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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

ADDENDUM TO THE REPORT ON MATTERS RELATED TO THE WORK OF THE INTERNATIONAL LAW COMMISSION (SEVENTIETH SESSION)

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Introductory Note

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

This year, the Seventieth Session (2018) of the Commission was held from July to August 2018 and the corresponding advanced report to the UN General Assembly was only made available from 21 August 2018 on the website of the Commission. With a view to update the Member States on most recent work of the Commission, the Secretariat considered it appropriate to place the same before the Member States at the Fifty-Seventh Annual Session (2018) of AALCO in addition to the report on the Sixty-Ninth Session (2017) of the Commission.

This additional report contains summaries of the deliberations and the work of the Commission on the following topics: (1) Peremptory Norms of General International Law (*jus cogens*); (2) Succession of States in respect of State Responsibility; (3) Immunity of State Officials from Foreign Criminal Jurisdiction; (4) Protection of the Environment in Relation to Armed Conflicts; (5) Protection of the Atmosphere; (6) Provisional Application of Treaties; (7) Identification of Customary International Law; and (8) Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties.

ADDENDUM TO THE REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION (SEVENTIETH SESSION)

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I. Peremptory Norms of General International Law (*jus cogens*)

1. Introduction

1. Based on the proposal contained in the annex[1] to the report of the International Law Commission on its sixty-sixth session (2014), the topic "*Jus cogens*" was included in the long-term programme of work of the ILC. At the 3257th meeting on 27 May 2015 at its sixty-seventh session (2015) the ILC took the decisions of including the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as the Special Rapporteur for the topic. Subsequently, the General Assembly (UNGA) in its resolution 70/236 of 23 December 2015,[2] took note of the decision of the Commission to include the topic in its programme of work.

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

3. At the 70th Session of the Commission, the third report of the Special Rapporteur was presented for consideration of the consequences and legal effects of peremptory norms of general international law. Having already presented the first report on the topic laying down its scope and the nature of *jus cogens* and the second report on the criteria for the identification of *jus cogens* the Special Rapporteur presented the third report which dealt with the consequences of *jus cogens* norms, and proposed 13 draft conclusions numbered as 10 to 23.

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[1] ILC, 'Report of the International Law Commission on the Work of its 69th Session' 274 (5 May- 6 June and 7 July- 8 August 2014) UN Doc A/69/10.
[2] UNGA Res 70/236 (23 December 2015) UN Doc A/RES/70/236
[3] ILC, 'First Report on *jus cogens* by Dire Tladi, Special Rapporteur' (8 March 2016) UN Doc A/CN.4/693.
[4] ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' (16 March 2017) UN Doc A/CN.4/706.
[5] Committee of Legal Advisors on Public International Law, 'Presentation by Ms Päivi Kaukoranta,
Chair of the Committee of Legal Advisers on Public International Law (CAHDI) at the 70th Session of the International Law Commission (Geneva, 19 July 2018) <https://rm.coe.int/presentation-by-ms-paivi-kaukoranta-chair-of-the-cahdi-at-the-70th-ses/16808cde23> accessed 12 September 2018.
[6] See, AALCO, 'Report on matters relating to the work of the International Law Commission in its sixty-eighth session' 19 AALCO/56/NAIROBI/2017/SD/S1 <http://www.aalco.int/ILC%20Brief%202017%20f inal.pdf> accessed 9 September 2018
[7] ILC, 'Statement of the Chairman of the Drafting Committee' (9 August 2016) available at: <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 September 2018)
[8] ILC, 'Statement of the Chairman of the Drafting Committee' (26 July 2017) available at: <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 September 2018)
[9] See, ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' para. 90 (16 March 2017) UN Doc A/CN.4/706

4. At its 3425th meeting held on 9 July 2018, the Commission referred these draft conclusions to the Drafting Committee on the understanding the comments and observations of the members of the commission would be reflected in the work of the committee. Further, draft conclusions 10 to 14 were provisionally adopted by the Drafting Committee and placed before the Commission on 20 July 2018 at is 3434th meeting in the form of an interim report for information purposes only.

5. The seventieth session (2018) discussed this topic in the backdrop of the new third report on peremptory norms in general international law (*jus cogens*) by the Special Rapporteur addressing issues relating to the consequences of *jus cogens* norms. The Commission considered the third report at its 3414th to 3421st, and 3425th meetings, on 30 May and 1 June, and from 2 to 4 and on 9 July 2018.

2. The Third Report of the Special Rapporteur

6. The third report as discussed was focussed on the consequences of a *jus cogens* norm, and introduction of the third report was made by the Special Rapporteur beginning with summarising the views of the members of the Commission and debate in the Sixth Committee of the UNGA. According to the Special Rapporteur the draft conclusions were well received by the states and members of the commission and the debate which has been summarised in the report of the Commission reveals that the main criticism against the proposed draft conclusions was its repetitive nature. It was noted by the Special Rapporteur and agreed by the members that there was a need to streamline the draft conclusions, much of which was achieved by the drafting committee.[10]

7. On the basis of the third report on peremptory norms in general international law (*jus cogens*) the Special Rapporteur recommended the following 13 draft conclusions numbered from 10 to 23.

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

Draft conclusion 10
Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). Such a treaty does not create any rights or obligations.

2. An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty.

3. To avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*).

[10] ILC, 'Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' para. 9 (12 February 2018) UN Doc A/CN.4/714

Draft conclusion 11
Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)

1. A treaty which, at its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid in whole, and no part of the treaty may be severed or separated.

2. A treaty which becomes become invalid due to the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regards to their application;

(b) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) do not constitute an essential basis of the consent to the treaty; and

(c) continued performance of the remainder of the treaty would not be unjust.

Draft conclusion 12
Elimination of consequences of acts performed in reliance of invalid treaty

1. Parties to a treaty which is invalid as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to eliminate the consequences of any act performed in reliance of the treaty.

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty unless such a right, obligation or legal situation is itself in conflict with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 13
Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Draft conclusion 14
Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)

1. Subject to the jurisdictional rules of the International Court of Justice, any dispute concerning whether a treaty conflicts with a peremptory norm of general international law (*jus*

cogens) should be submitted to the International Court of Justice for a decision, unless the parties to the dispute agree to submit the dispute to arbitration.

2. Notwithstanding paragraph 1, the fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is not sufficient to establish the jurisdiction of the Court without the necessary consent to jurisdiction in accordance with international law.

