, sect. C.2, para. 127.

⁹³ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above); *Certain Activities Carried Out by Nicaragua in the Border Area* (see footnote 22 above); and *Armed Activities on the Territory of the Congo* (see footnote 23 above). See also *Final Award (Eritrea’s Damages Claims)* (footnote 28 above); *Final Award (Ethiopia’s Damages Claims)* (*ibid.*); and *The M/V “Virginia G” Case* (footnote 25 above) between Panama and Guinea-Bissau.

⁹⁴ For example, *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014* (see footnote 19 above); *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (see footnote 19 above); and *M/V “Norstar” (Panama v. Italy), Judgment* (see footnote 13 above). See also *Certain Iranian Assets* (footnote 24 above).

⁹⁵ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 331, para. 13, pp. 333–334, paras. 18–24, p. 337, para. 33, and pp. 339–340, para. 40; separate opinion of Judge Cañado Trindade, pp. 370–378, paras. 60–80; declaration of Judge Yusuf, p. 385, at p. 386, para. 5, and p. 389, para. 15; and declaration of Judge Greenwood, p. 394, para. 9.

⁹⁶ See Whiteman (footnote 1 above); B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973; C. Gray, *Judicial Remedies in International Law*, Oxford, Clarendon Press, 1987; P. N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, Oxford University Press, 2000, chap. 6, pp. 171–202; Shelton, “Righting

19. Third, the topic is concrete and feasible for progressive development and codification.⁹⁷ The topic falls within the law of international responsibility, which is one of the areas in which the Commission has considerable and long-standing expertise due to its universalist and generalist character.⁹⁸ The draft articles on diplomatic protection, somewhat analogous to this topic in terms of framing, have been recognized by international courts and tribunals to be reflective of customary international law on several points.⁹⁹

20. Fourth, while compensation is a traditional topic within the field of State responsibility, this proposal is driven by new developments in international law, particularly in the number and quality of decisions of international courts and tribunals on the topic since the adoption of the draft articles on the responsibility of States for internationally wrongful acts as well as their increased significance in international relations.¹⁰⁰

21. Finally, recent practice of the Commission supports the conclusion that the topic of compensation satisfies the criteria. In 2019, the Commission included in the long-term programme of work the topic proposed by Mr. Claudio Grossman Guiloff, “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, which addressed compensation as part of full reparation for the breach of these primary obligations.¹⁰¹ Other concluded topics have addressed compensation as part of full reparation for the breach of the relevant primary obligations.¹⁰² These examples, while importantly different from the proposed topic which focuses on compensation under general

wrongs ...” (footnote 17 above); Xue H., *Transboundary Damage in International Law*, Cambridge University Press, 2003; Nevill (footnote 71 above); Smutny (footnote 78 above); I. Marboe, *Die Berechnung von Entschädigung und Schadenersatz in der internationalen Rechtsprechung*, Frankfurt am Main, Peter Lang, 2009; Higgins (footnote 17 above); C. L. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Leiden, Brill Nijhoff, 2018; V. Fikfak, “Changing state behaviour: damages before the European Court of Human Rights”, *European Journal of International Law*, vol. 29, No. 4 (November 2018), pp. 1091–1125; and Dreyssé (footnote 71 above).

⁹⁷ Working Paper prepared by the Secretariat (see footnote 18 above), para. 38 (“Since the adoption of the 2001 articles, the case law of international courts and tribunals concerning the quantification of compensation has increased and diversified, making the topic sufficiently feasible and concrete for codification and progressive development”).

⁹⁸ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above).

⁹⁹ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, at p. 599, para. 39; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 558, at p. 605, para. 129; and *Certain Iranian Assets* (footnote 24 above), paras. 61, 66 and 68. See also *The M/V “Virginia G” Case* (footnote 25 above), p. 53, para. 153; *Cyprus v. Turkey* (footnote 26 above), paras. 45–46; *Arctic Sunrise, Award on Merits of 14 August 2015* (see footnote 25 above), p. 210, at p. 256, note 168; *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at p. 102, para. 266; and *Case of H. F. and Others v. France, Applications nos. 24384/19 and 44234/20, Judgment of 14 September 2022*, Grand Chamber, European Court of Human Rights, paras. 87–92, 211 and 257.

¹⁰⁰ In 2023, the Institute of International Law established the Twelfth Commission: The Determination of Quantum in International Adjudication, see www.idi-iil.org/en/commissions/page/2.

¹⁰¹ Grossman Guiloff (see footnote 49 above), para. 23 (a).

¹⁰² See paragraphs (17) to (23) of the commentary to article 12 of the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, sect E.2, para. 45; and paragraphs (5) to (8) of the commentary to principle 9 of the draft principles on protection of the environment in related to armed conflicts, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. VI, sect. C.2, para. 71.

secondary rules and without limitation to responsibility for breach of specific primary obligations, show that the Commission has recently accepted related issues as falling within its mandate.

III. The past work of the Commission on the proposed topic

22. The approach to compensation under the international law of State responsibility adopted by the Commission in the draft articles on the responsibility of States for internationally wrongful acts may be traced back to the fourth Special Rapporteur on State responsibility, Mr. Gaetano Arangio-Ruiz.¹⁰³ In 1993, the Commission adopted draft article 8 (“Compensation”) with commentary on first reading¹⁰⁴ (renumbered as article 44 in the 1996 draft articles on State responsibility):

“1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

“2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.”¹⁰⁵

23. The fifth Special Rapporteur on State responsibility, Mr. James Crawford, addressed compensation in 2000 in his third report on State responsibility.¹⁰⁶ He suggested that the Commission “was faced with a choice between two solutions: it could either draft article 44 succinctly, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive”.¹⁰⁷ Crawford emphasized that it was essential to take account of the different legal relations involved, including legal relations with non-State entities.¹⁰⁸ In light of the discussion, in 2000 the Drafting Committee provisionally adopted on second reading draft article 37 (“Compensation”), with language identical to that of article 36 of the draft articles on the responsibility of States for internationally wrongful acts.¹⁰⁹ States were generally welcoming,¹¹⁰ and in 2001 the Drafting Committee decided to retain the previous year’s text without any changes.¹¹¹

24. To fully appreciate the law of compensation for damage caused by an internationally wrongful act, article 36 of the draft articles on the responsibility of States for internationally wrongful acts is to be read alongside other provisions of Part Two (“Content of the international responsibility of a State”). The terms “damage” and “caused” are elaborated upon in article 31 (“Reparation”). On second reading, the Commission chose to draft these issues as aspects of the general principle of full reparation, rather than relating specifically to compensation (as in the first

¹⁰³ Second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, chap. II, pp. 8 *et seq.*

¹⁰⁴ See *Yearbook ... 1993*, vol. II (Part Two), pp. 67–76; and *ibid.*, vol. I, 2321st meeting, 19 July 1993, pp. 165–167, paras. 42–73, 2322nd meeting, 19 July 1993, pp. 172–174, paras. 33–77, 2323rd meeting, 20 July 1993, pp. 174–176, paras. 1–33, and 2324th meeting, 21 July 1993, pp. 177–178, paras. 1–10.