Draft conclusion 15
Consequences of peremptory norms of general international law (*jus cogens*) for customary international law

1. A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*)

2. A customary international law rule not of *jus cogens* character ceases to exist if a new conflicting peremptory norm of general international law (*jus cogens*) arises.

3. Since peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector rule is not applicable.

Draft conclusion 16
Consequences of peremptory norms of general international law (*jus cogens*) on unilateral acts

A unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid.

Draft conclusion 17
Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations

1. Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*).

2. To the extent possible, resolutions of international organizations, including those of the Security Council of the United Nations, must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*).

Draft conclusion 18
The relationship between peremptory norms of general international law (*jus cogens*) and obligations erga omnes

Peremptory norms of general international law (*jus cogens*) establish obligations erga omnes, the breach of which concerns all States.

Draft conclusion 19
Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness

1. No circumstance may be advanced to preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. Paragraph 1 does not apply where a peremptory norm of general international law (*jus cogens*) emerges subsequent to the commission of an act.

Draft conclusion 20
Duty to cooperate

1. States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*).

2. A serious breach of a peremptory norm of general international law (*jus cogens*) refers to a breach that is either gross or systematic.

3. The cooperation envisioned in this draft conclusion can be carried out through institutionalized cooperation mechanisms or through ad hoc cooperative arrangements.

Draft conclusion 21
Duty not to recognize or render assistance

1. States have a duty not to recognize as lawful a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

2. States shall not render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

Draft conclusion 22
Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law

1. States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), where the offences are committed by the nationals of that State or on the territory under its jurisdiction.

2. Paragraph 1 does not preclude the establishment of jurisdiction on any other ground as permitted under its national law.

Draft conclusion 23
Irrelevance of official position and non-applicability of immunity *ratione materiae*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.

2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

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

8. As regards the draft conclusion 10, 11 and 12 the Special Rapporteur emphasized that they were directly based upon the provisions of the Vienna Convention on the Law of Treaties, 1969 ("VCLT") except for draft conclusion 10(3), which was based upon the general rule of interpretation contained in Article 31(3)(c) of the VCLT. The draft conclusion provided for the interpretation of the treaty text in accordance with peremptory norm of general international law so that consistency between the two may be maintained. It was also noted by him that there was significant amount of practice in support of the draft conclusion 10(3) which has been reflected in his third report and found support from the ILC's report on the Fragmentation of International Law and other decisions and instances of state practice.

9. Draft conclusion 13 on the other hand concerning the effects of peremptory norms of general international law (*jus cogens*) was primarily based on another ILC study the guideline 4.4.3 of the Guide to Practice on Reservations to Treaties. Draft conclusion 14 contained certain procedures that were recommended on the basis of Article 66 of the VCLT encouraging state that were not party to the VCLT to explore similar modes of peaceful settlement of their disputes relating to the application of *jus cogens* norms.

10. Finding support in the decisions of national courts draft conclusion 15 was drafted in order to reflect the current position in international law that *jus cogens* norms would prevail over other norms of customary international law. In addition paragraph 2 of draft conclusion 15 was based on upon the well accepted Article 64 of the VCLT and decisions of the European Court of Justice discussed in the third report. Additionally, the third report on the topic also addresses the views of some scholars that prescribe to the view that it would be practically impossible for customary international law to conflict with *jus cogens* norms, but nonetheless noting that even treaties rarely conflict with *jus cogens* norms nonetheless this theoretical possibility was addressed by draft conclusion 15. Paragraph 3 of draft conclusion 15 also reiterated the general rule of international law that the principle of persistent objector had no application to the norms possessing a *jus cogens* character. Further, draft conclusion 16 was also based upon an earlier work of the ILC on the Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations. The draft conclusion 16 is based on principle 8 of the previously mentioned guiding principles

11. As regards draft conclusion 17, it extended the general consequence of non-derogability of *jus cogens* norms to the binding resolutions of international organizations including the UN Security Council. It was explained by the Special Rapporteur that binding resolutions of international organizations did not establish binding obligations if they conflicted with a norm of *jus cogens*. He also noted that, similar to paragraph 3 of draft conclusions 10, paragraph 2 of draft conclusion 17 contained an interpretative presumption indicating that to the extent possible resolutions of international organizations were to be interpreted in a manner consisted with norms of *jus cogens*.

12. Draft conclusions 18-21 related to the consequences of a *jus cogens* norm on state responsibility, in particular reference to the Articles on Responsibility of States for Internationally Wrongful Acts, 2001 ('ARSIWA') taken note of by the UNGA. Accordingly, the Special Rapporteur defines the relationship between an *erga omnes* obligation and a *jus cogens* norm in draft conclusion 18 as one deriving from the other while placing reliance on the terminology in the Barcelona traction case.

13. The Special Rapporteur identified two consequences on the articles namely article 26 and 41, that relate to the circumstances precluding wrongfulness did not apply to breaches of obligations arising from *jus cogens* norms, and the duty to cooperate to bring an end to breaches of *jus cogens* norms. The rule in article 26 of the ARSIWA was adopted in article 19 of the draft conclusions. With regard to article 26, it was taken note of by adding paragraph 2 in draft conclusions 19 that for *jus cogens* norms that come into being later, their consequences shall not apply retrospectively as regards responsibility.

14. As regards, the duty to cooperate to bring an end to a breach of an obligations arising out of a *jus cogens* norm The duty to cooperate was reflected in draft conclusion 20 providing for a definition of a serious breach in paragraph 2 and providing for options of institutionalized or ad-hoc cooperation mechanisms in paragraph 3. Although the corollary to the duty to cooperate bring an end to violations or *erga omnes* obligations deriving from *jus cogens* norms is the right to invoke the responsibility of a state for the violation of an *erga omnes* obligation that right has not received much comment from the Special Rapporteur but nonetheless finds mention in his third report.

15. Also akin to the duty to co-operate is the duty not to recognize or render assistance for the maintenance of a situation created by a breach of *jus cogens* norms, as provided for in draft conclusion 21 and based on article 41 of the ARSIWA. As opposed to draft conclusion 20 Special Rapporteur preferred not to restrict the scope of application of the duty non-recognition only to 'serious' breaches and cited the Wall Opinion and the Namibia case to support the proposition that in fact, there was no seriousness threshold for the duty to cooperate. Moreover, since the duty unlike the duty cooperate did not require positive actions, and thus was less cumbersome, the lowered threshold seemed apposite to the Special Rapporteur.