¹⁰⁵ Article 44 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63.

¹⁰⁶ Third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 47–52, paras. 147–166.

¹⁰⁷ *Yearbook ... 2000*, vol. II (Part Two), p. 39, para. 192.

¹⁰⁸ *Ibid.*, p. 43, para. 230.

¹⁰⁹ *Ibid.*, p. 68, art. 37.

¹¹⁰ Fourth report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/517 and Add.1, pp. 9–10, paras. 33–34 (see limited questions regarding moral damage and “financial assessability”), and Annex, pp. 19 and 24.

¹¹¹ See the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session.

reading).¹¹² Article 31 elaborates on the use of the term “caused” in its paragraph 1 in the commentary, emphasising the variety of factors that may be relevant for applying causality for different breaches of international obligations,¹¹³ accepting mitigation of damage¹¹⁴ but rejecting (in a departure from the first reading)¹¹⁵ concurrency as an element affecting the scope of reparation.¹¹⁶ The notion of “damage” refers back to article 31, paragraph 2; that is any damage, whether material or moral,¹¹⁷ which is explained in the commentary as, respectively, damage to property or other interests of the State or its nationals assessable in financial terms and such items as individual pain and suffering, loss of loved ones or personal affront.¹¹⁸ Two further provisions expressed as applicable to all forms of reparation, but particularly important in practice for compensation, are article 38 (“Interest”)¹¹⁹ and article 39 (“Contribution to the injury”).¹²⁰

25. The Commission also addressed compensation after the adoption of the draft articles on the responsibility of States for internationally wrongful acts. The draft articles on diplomatic protection, despite Crawford’s expectations,¹²¹ did not deal with the question of quantification of compensation arising in the context of injury to aliens.¹²² The draft articles on the responsibility of international organizations

¹¹² See *Yearbook ... 2001*, vol. I, 2682nd meeting of 30 May 2001, p. 103, para. 6. See also article 42 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63; *Yearbook ... 1993*, vol. II (Part Two), pp. 68–70, paras. (6)–(13) of the commentary to draft article 44 [originally numbered article 8] (discussing causality), and pp. 71–72, paras. (16)–(19) of the same commentary (on material and moral damage); and articles 31 and 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 91 and 98, respectively. See also the third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 18–20, paras 27–29 and 31–37.

¹¹³ Paragraphs (9)–(10) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 92–93 (see, similarly, *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 26, para. 34).

¹¹⁴ Paragraph (11) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 93 (explicitly endorsed in *The Islamic Republic of Iran v. the United States of America*, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020 (see footnote 19 above), para. 1796). See also *Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)* (footnote 6 above), p. 55, para 80.

¹¹⁵ *Yearbook ... 1993*, vol. II (Part Two), p. 70, paras. (12)–(13) of the commentary to draft article 44 [originally numbered article 8].

¹¹⁶ Paragraphs (12)–(13) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 93–94 (explicitly endorsed in *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 49, para. 98).

¹¹⁷ See the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session.

¹¹⁸ Paragraph 2 of article 31 of the draft articles on the responsibility of States for internationally wrongful acts and paragraph (5) of the commentary thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 91–92.

¹¹⁹ *Ibid.*, art. 38, p. 107. See also the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session (“a mere reference in the context of compensation ... in the draft articles adopted on first reading”).

¹²⁰ Article 39 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 109.

¹²¹ See the third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 51, para. 158 (b).

¹²² Paragraph (1) of the general commentary to the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 26, note 21 (referring back to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 68).

essentially replicated the text of article 36 of the draft articles on the responsibility of States for internationally wrongful acts in drafting the provision on compensation.¹²³ Compensation was discussed as part of the topic of succession of States in respect of State responsibility.¹²⁴ The identification of compensation as a possible future topic by the Secretariat¹²⁵ and its treatment in the syllabus for the topic “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”¹²⁶ and within the concluded topics have already been noted above at paragraphs 3 and 21 respectively.¹²⁷

IV. The possible form of the work of the Commission

26. The work of the Commission may take the form of principles, in line with how reparation and compensation were addressed most recently by the Commission.¹²⁸ This form would be suitable for the practical orientation of the topic and reflect the recognized customary international law character of article 36¹²⁹ and other related provisions of the draft articles on the responsibility of States for internationally wrongful acts.¹³⁰ Alternatively, the form of articles would be in line with the treatment of secondary rules of international responsibility in the draft articles on the responsibility of States for internationally wrongful acts, the draft articles on diplomatic protection, and the draft articles on the responsibility of international organizations. Commentaries to article 36 and other related provisions of the draft articles on the responsibility of States for internationally wrongful acts show that practical issues can be addressed in this way in a satisfactory and well-received manner.¹³¹ On balance, principles are the preferable form for addressing the topic in

¹²³ See the discussion in footnote 61 above.

¹²⁴ Fourth report on succession of States in respect of State responsibility, by Special Rapporteur Mr. Pavel Šturma (A/CN.4/743), paras. 49–66, and Annex, draft article 17; and the Report of the International Law Commission on the work of its seventy-second session, *Official Records of the General Assembly, Seventy-sixth session, Supplement No. 10 (A/76/10)*, chap. VII, paras. 129–130, 146 and 159.

¹²⁵ Working Paper prepared by the Secretariat (see footnote 18 above), sect. II.E.

¹²⁶ Grossman Guiloff (see footnote 49 above), para. 23 (a).

¹²⁷ See paragraphs (17) to (23) of the commentary to article 12 of the draft articles on prevention and punishment of crimes against humanity, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, para. 45; and paragraphs (5) to (8) of the commentary to principle 9 of the draft principles on protection of the environment in relation to armed conflict, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. V, sect. E.2, para. 59.

¹²⁸ See paragraphs (5) to (8) of the commentary to principle 9 of the draft principles on protection of the environment in relation to armed conflict, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. V, sect. E.2, para. 59.

¹²⁹ See footnote 13 above.

¹³⁰ *Case of Georgia v. Russia (I)* (see footnote 26 above), para. 54; *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (see footnote 19 above), paras. 1787–1788; *The “Enrica Lexie” Incident* (see footnote 13 above), para. 1082; and *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 43, para. 70, and p. 50, para. 101.

¹³¹ See reliance on the relevant commentaries in *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 342, para. 49; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 58, para. 151; *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 49–50, para. 98, pp. 63–64, para. 148, and p. 130, para. 382; *Arctic Sunrise, Award on Compensation* (footnote 25 above), p. 344, paras. 91, and p. 350, para. 118; *M/V “Norstar” (Panama v. Italy), Judgment* (footnote 13 above), p. 122, para. 458; and *The Duzgit Integrity Arbitration* (footnote 25 above), para. 212.

relation to rules of international responsibility reflecting customary international law and the best practices of their application.

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Annex II

Due Diligence in International Law

by Penelope Ridings

1. Introduction

1. The obligation of ‘due diligence’ has a long historical pedigree in international law.¹ It developed in the nineteenth century through State practice and arbitral decisions in the context of the law of neutrality and the protection of aliens and their property.² International judicial decisions in the twentieth century advanced the concept and gave it more concrete form.³ Judicial decisions grounded due diligence in the notion that States must prevent the use of their territory for activities that are detrimental to the rights and interests or would harm other States. The International Court of Justice in the *Corfu Channel case* gave expression to this as the obligation of States not to allow their territory to be used for acts contrary to the rights of other States.⁴ It has gained even further judicial recognition since the 1980s.⁵

2. At the most general level, due diligence has been understood as a duty or standard of care that should be applied to a State’s actions on its territory or activities subject to its jurisdiction or control, which harm the rights and interests of other States. Due diligence is commonly associated

¹ For an examination of the history of due diligence see Giulio Bartolini, “The Historical Roots of the Due Diligence Standard”, in Heike Krieger, Anne Peters, and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020), pp. 23-41; Samantha Besson, *La due diligence en droit international* (The Pocket Books of The Hague Academy of International Law / Les livres de poche de l’Académie de droit international de La Haye <https://brill.com/view/serial/HAPB>), vol. 46 (2021) pp. 33-71; Samantha Besson, *Due Diligence in International Law* (Hague Academy Special Editions) (2023) pp. 38-48; Jan Arno Hessbruegge, “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law”, *N.Y.U. J. Int’l. L. & Pol.*, vol. 36 (2003-2004), pp. 265-306; Awalou Ouedraogo, “La neutralité et l’émergence du concept de *due diligence* en droit international: l’affaire de l’Alabama revisitée”, *Journal of the History of International Law*, vol. 13(2) (2011), pp. 307-346.

² See *Alabama Claims Arbitration (United States of America v. United Kingdom)*, Final Award of 14 September 1872, RIAA Vol. XXIX pp.125-134 at p. 129, which was governed by the rules set out in Article VI of the 1871 Treaty of Washington, including the ‘due diligence’ that ought to be exercised by neutral governments; *Frederick Wipperman Arbitration (United States of America v. Venezuela)*, Final Award of 2 September 1890, Moore, History and Digest, vol. 3, pp. 3039-3043 at pp. 3041-3042.

³ See e.g. *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume Uni) [British Property in Spanish Morocco Arbitration (Spain v. United Kingdom)]*, Final Award of 1 May 1925, RIAA Vol. II pp. 615-742; *Island of Palmas Arbitration (The Netherlands v. United States of America)*, Final Award of 4 April 1928, RIAA Vol. II pp. 829-871; *William E. Chapman Arbitration (United States of America v. United Mexican States)*, Final Award of 24 October 1930, RIAA Vol. IV pp. 632-640; *Trail Smelter Arbitration (United States of America v. Canada)*, Final Award of 11 March 1941, RIAA Vol. III pp. 1905-1982; Dissenting Opinion of Judge Moore, in *S.S. Lotus (France v. Turkey)*, Judgment of 7 September 1927, *P.C.I.J. Reports 1927*, Series A No. 10, pp. 65-94 at p. 88; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, I.C.J. Reports (1949) p. 4 at p. 22.

⁴ *Corfu Channel Case* supra n. 3. Interestingly, the English text of the case includes the word “knowingly” whereas the French text omits this and states: “l’obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d’actes contraires aux droits d’autres Etats.”

⁵ See e.g. *United States Diplomatic and Consular Staff in Tehran*, Merits, Judgment, I.C.J. Reports 1980 p. 3, paras. 67-68; *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgments, I.C.J. Reports 1986 p. 14, paras. 157-158, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 241-242; *The Gabčíkovo-Nagymaros Project*, Merits, I.C.J. Reports 1997, p. 7, para. 53; *Pulp Mills on the River Uruguay*, Merits, I.C.J. Reports 2010, p. 14, para. 101; *Certain Activities carried out by Nicaragua in the Border Area*, Merits, I.C.J. Reports 2015, p. 665, para. 104; *Indus Waters Kishenganga Arbitration*, Partial Award of 18 February 2013, PCA 2011-01, paras. 449-450; ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 2011, p. 41, para. 110; ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024.

with international environmental law, in particular the duty to prevent transboundary environmental harm. According to the International Court of Justice this duty of prevention flows from “the due diligence required of a State in its territory”.⁶ As is clear from the language of the Court, due diligence is broader than this specific application to the prevention of transboundary environmental harm. For example, it is associated, *inter alia*, with the protection of diplomatic and consular premises and personnel⁷ and the failure of a State to prevent harmful acts of non-State actors subject to its jurisdiction or control.⁸

3. Due diligence may be considered a general principle of law which applies in different areas of international law, generating specific expressions of the due diligence obligation in those areas. Indeed, there is a multiplicity of special international law regimes in which commentators have sought to use due diligence. These include international humanitarian law,⁹ international law of the sea,¹⁰ international cybersecurity law,¹¹ international organisations law where it addresses the responsibility for human rights violations committed abroad by international organisations, including the United Nations and international financial institutions,¹² and international human rights law, where it is associated with the duty of a State to protect people within its jurisdiction from harm¹³ and the control of corporations in line with the United Nations Guiding Principles on Business and Human Rights.¹⁴ It is also finding relevance in new areas of international law, such as space law, global health,¹⁵ and the development of artificial intelligence.