16. Draft conclusions 22 and 23 related to the consequences of *jus cogens* norms on individual criminal responsibility, drew upon the previous work of the commission on crimes against humanity and immunity from foreign criminal jurisdiction for state officials. Article 7 of draft articles on crimes against humanity and Articles 6 and 7 of the draft articles on the immunity of state officials from foreign criminal jurisdiction have been included in the third report as proposed draft conclusions 22 and 23 respectively.

17. As regards draft conclusion 22 the duty to establish domestic jurisdiction over crimes prohibited by *jus cogens* norms has been provided for on the basis of the territoriality and nationality principle. More controversial is the paragraph 2 that permits states to establish jurisdictions for punishment of *jus cogens* crimes on grounds other than territoriality and nationality in accordance with their national law, leaving open the scope for establishment of universal jurisdiction for the punishment of *jus cogens* crimes.

18. More controversial is draft conclusion 23 that concerns the irrelevance of official position and the non-applicability of immunity *ratione materiae* in the prosecution of *jus cogens* crimes. According to the Special Rapporteur, despite the criticism that the principle received during the previous work of the ILC on the aforesaid topics, he believed that the conclusion accurately reflected the position of customary international law in this regard. He argues that the case law cited in opposition to the principles concerns mainly to immunity from civil proceedings in domestic courts. In his report, he analyses a number of cases where there was in question for

example, the case concerning the *Jurisdictional Immunities of State*[11] and the case of *Minister of Justice v. Southern African Litigation Centre*.[12]

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

19. The members of the Commission commended the Special Rapporteur, Mr. Dire Tladi on the presentation of his third report on peremptory norms of general international law (*jus cogens*) and proposed draft conclusions therein. Although some members expressed regret about the procedure being followed whereby draft conclusions were left pending in the Drafting Committee without being considered by the Commission until the conclusions of the first reading of the entire set of draft conclusions, largely the work of the Special Rapporteur was welcomed by the members of the Commission. Several member supported the Special Rapporteur's practical approach to the topic in an area that posed the challenge of a paucity of practice coupled with moral and political underpinnings. The member emphasized that the Commission should take cautious approach and examine all aspects of the consequences of *jus cogens* in balanced manner and a suggestion was that in areas where the characteristics of *jus cogens* norms were intertwined with the consequences of their breach, they should be considered together.

20. It was also noted that the Special Rapporteur had not proposed a draft conclusion relating to general principles of law, which may have the unintended implication that a conflict between the two may be resolved in favour of general principles. The member also agree that consistency of terms such as consequences, conflict, and legal effects etc. should also be maintained with the earlier work of the Commission and existing legal instruments where these terms have been employed.

21. As regards draft conclusion 10, some members noted that the second sentence providing that treaties in conflict with *jus cogens* norms do not have legal consequences be clarified in the commentary. Further, it was also highlighted that the issue of interpretation addressed in paragraph 3 was pertinent to not only treaties but other sources of international law as well.

22. As regards the elements regarding termination of treaty on account of its conflict with an existing or future *jus cogens* norm the member suggested that the Special Rapporteur keep track of Article 70 and 71 of the VCLT and incorporate the same obligations in the draft conclusions. Further, the general procedure for termination of treaties for reasons inter alia a conflict with a *jus cogens* norms should also be included as provided for in article 69 and 70 of the VCLT. As regards reservation to treaties the members who specified that the very existence of norms of *jus cogens* in a treaty did not mean that any reservation to the treaty was invalid for e.g. reservation to the compromissory clauses in the treaty.

23. Regarding the dispute settlement procedure to be adopted for determining whether a treaty conflict with a norm of *jus cogens*, the Special Rapporteur opted for a modified version of Article 66 of the VCLT, wherein an additional option of an arbitral tribunal has been provided for. Some members welcomed this approach as a novel step that may increase the chances of judicial settlement in this regard as at present many states have attached reservations to it. On the other hand, some members commented that the additional option of arbitration may run counter to the aims of the international community to maintain legal certainty and promote the

[11] *Jurisdictional Immunities of State (Germany v. Italy: Greece intervening) Judgment* [2012] ICJ Rep. 99.
[12] *Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others*, Judgment of the South African Supreme Court of Appeal, 2016 (4) BCLR 487 (SCA).

consolidation of international law. As regards the relationship between *jus cogens* and customary international law expressed in draft conclusion 15, the members of the Commission were of the opinion that there was a fundamental difference between the *jus cogens* norms and customary international law as state consent was not the exclusive basis for *jus cogens*. Further paragraph 3 of the draft conclusion 15 was well received in as much as the members of the Commission not only agreed that the persistent objector rule had no applicability on *jus cogens* but also commented that the said paragraph also accorded with the without prejudice clauses inserted in the draft conclusions on the identification of customary international law, that was adopted by the Commission on second reading at the seventieth session of the Commission.

24. As regards the terminology of 'unilateral acts' adopted in draft conclusion 16 it was suggested that the word unilateral commitment be employed to restrict the application of the paragraph only to formal unilateral act that created legal obligations. It was suggested that the said clarification could be made in the commentaries to the draft conclusions.

25. With regard to the consequences of the *jus cogens* norms on the resolutions of international organizations addressed in draft conclusion 17 there was a difference of opinion in the Commission. One group of members were of the view that a specific mention of the UN Security Council is in order given its importance and vast scale of powers granted to it under Chapter VII of the UN Charter. The other group emphasized that the paragraph was intended to formulate general rules and mentioned of a specific organization would not be conducive to it apart from having a potential negative impact on the collective security mechanism in the UN system. Some members also pointed out that the draft conclusions should reflect that the resolutions in violation of *jus cogens* were not only not binding were also invalid, and that there could be a possibility of severability be considered in relation to the invalidity of resolutions.

26. Draft conclusion 18 related to the relationship between *jus cogens* norms and *erga omnes* obligations. Apart from expressing the view that the relationship between *jus cogens* and obligations *erga omnes* was complex and deserved more thorough and in-depth consideration, it was suggested by some members that the point that not all obligations *erga omnes* arose from *jus cogens* norm be included in the draft conclusion.

27. Apart from expressing general agreement in relation to draft conclusion 19 which was based on article 26 of the ARSIWA, it was suggested that the provision follow the aforesaid article 26 more closely apart from extending its application to international organization and the general law of countermeasures. As regards, the duty cooperate some members were sceptical whether the duty reflected existing law or what precise obligation it entailed but by and large welcome draft conclusion 20 and suggested that the text follow the language of the Namibia Advisory Opinion[13] more closely. Questions were also raised about the necessity of draft conclusion 20 paragraph 3 in as much as it made no reference to the collective security mechanism of the UN Security Council.

28. As regards, draft conclusion 21 some members of the commission questioned the view of the Special Rapporteur to omit the use of the word 'serious' in the draft conclusions as it was present in article 41 of the ARSIWA on which the said draft conclusions was based upon. They expressed that the omission of the said qualifier word 'serious' employed before 'breach' expanded the scope of the principles beyond what was accepted in the ARSIWA. Others agreed

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep. 54, paras 117-119.

with the view of the Special Rapporteur that the duty not to recognise or render assistance has a lower threshold than the duty to cooperate and hence the omission of the word 'serious' was appropriate. In any case the members of the Commission agreed that this was an area on which the Commission should engage in the process of progressive development.

29. Draft conclusions 22 and 23 were based upon the work of the Commission that was still underway and had not been adopted in entirety, namely the work of the Commission on crimes against humanity and immunity of state officials from foreign criminal jurisdiction. As such they dealt with the consequences of *jus cogens* norms on individual criminal responsibility, which lead some members to comment that the draft conclusions addressed primary rules of international criminal law regarding criminal prosecution under national jurisdiction and thereby deviated from the topic which was to be limited to secondary rules of international law, focussing on its general effect.

30. As regards paragraph 1 of the draft conclusion 22, there was consensus amongst several members regarding the existence of a number of treaties in force and state practice that stating that states should exercise national jurisdiction to punish *jus cogens* crimes committed on their territory or by their nationals. Other members were of the contrary opinion and stated that the treaties and practice did not suggest the conclusion in the afore-said paragraph 1. Some members sought to include the passive nationality principle and, suggested to address issues arising out of conflict of jurisdiction in the commentaries. Further, in relation to paragraph 2 of draft conclusion 22, several members agreed with the use of a *non-obstante* or without prejudice clause to secure sovereign space in the regard. In similar vein, a suggestion was made to add in 'accordance with international law' to the paragraph in acknowledgment of the ambiguity in international law regarding universal jurisdiction.

31. The lack of consensus amongst the members regarding draft conclusion 22 was visible even in the discussion of the members on draft conclusion 23. Draft conclusion 23 proposed the non-applicability of immunity *ratione materiae* to criminal prosecution of *jus cogens* crimes. Several members were of the view that the balance of authorities supported the draft conclusion and that it was only in civil cases that the exception of immunity *ratione materiae* was upheld.

32. On the other hand, other members were of the view that the state practice relied upon by the Special Rapporteur did not support the conclusion arrived at in the draft conclusion. They expressed that the conclusions arrived at was potentially wider than draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction, adopted as the sixty-ninth session (2017). They expressed concern that the said draft conclusion 23 may create hurdles for the Commission in reaching an agreement on the draft articles on immunity of state officials from criminal jurisdiction and in the overall success of the draft convention on crimes against humanity.

4. Future Work of the Commission

33. As regards, the future work of the Commission, there was support in the Commission for the development of illustrative list non-exhaustive in nature of the *jus cogens* norms that could be drawn from the previous work of the Commission. It was emphasized that the comments received from States on what norms should be included would be of utmost importance. Other also expressed some caution, as they believed that such a list might take a long time to achieve agreement within the Commission.

34. Support was also expressed that regional *jus cogens* norms also be studied as it had attracted some support from States in the Sixth Committee. Other members were doubtful as to how the concept could be reconciled with the norms having the character of being "accepted and recognized by the international community as a whole" provisionally adopted by the drafting committee as draft article 2(3).

35. Some members had commented on the working method of the Commission that did not include the preparation of commentaries to which the Special Rapporteur explained that due to a paucity of time the same was not prepared. He undertook to produce a full set of commentaries for the careful consideration of the Commission on the understanding that the topic would be considered during first half of seventy-first session (2019) as opposed to receiving insufficient time in the second half as had been the case in the present session.

II. Succession of States in respect of State Responsibility

1. Introduction

1. At its sixty-eighth session (2016) the Commission decided to include the topic 'succession of states in respect of state responsibility' in its long term programme of work on the basis of the proposal contained in the report to the UNGA on the work of the Commission at the sixty-seventh session (2015). At its sixty-ninth session (2017), the Commission decided to include the topic "succession of states in respect of state responsibility; in its programme of work and appoint Mr. Pavel Sturma as Special Rapporteur. The UNGA subsequently vide resolution 72/116 of December 2017, took note of the decision of the Commission to include the topic in its programme of work.

2. At the present session the Commission had before it the second report of the Special Rapporteur on the topic that looked at certain general rules regarding succession of state responsibility and the transfer of obligation arising from the internationally wrongful act of the predecessor State, that provide for exceptions from the aforesaid general rules. The commission considered the second report at its 3231st to 3435th meetings from 17 to 24 July 2018. At is 3435th meeting on 24 July 2018 the Commission decided to refer the proposed draft articles in the second report i.e. draft article number 5-11 to the drafting committee to consider the report taking into account the views of the members in plenary session. At its 3443rd meeting, on 3 August 2018 the Chair of the drafting committee presented his interim report which provisionally adopted draft articles 1, paragraph 2 and draft article 5 and 6. The Commission also decided to request the Secretariat to prepare a memorandum on the treaties registered under article 102 of the UN Charter which may be relevant to the future work on the topic. During the discussion in the Commission the Special Rapporteur indicated that he agreed that the Commission should consider changing the title of the topic to "State responsibility problems in cases of succession of States."

3. The seventieth session (2018) discussed this topic and considered the second report on succession of states in respect of state responsibility by the Special Rapporteur addressing the general rule regarding state succession in respect of state responsibility and the transfer of obligations arising from the internationally wrongful acts of the predecessor state, that provide for exceptions from the aforesaid general rules. The Commission considered the second report at its 3431st to 3435th meetings from 17 to 24 July 2018.

2. The Second Report of the Special Rapporteur

4. The second report on the succession of state in respect of state responsibility focused on certain general rules on the topic and the transfer of obligations arising from international wrongful acts of the predecessor state. As regards, the report the Special Rapporteur indicated a few general comments followed by comments on the specific draft articles numbered from five to to eleven. As regards the general theory of non-succession of state responsibility the Special Rapporteur indicated that he did not favour a replacement of that theory with another similar one but sought to provide a more realistic and flexible approach to it, which is what his report focused upon. It was also stressed upon that while consistency with the previous work of the commission was important on the present topic, it was not necessary to adopt the same structure as regards the work of the Commission on the Vienna Convention on the Succession of States in Respect of Treaties, 1978 ('1978 Vienna Convention') and the Vienna Convention of the Succession of States in Respect of State Property, Archives and Debts, 1983 ('1983

Vienna Convention'). Moreover, while maintaining that the ARSIWA generally reflected the state of customary international law the Special Rapporteur emphasized that the rules arising therefrom should be applied or developed to serve as guidance for States facing problems of responsibility in case of succession. Further, it was also reminded by the Special Rapporteur that the rules arising from the present topic could not be applied '*in abstracto*' but in the context of the secondary rules of state responsibility relating to attribution and the content and form of responsibility in general.