4. The obligation of due diligence lies at the nexus between the responsibility of States as members of the international community and the sovereign right of States to act within their territory.¹⁶ In the contemporary interconnected world, there is a heightened focus on the extent to which the actions of a State, and the natural and juridical persons subject to its jurisdiction or control,

⁶ *Pulp Mills on the River Uruguay (Argentina/Uruguay)* supra n. 5, para. 101.

⁷ *United States Diplomatic and Consular Staff in Tehran*, supra n. 5, paras. 67-68.

⁸ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, I.C.J. Reports 2005 p. 168, paras. 246-250, where the Court uses the term ‘vigilance’.

⁹ Antal Berkes, ‘The standard of ‘Due Diligence’ as a result of interchange between the law of armed conflict and general international law’, *Journal of Conflict and Security Law*, vol. 23(3) (2018), pp. 433-460; Marco Longobardo, ‘The Relevance of the Concept of Due Diligence for International Humanitarian Law’ *Wisconsin International Law Journal* 37 (2019) 44-87.

¹⁰ See e.g. ITLOS, *Responsibilities and Obligations of States in the Area*, supra n. 5, paras. 110-112; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2015, para. 129; ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, supra n. 5.

¹¹ Michael. N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., (Cambridge: Cambridge University Press, 2017), Rules 6 and 7; Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, 22 July 2015, UN Doc. A/70/173 (Cybersecurity Report), paras. 13 (c) and 28 (a) and (b).

¹² Ellen Campbell et al, “Due diligence obligations of international organisations under international law”, *New York University Journal of International Law and Politics*, vol. 50(2) (2018) pp. 541-604; International Law Association, *Accountability of International Organizations*, Berlin Conference (2004); Nigel. D. White, “Due Diligence, the UN and Peacekeeping”, in Peters, Krieger and Kreuzer (eds.), *Due Diligence in International Legal Order*, pp. 217-233; Regis Bismuth “The Emerging Human Rights and Environmental Due Diligence Responsibility of Financial Institutions” in William Blair, Chiara Zilioli and Christos Gortsos (eds), *International Monetary and Banking Law post COVID-19* (Oxford University Press, 2023), pp. 330-351.

¹³ See for example in relation to the protection of women from violence: *Opuz v Turkey*, European Court of Justice (Application no. 33401/02), Judgment, 9 June 2009.

¹⁴ Jonathan Bonnitcha & Robert McCorquodale, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights” *The European Journal of International Law*, Vol. 28(3) (2017) pp. 899-919; John Gerard Ruggie, & John F. Sherman III, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Johnathan Bonnitcha and Robert McCorquodale”, *European Journal of International Law*, vol. 28 (2017) pp. 921-928.

¹⁵ Ahmed Alfatlawi & Azhar Al-Fatlawi, “Conceptual framework of due diligence and notification in light of the rules of international responsibility: COVID 19 as a model” *Al-rafidain of Law*. vol. 24(79) (June 2022) pp. 72-110; Antonio Coco, Talita de Souza Dias, “Prevent, respond, cooperate: states’ due diligence duties vis-à-vis the Covid-19 pandemic”, *Journal of International Humanitarian Legal Studies*, vol.11 (2020), pp. 218-236.

¹⁶ See Arbitrator Max Huber, *Case of the Island of Palmas (Netherlands v. USA)*, supra n. 3 at p. 839: “Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States ...”.

adversely impact on the rights and interests of other States and persons. There is an expectation of a standard of conduct on the part of States that they will act reasonably with regard to the rights and interests of others in the international community. The obligation of due diligence gives expression to this expectation.

5. While due diligence has been addressed in various special regimes of international law, there are common characteristics of due diligence in international law that can be ascertained from the abundant State practice, judicial decisions and doctrinal writings. Although there have been attempts to articulate these common characteristics in the past, including by the International Law Association (ILA),¹⁷ there is room for a systematic approach which examines the full ambit of the obligation of due diligence.

6. Such a study would draw on the growing interest in due diligence in international law, particularly in academic writings,¹⁸ and the more frequent recourse to the obligation of due diligence in pleadings before international courts and tribunals.¹⁹ Nevertheless, the legal character, scope and content of the duty of due diligence at international law is not well defined. A topic on due diligence in international law would give concrete guidance to States on the necessary requirements to enable them to meet their due diligence obligations.

7. The sections that follow first address the past work of the Commission on the topic (Section 2). This provides the necessary background for consideration of the scope of the proposed topic and issues to be addressed (Section 3). This is followed by consideration of the criteria for the selection of topics (Section 4), and the possible form of the output of the topic (Section 5). A selected bibliography is also provided.

2. The past work of the Commission related to the proposed topic

8. Due diligence in international law is grounded in the past work of the Commission and a topic on due diligence in international law would add to, and not detract from, that earlier work.²⁰

9. In its first session in 1949, the Commission included the topic of State responsibility in its provisional list of topics selected for codification.²¹

10. Following the submission of the Second Report of Special Rapporteur Robert Ago, the Commission decided to split consideration of State responsibility for lawful activities and State responsibility for internationally wrongful acts and to deal first with the latter.²² In part this was due to the different basis of the “so-called responsibility for risk” which made the simultaneous consideration of the two subjects difficult.²³

11. In his Fourth Report Special Rapporteur Robert Ago introduced due diligence in his draft article 11 on attribution of the conduct of private parties where he cited at length State practice on the protection of aliens.²⁴ The concept of negligence on the part of States was further introduced into the draft articles on State Responsibility in his Seventh Report, and in particular through draft

¹⁷ International Law Association, Duncan French (Chair) Tim Stephens (Rapporteur) “ILA Study Group on Due Diligence in International Law: First Report” (International Law Association Reports) 2014; International Law Association, Duncan French (Chair) Tim Stephens (Rapporteur) “ILA Study Group on Due Diligence in International Law: Second Report” (International Law Association Reports) 2016.

¹⁸ Besson, *La due diligence en droit international*, supra n. 1; Besson, *Due Diligence in International Law*, supra n. 1; Krieger, Peters, & Kreuzer, *Due Diligence*, supra n. 1; Joanna Kulesza, *Due Diligence in International Law*, (Leiden: Brill Nijhoff, 2016); Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge: Cambridge University Press, 2022); Societe Francaise pour de Droit International (SFDI)/Sarah Cassella (eds), *Le standard de due diligence et la responsabilité internationale* (Paris: Pedone, 2018).

¹⁹ See for example the Written Statements and Oral Statements before the International Tribunal on the Law of the Sea, ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

²⁰ For a description of the work of the International Law Commission on the relationship between due diligence and State responsibility see Kulesza, *Due Diligence*, supra n. 18, pp. 115-220.

²¹ UN ILC, Yearbook ... 1949, Vol. I, pp. 49-50, paras. 27-32.

²² UN ILC, Yearbook ... 1970, Vol. II, p. 178, para. 6.

²³ *Ibid.*, Vol. II, p. 178, para 6 and p. 306, para. 66.

²⁴ UN ILC, Yearbook ... 1972, Vol. II, pp. 95-126, paras. 61-146. See also International Responsibility, Second Report of Special Rapporteur Francisco V. Garcia Amador, UN ILC, Yearbook ... 1957, Vol. II, pp. 121-130.

article 23,²⁵ as well as his distinction between obligations of conduct and obligations of result, covered by draft articles 20 and 21.²⁶ Special Rapporteur James Crawford expressed considerable caution in his Second Report on Robert Ago's classification,²⁷ and it was abandoned on second reading in the draft articles on State responsibility for internationally wrongful acts.²⁸ In concluding the articles on State responsibility, the Commission consigned the function of due diligence to the level of primary rules and as a standard which varies from one context to another and in light of the rules giving rise to the primary obligation.²⁹

12. The Commission's work on State responsibility for internationally wrongful acts was commenced in advance of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, although they were eventually completed in parallel. The First Special Rapporteur for the topic of international liability for injurious consequences, Robert Quentin-Baxter, grounded the topic in the recognition that there were activities that are in principle useful and legitimate, and should therefore not be prohibited, but which entailed an element of transboundary harm or the risk of such harm.³⁰ Initially the topic was intended by him to have a wide application to activities undertaken within the territory or jurisdiction of a State which cause injury or harm.³¹ However, the Commission decided to limit it to the physical environment.³²

13. The Commission continued to discuss the single topic of international liability for injurious consequences not prohibited by international law until 1997 when it was split into two parts: prevention of transboundary damage from hazardous activities and international liability in case of loss from transboundary harm arising out of hazardous activities.³³ Due diligence was discussed in the context of prevention,³⁴ and characterised as a central component of the duty to prevent transboundary harm.³⁵ Indeed, the articles on prevention of transboundary harm treat the duty of prevention in the same breath as the duty of due diligence.³⁶ While the articles give some content

²⁵ UN ILC, Yearbook ... 1978, Vol. II (Part One), pp. 32-37, paras. 1-19.

²⁶ UN ILC, Yearbook ... 1977, Vol. II (Part One), pp. 4-20, paras. 1-46. See Paul-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", *European Journal of International Law*, vol. 10 (1999), pp. 371-385 for a critique of Ago's approach to obligations of conduct and obligations of result.

²⁷ UN ILC, Yearbook ... 1999, Vol. II (Part One), pp. 27-29, paras. 80-92.

²⁸ James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) pp. 226-232.

²⁹ UN ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook ... 2001 Vol. II, Part 2, General Commentary, pp. 31-32, paras. 1-4. For a spirited response of Special Rapporteur Mr. James Crawford to suggestions that due diligence be addressed within the draft articles on state responsibility, see UN ILC, Yearbook ... 1999 Vol. I, pp. 181-183; paras. 51-71.

³⁰ Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook ... 1981, Vol. II, (Part One), pp. 122-123; paras. 78-93; Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook ... 1983, Vol. II, (Part One), p. 201-202, para. 2.

³¹ Fourth report by Quentin-Baxter, *supra* n. 31, p. 202, footnote 8.

³² First report on prevention of transboundary damage from hazardous activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook ... 1998, Vol. II (Part One), p. 193, para. 71.

³³ UNGA Resolution, Report of the International Law Commission on the work of its forty-ninth session A/RES/52/156, 26 January 1998.

³⁴ For a review of the previous work on the Commission on the topic, see First report on prevention of transboundary damage from hazardous activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook ... 1998, Vol. II (Part One) pp. 186-193, paras. 32-70.

³⁵ Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook ... 1999 Vol II (Part One) pp. 116-121, paras. 18-49.

³⁶ Articles on Prevention of Transboundary Harm from Hazardous Activities, General Commentary, UN ILC Yearbook ... 2001, Vol. II (Part Two) p. 148, para. 2. Nevertheless Crawford has explained that there is a difference between them: an obligation of due diligence would be breached by failure to take action, whether the prohibited event in fact took place, while in the case of the obligation of prevention, there must be a failure to take steps as well as the occurrence of the event: Crawford, *State Responsibility*, *supra* n. 28, pp. 231-232.

to the duty of due diligence in the context of transboundary harm from ultrahazardous activities in the environmental field,³⁷ they are limited in their application.