5. On the whole the Special Rapporteur indicated that the second report took into account the comments from the members of the Commission and from the States in the Sixth Committee of the UNGA and proposed seven draft articles numbered from five to eleven.

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

Draft article 5
Cases of succession of States covered by the present draft articles

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

Draft article 6
General rule

1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.

2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.

3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.

4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.

Draft article 7
Separation of parts of a State (secession)

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was

carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.

4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

Draft article 8
Newly independent States

1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.

2. If the newly independent State agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.

3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.

Draft article 9
Transfer of part of the territory of a State

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.

Draft article 10
Uniting of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.

2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.

3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.

Draft article 11
Dissolution of State

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.

2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.

2.2. Introduction by the Special Rapporteur of the second report on the succession of state in response of state responsibility.

6. As regards draft article 5 the Special Rapporteur expressed the rule that the present article applied only to legal situations of succession that were in conformity with the Charter of the United Nations. In the report practice of the Security Council, and the case law of the human rights courts are cited in support of the provision occurring in the 1978 and the 1983 Vienna Conventions along with the articles on nationality of natural persons in relation to the succession of states. The Special Rapporteur indicated that although there were certain 'grey' areas in the matter of legality of successions many of the examples cited were in relation to the norm of aggression and others such as racial discrimination. Further, the draft article 5 is modelled on article 6 of the 1978 Vienna Convention and consistent with other previous work of the Commission and along with the work of the *Instut de Droit International*.

7. The other general rule contained in draft article 6 states the general rule of non-succession in respect of state responsibility except for when there is a continuous wrongful act. It further states that in cases where the predecessor state survives the act of succession would have no bearing the right to invoke the responsibility of the predecessor state. The report of the Special Rapporteur has placed reliance on the caselaw of the European Court of Human Rights, the Inter-American Court of Human Rights and the leading award in the Lighthouse Arbitration along with the case of the ICJ in the Gabcikovo Nagyramos Case.

8. Draft article 7, 8, and 9 deal with cases where international responsibility of the predecessor state is transferred to the successor state in cases where the predecessor state continues to exist. The three draft article address the three distinct situations of the separation of a part of the state, establishment of a newly independent state, the transfer part of the territory of the state. The methodology followed in their drafting is common, in as much as they first they express the general rule of non-succession and thereafter prescribe exception bases on either the direct link to consequences of the wrongful breach or the territory. An example of the secession of Belgium from the Kingdom of the Netherlands in 1830 was in cited support of the proposition

that link with the territory was integral to the question of reparations. As regards the general rule it is pertinent to note that in relation to new states it was stated the limited state practice supported the conclusion that there was no succession to the colonial order without the consent of the successor.

9. As regards draft article 10 and 11 the Special Rapporteur stated that they dealt with situations where the transfer of responsibility from the predecessor state takes place in a situation where the predecessor ceases to exist. The respective cases identified in draft article 10 and 11 are that of a merger of a state into another state and the dissolution of a state. Draft article 11 also expressed the role for the negotiation of agreements in good faith by the predecessor state. With regard to the merger of a state or unification thereof provided for in draft article 10 the Special Rapporteur has relied upon the practice of three states from the Members of AALCO namely Socialist Federal Republic of Vietnam, the United Republic of Tanzania and the United Arab Republic.

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

10. The members of the Commission generally welcomed the second of the Special Rapporteur and commended him on his work in structuring the work. Due to the lack of decisions of domestic courts and international courts and tribunals the members understood the reliance on the academic writing and the work of the Instut de Droit International but advised caution. In addition some members noted that the practice considered in the second report unlike the first report had predominantly focussed on European Sources and examples. As regards, the basic distinction maintained in the draft article as depending upon the existence on the predecessor state a number of members were in support of the Special Rapporteurs work. The examples cited often contained agreement towards which the members asserted that the were often narrow in scope and that caution was required in inferring general rules from them.

11. As regards draft article 5 members generally expressed their support for draft article 5, which they considered to be consistent with the principles of *ex injuria jus non oritur* under UNGA Res 2625 on the Declaration of Principles in International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Other members suggested that the legality of succession should be considered separately from the possible consequences that were the subject of the present topic.

12. As regards draft conclusion 6 members generally expressed agreement with the general rule expressed but remarked that the formulation of that draft article was unclear. Further as regards paragraph the members considered that employing the term reparation may restrict the scope of the draft articles.

13. In relation to draft article 7 the view was expressed and accepted by the Special Rapporteur that the reference to the term ‘secession’ may be interpreted to refer to unlawful succession. Further in relation to transfer of responsibility some members were of the view that no transfer would occur but the states would distinctly be responsible for their acts. As regards the attribution to the conduct of insurrectional or other movements what would be the date of succession on which the consequent transfer of responsibility would take place.

14. As regards draft article 8 some members expressed the view that the concept of newly independent case did not seem appropriate for codification due to its anachronistic nature while state that a direct link to population should be included in addition to territory. As regards draft

article 9 several members remarked that their comments and views regarding the need for clarification of terms and concepts in draft article 7 should apply to draft article 9 as well.

15. In relation draft article 10 and 11 several members did not support the transfer of responsibility merely due to the non-existence of the predecessor state in the absence of agreement. They stated that support only in academic writing and the work of the *Instut de Droit International* were available which was not enough for codification.

4. Future Work of the Commission

16. As regards the future work of the Commission on the topic, there was general agreement that the Special Rapporteur should consider future topics such as the role of international organization and the effect of non-recognition policies on issues of succession to responsibility. Further the Special Rapporteur specified that the third report on the topic to be presented in 2019 would focus on the transfer of the rights or claims of an injured predecessor State to the predecessor state. The fourth report to be released in 2010 could address procedural and miscellaneous issues, including the plurality of successor states and the issues of shared responsibility, or application of these rules to other subjects like international organizations or individuals.