14. The relationship between due diligence and State responsibility has occupied the Commission for decades. Quentin-Baxter had initially raised the duty of care or due diligence as a central factor that operated as a function of the obligation of prevention.³⁸ He later abandoned the phrase ‘duty of care’ as having “too many overtones to justify its retention in the vocabulary of the present topic”. Part of his justification for doing so was because the phrase, even when applied to ‘acts not prohibited by international law’, suggested a standard which, if disregarded, would entail the responsibility of a State for wrongful acts, which was not within the scope of the topic.³⁹ He reaffirmed the Commission’s decision that “the topic lay within the field of ‘primary’ rules, i.e. rules that are governed by and do not compete with the established system of State responsibility for wrongful acts or omissions”.⁴⁰ Nevertheless, a duty of care subsequently appeared in the reports of the second and third Special Rapporteurs on the topic.⁴¹ The conundrum of the place of due diligence within the system of State responsibility has pervaded consideration of the duty of due diligence since then.⁴²

15. The duty of due diligence has also featured in other outputs of the Commission’s work, including non-navigational uses of watercourses.⁴³ Draft article 7 of the law of the non-navigational uses of international watercourses placed due diligence as a central element in the use of international watercourses so as not to cause significant harm to other States in whose territory part of an international watercourse is situated.⁴⁴ In the draft articles on the protection of persons in the event of disasters, article 9 addresses the reduction of disasters and was inspired by principles of international environmental law, including due diligence.⁴⁵ The draft guidelines on the protection of the atmosphere include an obligation on States to protect the atmosphere by exercising due diligence.⁴⁶ Most recently the Commission addressed due diligence in the draft principles on the protection of the environment in relation to armed conflict, principle 10 of which addresses corporate due diligence when business enterprises act in an area affected by an armed conflict.⁴⁷

³⁷ Articles on Prevention of Transboundary Harm from Hazardous Activities, General Commentary, UN ILC Yearbook ... 2001, Vol. II (Part Two), Commentary to Article 3, pp. 154-155, paras. 7-18.

³⁸ Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC Yearbook ... 1981, Vol. II (Part One), pp. 119-123, paras. 68-72 and 90.

³⁹ Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook ... 1982, Vol. II (Part One), pp. 55-57, paras. 19-23.

⁴⁰ Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook ... 1983, p. 203, para. 7.

⁴¹ See Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur, UN ILC Yearbook ... 1986, Vol. II (Part One), p. 149, para. 18; Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook ... 1999 Vol. II (Part One), p. 119, para. 32.

⁴² See for example UN ILC, Yearbook ... 1999 Vol. I, pp. 181-183; paras. 51-71 and the discussion between Special Rapporteur Mr. James Crawford and Mr. Hafner and Mr. Simma on due diligence.

⁴³ See Fourth report on the law of the non navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur, UN ILC, Yearbook ... 1988, Vol. II (Part One), pp. 237-243.

⁴⁴ UN ILC, Yearbook ... 1994, Vol. II (Part Two), pp. 103-104, paras. 3-9 of the commentary to draft article 7.

⁴⁵ Draft articles on the protection of persons in the event of disasters, with commentaries 2016, UN Doc A/71/10, commentary to draft article 9, para. 4. See also draft article 16 which establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance.

⁴⁶ Draft guidelines on the protection of the atmosphere, with commentaries 2021, UN Doc A/76/10, draft guideline 3.

⁴⁷ Draft principles on the protection of the environment in relation to armed conflict, with commentaries 2022, UN Doc A/77/10, draft principle 10.

16. This review makes it clear that the duty of due diligence has featured in the past work of the Commission. However, the Commission has never comprehensively addressed the duty as a stand-alone duty with wider application than environmental harm. The Commission's consideration of the contours of the duty have not always been consistent. This has made identification of the scope and core contents of the duty difficult. It also sits somewhat uneasily between primary obligations and secondary obligations of responsibility. The proposed topic would complement the past work of the Commission and address matters not covered to date by the Commission.

3. Scope of the proposed topic and issues to be addressed

17. The topic would seek to clarify the legal character, scope and content of the due diligence obligation. Due diligence is often referred to as a 'duty' or an 'obligation' where the content of the duty is ascertained from the content of the primary obligation which it qualifies and the rights and interests of other States which are to be protected.⁴⁸ It is referred to as a standard of conduct by which to assess the conduct of a State in meeting its primary obligations.⁴⁹ It may also be considered a general principle of law which finds expression in different areas of international law.⁵⁰ The term 'due diligence' may take on different meanings depending on the context in which it is used.⁵¹ In order to more clearly delineate the topic, the core of the due diligence obligation will be that enunciated by the International Court of Justice in the *Corfu Channel case* that a State should not allow its territory to be used for acts contrary to the rights and interests of other States protected by international law.⁵²

18. The objective of the topic would be to identify the legal character, scope and content of a due diligence obligation in international law through discerning common elements of the due diligence obligation that can be applied both generally in international law and to special regimes of international law. The topic would map the normative contours of the due diligence obligation through an analysis of State practice, judicial decisions and doctrine on due diligence as applied in different fields of international law with the objective of identifying the core characteristics of due diligence that are not dependent on the primary obligation to which due diligence is attached. This will enable a deductive approach to be adopted which deduces from these individual elements those that are common characteristics of due diligence. Although some commentators have disputed that there exists a general regime of due diligence,⁵³ others have illustrated the promise of such a regime.⁵⁴

a) Title of the proposed topic

19. The title of the proposed topic is 'Due Diligence in International Law'. The use of 'due diligence' as a general term, rather than any of its elements, is deliberate. It allows the topic to be

⁴⁸ Besson, *Due Diligence*, supra n. 1, p. 65.

⁴⁹ Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States", *German Yearbook of International Law*, vol. 35 (1992), pp. 9-51 at p. 42; International Law Association Study Group on Due Diligence in International Law, 'Second Report', supra n. 18; Caroline Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence*, (Oxford: Oxford University Press, 2021), pp. 99-129.

⁵⁰ International Law Association Study Group on Due Diligence in International Law, 'Second Report', supra n. 18, p. 6.

⁵¹ See for example the use of 'due diligence' by the International Court of Justice in the *Bosnian Genocide case*, as a standard to define the scope of the duty to prevent genocide: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) Judgment, I.C.J. Reports 2007, p. 43 at para. 430.

⁵² *Corfu Channel Case*, supra n. 3.

⁵³ See Riccardo Pisillo Mazzeschi, "Le chemin étrange de la due diligence: d'un concept mystérieux à un concept surévalué", in SFDI (ed.), *Le standard de due diligence et la responsabilité internationale: Journée d'études franco-italienne du Mans*, (Paris: Pedone, 2018) pp. 323-338.