III. Immunity of State Officials from Foreign Criminal Jurisdiction

1. Introduction

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

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

3. At its sixty- ninth session held in 2017, which immediately preceded the seventieth session, the Commission had before it the Fifth Report of the Special Rapporteur analyzing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), which it had begun to debate at its Sixty-Eighth session. The report, as highlighted above considered the issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction offering an analysis of relevant state practice in addition to addressing some crucial methodological and conceptual questions related to limitations and exceptions. As apparent, the thrust of the debate was on the non-application of the legal regime of immunity in specific cases. In the meeting held on July 20, 2017 after several members addressed the Commission as to their concerns, the Commission provisionally adopted the draft article 7 and annex by a recorded vote of 21-8-1 (with four members absent). Thereafter, the Special Rapporteur proposed commentary for the draft article and annex, which was then revised and adopted by the Commission at its later meetings.

4. The seventieth session discussed this topic in the backdrop of a fresh (sixth) report prepared by the Special Rapporteur addressing certain procedural aspects of the topic. The Commission considered the sixth report at its 3438th to 3440th meetings, on 30 and 31 July 2018. The debate on the report would be continued and completed at the seventy-first session in 2019.

2. The Sixth Report of the Special Rapporteur

5. The Special Rapporteur began the report with an elaboration that unlike previous reports, the sixth report contained a detailed summary, for information purposes, of the debate

surrounding the adoption of draft article 7. The Commission, it should be recalled, at its sixty-ninth session adopted this draft article. This detailed summary would not have been necessary in the normal course but for the highly sensitive nature of the topic and the divergent positions expressed in the Commission and the Sixth Committee on draft article 7.

6. The Special Rapporteur noted that over the years, the approach of the Commission had shifted from the more classical aspects of the topic such as timing, invocation and waiver to the need to establish procedural safeguards in the best interests of protecting rights and preventing the abuse of exercise of criminal jurisdictions. Since immunity in this context would be claimed in a foreign criminal jurisdiction, there is a general heightened awareness of the significance of the report from a rights perspective.

7. Given the scope of the issues to be discussed, the Special Rapporteur highlighted the need to consider the following aspects, including: (a) what was meant by criminal "jurisdiction"; (b) what kinds of acts of the forum State were affected by immunity from foreign criminal jurisdiction; (c) who determined the applicability of immunity, and what effect did such a determination have on immunity; (d) when did immunity from foreign criminal jurisdiction begin to apply; (e) was invocation of immunity necessary, and who could invoke such immunity; (f) how was the waiver of immunity effected, and by whom; (g) what was the effect of the waiver of immunity on the exercise of jurisdiction; (h) how would the communication between the forum State and the State of the official be ensured, and what mechanisms could be used for such communication; (i) what mechanisms, if any, enabled the State of the official to have its legal positions made known and taken into consideration by the courts of the forum State when determining whether immunity applied in a specific case; (j) how would international judicial cooperation and assistance between the forum State and the State of the official be facilitated; (k) to what extent, and through which procedures, would the obligation to cooperate with an international criminal court be taken into consideration; and (l) how would proceedings began in the forum State be transferred to the State of the official or an international criminal court, as necessary.

The following four criteria are needed to address the above aspects:

a. The presence of the foreign "State Official" in the jurisdiction of the forum State, whose acts, at least in respect of immunity *ratione materiae*, were performed in an official capacity.
b. The need to balance the rights of both the states in question-the forum State exercising jurisdiction and the State of the official.
c. The need to balance the functional and representative character of the State official and the countervailing obligation to fight impunity under international law.
d. Ensuring the application of international human rights law and its standards to foreign State officials.

Four complementary dimensions are essential to address the broad and comprehensive sweep of the subject:

a. Timing, identification of the acts of the foreign State that may be affected by immunity and determination of the immunity are the most significant aspects on which the procedural aspects of the broad topic need to be examined.

b. The procedural elements of autonomous procedural significance with links to the application or non-application of immunity as a first level safeguard for the State of the Official, in particular questions concerning the invocation and waiver of immunity.
c. The communicative and consultative mechanisms between the forum State and the State of the Official including instruments of international legal cooperation and mutual assistance between States concerned.
d. The procedural safeguards inherent in the concept of a fair trial and the protections available under international human rights law.

8. In addition to the above, the Special Rapporteur thought it necessary that the obligation to cooperate with the International Criminal Court and its link with the subject of the sixth report should be analysed as well.

9. As regards the substantive elements of the report, it focussed on the "when", "what" and the "who" by examining: a. the ***timing*** of the consideration of immunity; b. ***the acts of authorities*** (kinds of acts) of the forum State that may be affected by immunity; and c. identifying the ***relevant State organ*** competent to decide the question of immunity (determination).

10. As regards ***timing***, the Special Rapporteur highlighted that the question of immunity should be considered at the "early stages" of the process. Since, it is objectively impossible to quantify "early stages" precisely, the consideration of immunity should happen by combining two elements: a. the stage of criminal procedure (investigation, prosecution and trial); and b. the binding and coercive nature of any measure on the functional and representative capacity of the foreign State Official. To apply these criteria in a concrete situation, it would imply as follows:

a. Immunity should be considered by the Courts of the forum State at the earliest possible opportunity i.e., before any decision on merits is taken.
b. It is doubtful whether immunity can apply at the inquiry or investigation state. However, it should be considered before any coercive measures that have the potential to impede his functioning are taken.

11. A distinction between immunity *ratione materiae* and immunity *ratione personae* should be considered while applying the timing criteria.

12. As regards the ***kinds of acts affected***, the following jurisdictional acts are covered: bringing of a criminal charge, a summons to appear before a court as a person under investigation or to attend a confirmation of charges, committal for trial, a summons to appear as the accused in a criminal trial, a court detention order or an application to extradite or surrender a foreign official. In addition, executive acts like detention of a foreign official or registration of a search or arrest warrant in international police cooperation, summons to appear as a witness to a third person, precautionary measures ordered by a forum State court and other interim measures like attachment of assets are also covered.

13. As regards ***determination***, forum State Courts would be the most appropriate bodies to determine questions of immunity though other competent organs of the State (like Public Prosecutors) acting together with Courts could also settle questions in this regard. National laws are significant in this regard and the matter would be analysed in detail in the seventh report as a cooperation issue.

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

14. Members commended the Special Rapporteur for her excellent report though some members regretted the delay in its issuance including the fact that the relevant draft articles would only be submitted next year. Some members pointed out that the report did not comprehensively address all the procedural aspects nor deal with the procedural and substantive aspects of the topic. Some members were of the view that even though the draft articles were not adopted, the analysis in the report was a significant advancement for the topic. The seventh report, it was hoped, would be submitted in a timely manner.

15. Members mentioned the interest of the African Union in having a request included in the agenda of the General Assembly for an advisory opinion of the International Court of Justice on the question of immunities and the relationship between articles 27 and 98 of the Rome Statute of the International Criminal Court.

16. It was highlighted that the topic was politically sensitive and legally complex, with the potential to affect not only international relations but also the municipal functioning of courts, thereby providing an opportunity for States to harmonize their procedures on the subject. Since State practice is extremely crucial for a topic of the said nature, it was regretted by some members that State practice from certain regions was missing in addition to practice on certain aspects of immunity *ratione materiae*. The general paucity of practice and doctrine in this area was acknowledged.

17. The relationship of this topic to other topics on the current programme of work of the Commission, including crimes against humanity and peremptory norms of international law (*jus cogens*) as well as universal criminal jurisdiction, included in the current session in the long-term programme of the Commission was highlighted. In this context, it was highlighted that it was of utmost importance that consistency ought to be maintained to prevent the needless fragmentation of international law. The discussion on procedural issues is of utmost significance given its close link with stability of international relations and the need to ensure the sovereign equality of States.

18. As regards the summary of the debate on draft article 7 in the sixth report, members reflected a broad array of positions on the topic. Some expressed dissatisfaction over the manner in which draft article 7 was adopted and the impact that such an adoption could have on the working methods of the Commission. Similarly, the need for the Commission to clarify whether draft article 7 reflected existing customary law or progressive development of international law was expressed. The view that limitations and exceptions constituted the essence of the topic was also put forth with the position that a discussion on procedural aspects would ensure the fair and effective operation of draft article 7.

19. As regards the comments on the procedural aspects of the sixth report, some members while acknowledging the position of draft article 2 (before the Drafting Committee), mentioned that it was not entirely necessary to define criminal "jurisdiction" for the current purpose. A functional approach would suffice.

20. On the question of ***timing***, members highlighted the importance of addressing questions of immunity at an early state of the proceeding, given the fact that it involved questions of a preliminary nature. The jurisprudence of the ICJ and the 2001 Vancouver Resolution on immunities from jurisdiction and execution of Heads of State and of Government in

international law of the Institute of International Law indicated similar notions. It was opined that diversity of national law would create difficulty in determining the application of immunity rules during the investigation cases, whereas, some others suggested that immunity considerations should cover the entire criminal procedure starting from investigation until the pre-trial stage.

21. On the question of ***acts affected***, some members noted that it was necessary to clarify what was meant by "acts affected by immunity". The need to distinguish between criminal investigation of a situation and the criminal investigation of a particular case was highlighted with the latter assuming greater significance for the debate. It was viewed that immunity must be considered before binding measures were taken against State officials that constituted a hindrance to the effective exercise of their functions. Specific measures like arrest warrant, criminal indictment, a summons to appear before a court, request for extradition/surrender would normally amount to coercive measures, though some measures like a criminal complaint would not necessarily amount to a coercive measure affecting the functioning of a foreign official.

22. On the question of ***determination*** of immunity, some members opined that it was for courts of the forum State to determine the question of immunity and its exceptions. A decision of a higher court would have a greater coercive force than that of a magistrate court. It was suggested that the role of the national executive like the ministry responsible for foreign affairs should not be discounted in this regard. In the event of a doubt or ambiguity regarding the application procedure for law enforcement, it was suggested that an appropriate State organ could provide appropriate instructions to the law enforcement agencies. The role of the Security Council in matters concerning compliance with arrest warrants could also be examined as per suggestions expressed.

23. On the issue of procedural safeguards and guarantees, it was noted by some members that a distinction should be drawn between safeguards ensuring individual due process and international human rights law generally and safeguards aimed at protecting the stability of international relations. The consequences of denial of immunity should be specifically addressed in the context of draft article 7. Compliance with Articles 9, 10 and 14 of the International Covenant on Civil and Political Rights (ICCPR) that deal with certain due process requirements in international human rights law is important. On the international relations front, safeguards would necessarily imply that exercise of jurisdiction based on draft article 7 should be permitted only if the following four conditions were met. *Firstly*, the foreign official was present in the forum State. *Secondly*, the evidence against the foreign official was "fully conclusive". *Thirdly*, the decision to pursue the criminal proceeding should be taken at the highest levels of the Government or prosecutorial authority. *Fourthly*, the forum State must cooperate with the State of the official. Furthermore, all efforts to transfer the foreign official to his home State for trial should be explored, the refusal/failure of which should require exploring of options to try him before competent international courts/tribunals. Thus, national prosecution should be commenced only after exhausting other efficacious possibilities of accountability as regards a foreign official.

4. Future Work of the Commission

24. Members were optimistic about the future work plan of the Special Rapporteur, highlighting the need to have a complete set of draft articles on procedural aspects in the seventh report. The first reading of such draft articles could be completed in the next session.

25. While some members supported the idea of examining the issue from the perspective of International Criminal Court obligations to cooperate with the Court, certain other members opposed the view holding that the draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international rule. The significance of devising a communication mechanism between the forum State and the State of the Official was mentioned. Such a mechanism would facilitate smooth investigation and prosecution basing itself on the principle of complementarity or subsidiarity. The international responsibility of States with respect to immunity *ratione materiae* on the question of procedural invocation would be useful.

26. The debate on the sixth report would be continued and completed at the seventy-first session of the Commission.

IV. Protection of the Environment in Relation to Armed Conflicts

1. Introduction

1. The topic "Protection of the environment in relation to armed conflicts" was included by the International Law Commission in its programme of work at its sixty-fifth session in 2013 and Ms. Marie G. Jacobsson was appointed as Special Rapporteur for the topic.[14] The Commission considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1) at its sixty-sixth session (2014), and her second report (A/CN.4/685) at its sixty-seventh session (2015). At its sixty-eighth session (2016), the Commission considered the third report of the Special Rapporteur (A/CN.4/700), and provisionally adopted draft principles 1, 2, 5 and 9 to 13, as well as the commentaries to these draft principles.[15] The Commission also took note of draft principles 4, 6 to 8, and 14 to 18, which had been provisionally adopted by the Drafting Committee at the same session.[16]

2. At its sixty-ninth session (2017), the Commission decided to establish a Working Group to consider the way forward in relation to the topic as Ms. Jacobsson was no longer with the Commission.[17] The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur Ms. Jacobsson on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur for the topic to assist with the successful completion of its work on the topic. Pursuant to an oral report by the Chair of the Working Group, Ms. Marja Lehto was appointed as the Special Rapporteur by the Commission.