⁵⁴ ILA, Study Group on Due Diligence in International Law, First and Second Reports, supra n. 18; Robert Barnidge, "The Due Diligence Principle under International Law", *International Community Law Review*, vol 8 (2006), pp. 81; Awalou Ouedraogo, "La due diligence en droit international: de la règle de la neutralité au principe general", *Revue Général de Droit*, vol. 42 (2012), p. 641; Besson, *La due diligence en droit international*, supra n.1; Ollino, *Due Diligence Obligations*, supra n. 18.

concentrated on the common aspects of due diligence and does not prejudice the identification of any specific meaning of due diligence. It should be noted, however, that the topic would address due diligence, whether as an obligation, a duty or a principle. However, it would not directly address questions of State responsibility. The reference to ‘international law’ signals that the topic addresses due diligence in the context of general international law.

b) Scope of the proposed topic

20. This section considers the elements of the scope of the topic: the legal character of due diligence, the scope, and the content of the due diligence obligation. It also seeks to confine the scope of the topic by excluding certain elements that are peripheral to the main objective of the topic.

(i) Legal character of due diligence

21. There is a lack of clarity over the legal character or foundation of due diligence as a general principle of law or a customary international law obligation and therefore its relationship to the sources of law under Article 38(1)(a) to (c) of the Statute of the International Court of Justice. It is sometimes referred to as a ‘principle of international law’ in the sense of a general standard of behaviour applicable across international law.⁵⁵ On the other hand, its status as a principle has been questioned.⁵⁶ An understanding of the legal character of the duty of due diligence may assist in considering how it may be applied in both general and specific fields of international law. Similarly, in the orthodoxy of the articles on State responsibility, due diligence is an element of primary rules. It nevertheless has a necessary connection to secondary rules of responsibility arising from the consequences of breach of the obligation. Understanding due diligence within the orthodox framework of State responsibility, as well as within the dichotomy of obligations of conduct and obligations of result,⁵⁷ can assist in a better appreciation of its character.

(ii) Scope and content of due diligence

22. The topic would seek to identify common elements of due diligence gleaned from a survey of State practice, judicial decisions and doctrine related to the obligation of due diligence in specific areas of international law. It would examine a range of issues associated with the due diligence obligation, including the following:

- whether there are conditions under which due diligence arises that are specific to the due diligence standard, and not dependent on a particular obligation;
- the relevance of the circumstances or capabilities of the State concerned and the degree of their control over the sources of harm;
- the extent and nature of the variability of the standard of conduct that is required by the duty of due diligence; and the degree of care or vigilance, or the absence of negligence, that is required;
- whether there is a minimum level of risk of harm and the gravity of the harm before the obligation of due diligence is activated; and questions over the relevant knowledge requirement and foreseeability of the risk of harm; and
- the reasonableness of the standard of conduct with regard to a State’s activities and the activities of non-state actors subject to their jurisdiction or control, including consideration of the duty of due diligence as an objective standard.

⁵⁵ Kulesza, *Due Diligence*, supra n. 18, pp. 272–6; Barnidge, “The Due Diligence Principle”, supra n. 54; Ouedraogo, « La due diligence en droit international » (2012), supra n. 54.

⁵⁶ See Neil McDonald, “The Role of Due Diligence in International Law” *International & Comparative Law Quarterly* 68(4) (2019), who bases this in part on the non-legal policy considerations that may condition a State’s conduct; Heike Krieger & Anne Peters, ‘Due Diligence and Structural Change in the International Legal Order’, in Krieger, Peters, Kreuzer, *Due Diligence*, supra n. 1, pp. 371-6.

⁵⁷ See Ollino, *Due Diligence Obligations*, supra n. 18, pp. 64-130.

23. The topic would not be limited geographically but would have a wide application in light of the context of the primary obligations with which due diligence is associated. The geographical scope to which due diligence applies would include areas beyond national jurisdiction where the rights and interests of the international community are engaged.

(iii) Confining the scope of the topic

24. Given the multiplicity of the regimes in which due diligence obligations are found, it is necessary to clearly delineate the scope of the topic.

25. The topic would address due diligence obligations of *States*. It would not extend to due diligence that may be required of international organisations in the conduct of their internal processes,⁵⁸ nor to due diligence that may be required of multinational corporations, business operators, private investors or other non-State actors.⁵⁹ The applicability of due diligence to international organisations differs from that applying to States, due to the variety of their legal and institutional structures and their degree of control and institutional autonomy.⁶⁰ In some contexts, due diligence can be seen as a process whereby non-State actors, such as corporations, identify, assess, and manage risks related to their investment or activities.⁶¹ In light of these differences and the challenge of identifying commonalities in the application of due diligence to different actors, due diligence as applied to international organisations and non-state actors is not within the proposed scope of the topic.

26. The topic would not encompass the application or operationalisation of due diligence in particular circumstances as this would depend to a large extent on the content of the primary obligation to which due diligence is attached. Similarly, the topic would not undertake a micro-level analysis of the different individual primary obligations to which due diligence is associated as the focus would be on due diligence and not on primary obligations.

27. The proceduralisation of the due diligence obligation has become particularly pervasive in international environmental law and is also found in international human rights law.⁶² Due diligence is seen as entailing certain procedural obligations, such as notification, information sharing, consultation, cooperation, assessment and monitoring. However, the nature and scope of these procedural obligations depend on the relevant primary obligations. Thus, in identifying common elements of due diligence it will be a challenge to identify generally applicable procedural obligations in a way that clarifies and gives substance to the due diligence obligation in general international law. For this reason, the topic will not seek to identify any particular procedural obligations that are associated with due diligence in the special regimes of international law, as distinct from procedural obligations that possess a customary international law character and are applicable as common elements of the due diligence obligation.

28. The proposed topic would not directly address issues of State responsibility. However, as due diligence is associated with primary rules, the topic should assist in clarifying the relationship between primary and secondary rules and between obligations of conduct and obligations of result. It may also need to cover some aspects of circumstances precluding wrongfulness which are relevant to due diligence, such as *force majeure*, distress or necessity, where the contributory conduct of a State may arise.⁶³ In general, however, the topic would not encompass the relationship of due diligence with the question of attribution of conduct and responsibility, the question of causation and allocation of responsibility and the question of reparations in case of negligent

⁵⁸ See International Law Association, *Accountability of International Organizations*, Berlin Conference (2004); United Nations, Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, 2013, UN Doc. A/67/775-S/2013/110.

⁵⁹ For example, the United Nations Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) UN Doc. A/HRC/17/31.

⁶⁰ Besson, *Due Diligence*, supra n. 1, pp. 81-85.

⁶¹ Ollino, *Due Diligence Obligations*, supra n. 18, pp. 58-61.

⁶² See Ollino, *Due Diligence Obligations*, supra n. 18, pp. 232-265.

⁶³ Art. 23(2)(a), Art. 24(2)(a) and Art. 25(2)(b), ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, UN ILC, Yearbook ... 2001, Vol. II (Part 2), pp. 76-84; Ollino, *Due Diligence Obligations*, supra n. 18, pp. 218-225.

conduct by States. These are specific to the regime of State responsibility and any discussion of them in the context of a study of due diligence in international law would overlap with past work of the International Law Commission. It would also blur the distinction between primary and secondary rules that the Commission has sought to maintain in the past.

4. ILC's criteria for the selection of topics

29. The proposed topic would meet the Commission's criteria for the selection of topics. It would fit within the schema for the International Law Commission's long-term programme of work, and in particular Section IX on the law of international relations/responsibility.⁶⁴ This is in keeping with the earlier treatment by the Commission of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. As indicated in section 2, the topic would flow from and complement the work the Commission on the 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts* and the 2001 *Articles on the Prevention of Transboundary Harm from Hazardous Activities*.

30. Any new topic should meet the Commission's criteria for the selection of topics. These are that the topic should: (a) reflect the needs of States in respect of the progressive development of international law and its codification; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification. The Commission also agreed not to restrict itself to traditional topics but to also consider those that reflect new developments in international law and pressing concerns of the international community.

31. The Commission's criteria for the selection of topics are fulfilled in this instance. The topic is important to States which must decide how to navigate an increasingly complex world where the range of international actors is expanding, threats are increasing, including those associated with technological advances, and there is heightened concern over the harmful effects of governmental and private actions in an interconnected world. Due diligence is increasingly being seen as a tool to address situations in which care and oversight is required in order to prevent conduct which amounts to State responsibility.

32. The topic is also sufficiently advanced in terms of State practice to permit codification and progressive development. There is a growing body of judicial decisions, State practice and scholarly writings to advance the codification and progressive development of due diligence in international law. Due diligence has featured in the advisory opinion of the International Tribunal on the Law of the Sea on climate change,⁶⁵ and the advisory opinion on climate change sought from International Court of Justice can be expected to further assist in clarifying the scope of the duty.

33. An ILC topic on due diligence would also complement the work of the ILA which undertook a study into due diligence in international law and considered the extent to which there was a commonality of understanding between the distinctive areas of international law in which due diligence is applied.⁶⁶ This study, however, centred on due diligence as a standard of conduct and did not address due diligence as an obligation within the *Corfu Channel* paradigm. Neither did it address the legal character of due diligence and its relationship to secondary rules of responsibility. The *Institut de Droit International* is currently examining the "Harm Prevention Rules Applicable to the Global Commons" and intends to elucidate the parameters and application of the obligation to protect the environment of areas beyond national jurisdiction.⁶⁷ As a part of this it will elaborate on what the attendant standard of due diligence requires of States with respect to compliance with this obligation.⁶⁸ However the proposed topic on due diligence would be broader in geographical scope than the work undertaken by the *Institut* and would be more systematic than the work of the ILA.

⁶⁴ International Law Commission, *Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996*, UN ILC, Yearbook ... 1996, Vol II (Part Two), Annex II, pp. 133-136.

⁶⁵ ITLOS, *Request Submitted to the Tribunal by the Commission of Small Islands States on Climate Change and International Law*, Advisory Opinion, 21 May 2024.

⁶⁶ International Law Association, Study Group on Due Diligence in International Law, *supra* n. 18.

⁶⁷ *Institut de Droit International*, 3rd Commission, Harm Prevention Rules Applicable to the Global Commons, Editions, A. Pedone, 2023, p. 104.

⁶⁸ *Ibid*, p. 105.

34. The topic of due diligence is both concrete and feasible for progressive development and codification. A systematic examination of its content, based on State practice and subsidiary means for the determination of rules of international law, can serve to elucidate the contours of the obligation. The role of due diligence is acknowledged in judicial decisions and in the practice of States and can be a tool to address contemporary issues involving the harmful effects of activities of States and non-State actors subject to their jurisdiction or control and the consequent impact on the rights and interests of other States. It would also reflect new developments in international law and pressing concerns of the international community.

35. The study of due diligence would benefit from independent analysis and consideration by international legal experts. Through its methodological approach, the International Law Commission can give greater precision and form to the due diligence obligation through the elaboration of a legal framework of due diligence that can be used by States to minimise the harmful effects of their actions and of those subject to their jurisdiction or control. In this way it would assist States in providing them guidance to enable them to fulfil their obligations and to assist in addressing potentially harmful situations before they arise.

36. Finally, it is important that the Commission be fully engaged with the contemporary needs of the international community. International law must keep pace with the changing reality and with the increasing complexity of today's world. The International Law Commission has a role to play in the codification and progressive development of due diligence in international law. Given its composition and collegial working methods, and its close relationship with States through the General Assembly, the Commission would be able to make a useful contribution to international law on due diligence.

5. Possible form of output

37. The primary purpose of the topic is the codification of the practice relating to the obligation of due diligence in international law. Given its practical orientation, the preferred form is that of draft principles which can be used to assist States in their implementation of the due diligence requirement. A set of principles on due diligence in international law would bring together the fundamental normative content of the due diligence obligation which is sufficiently general and broadly supported so that it can serve as a guide to States for its practical application. Other alternative forms could be considered in light of progress on the topic, such as draft conclusions. Draft articles would be consistent with the 2001 Articles on State Responsibility and the 2001 Articles on Transboundary Harm and complement the past work of the Commission on interconnected legal issues. However draft principles are the preferred form of the output of the topic due to its practical orientation and the intent to formulate propositions at an appropriate level of generality to guide States.

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