3. At the seventieth session, the Commission established, at its 3390th meeting, a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the newly appointed Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18. The Working Group held two meetings, on 3 and 4 May 2018.

4. At its 3426th meeting, on 10 July 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, whilst beginning to consider the first report of Special Rapporteur Ms. Marja Lehto (A/CN.4/720 and Corr.1). The Commission continued its consideration of this report at its 3427th to 3431st meetings, from 11 to 17 July 2018. At is 3431st meeting, on 17 July 2018, the Commission referred the newly proposed draft principles 19 to 21, as contained in the first report of the Special Rapporteur, to the Drafting Committee. At its 3436th meeting, on 26 July 2018, the Chair of the Drafting Committee presented the report of the Drafting Committee on the topic containing draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session (A/CN.4/L.911). The Commission took note of the draft principles as presented by the Drafting Committee. It is anticipated that the Commission will take action on the draft principles and commentaries thereto at the seventy-first session in 2019. At its 3451st meeting, on 9 August 2018, the Commission adopted the commentaries to the draft principles provisionally adopted at the seventieth session.

[14] The decision was made at the 3171st meeting of the Commission, on 28 May 2013.
[15] Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10), para. 188.
[16] Document A/CN.4/L.876.
[17] Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10), para. 255.

2. The First Report of the Special Rapporteur

5. In the first report of the Special Rapporteur Ms. Lehto on this topic, the background of the topic was elucidated and the fact that the topic had been under active consideration by the Commission based on three reports submitted by her predecessor was recalled. Emphasis was placed on the continued interest of States in the topic as well as the importance of consultations with the United Nations Environment Programme (UNEP) and the International Committee of the Red Cross (ICRC). Abiding by a methodology which sought to ensure coherence with the work completed thus far, the Special Rapporteur defined the temporal scope of the topic to cover the whole conflict cycle and allowed the review of the law of armed conflict, international human rights law and international environmental law.

6. A perusal of the distinct legal regime of the law of occupation reveals a trend of according only indirect protection to the environment, with relevant concepts such as the notions of "civil life" and "usufruct" lending themselves to evolutive interpretation. Furthermore, the law of occupation had to be interpreted in the light of circumstances of the occupation, in particular its stability and duration. The Special Rapporteur recalled that, generally, an occupied territory is expected to be administered for the benefit of the occupied population, not the occupying State.

7. The report addressed the complementary relationship between international human rights law, international environmental law and the law of occupation as *lex specialis*. International jurisprudence confirmed the applicability of human rights law alongside the law of occupation, while the exact content of the obligations depended on the nature and duration of the occupation. Customary and conventional environmental law also played a role in situations of occupation, particularly in relation to transboundary or global issues. The Special Rapporteur emphasized that such environmental obligations protected a collective interest and were owed to a wider group of States than those involved in an armed conflict or occupation.

8. Proposals were made for draft principles 6 (2) (Protection of the environment of indigenous peoples), 15 (Post-armed conflict environmental assessments and remedial measures), 16 (Remnants of war), 17 (Remnants of war at sea) and 18 (Sharing and granting access to information) - principles deemed particularly relevant to situations of occupation. No new wording was proposed to the draft principles but it was suggested that in some instances it could be useful to clarify their relationship to situations of occupation in the relevant commentary.

9. The proposals for three new draft principles, to be incorporated in a new Part Four, were contained in the report. These proposed principles could be relevant to armed conflicts as well as the post-conflict phase, depending on the nature of the occupation. Draft principle 19 embedded the obligation of the occupying State to protect the environment, including in any adjacent maritime areas under control, in the general obligation to take care of the welfare of the occupied territories. The stated obligation extends to respecting the legislation of the occupied territory pertaining to the protection of the environment, unless absolutely prevented. Draft principle 20 provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. Draft principle 21, a principle of "due diligence", incorporated the obligation not to cause harm to the environment of another State. The words "at its disposal" notably allow for flexibility depending on the prevailing circumstances.

The following draft principles were proposed in the first report and provisionally adopted in the seventieth session:

Part Four
Draft principle 19

1. Environmental considerations shall be taken into account by the occupying State in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights.

2. An occupying State shall, unless absolutely prevented, respect the legislation of the occupied territory pertaining to the protection of the environment.

Draft principle 20
An occupying State shall administer natural resources in an occupied territory in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21
An occupying State shall use all the means at its disposal to ensure that activities in the occupied territory do not cause significant damage to the environment of another State or to areas beyond national jurisdiction.

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

10. Regarding the scope and methodology of the Report, the continuation of the methodology adopted by the previous Special Rapporteur was supported by the members, in particular the temporal approach to the topic. However, it was simultaneously noted that a strict temporal division might not always be feasible. A number of members agreed with the Special Rapporteur that the Commission should not seek to change international humanitarian law relating to occupation, but rather to fill gaps relating to environmental protection. Some members supported the addition of a separate Part Four, dealing specifically with occupation. Some others insisted that occupation fell exclusively within the armed conflict phase (Part Two), while yet others maintained it related to the post-armed-conflict phase (Part Three). Several members supported the proposal of the Special Rapporteur to extend the application of certain draft principles already provisionally adopted by the Commission to the situation of occupation and noted that this should be indicated in the commentaries. It was proposed by some members to indicate in a separate draft principle that the draft principles in Parts One, Two and Three applied *mutatis mutandis* to situations of occupation.

11. The members agreed, and the Special Rapporteur supported the conclusion, that the report presented little **State practice** to bolster its findings, thereby calling for the inclusion of State practice from a wider variety of regions.

12. The **concept of occupation and applicability of law of occupation** were delved into while the Report was being considered. The necessity of defining the concept, either in the commentary or in the text of the draft principles, ushered in a divergence in opinions. Some members argued against such definition recognizing that situations of occupation may vary in nature and duration. On the question of applicability of the law, suggestions were made to exclude the applicability to situations resulted from unlawful use of force. Several members suggested addressing the issue of the applicability of the law of occupation to international

organizations. While some members suggested that international organizations could exercise functions similar to those of an Occupying Power, other members questioned this proposition. It was noted by some members that the international administration of a territory by an international organization was very different in nature to a belligerent occupation. Several members suggested replacing the term "occupying State" with a more general reference to "Occupying Power", which was the term used in the relevant treaties.

13. As regards **the relationship/ interaction between the applicable legal regimes**, several members noted that, while the law of armed conflict predated international environmental law, the former had to be interpreted so as to incorporate elements of the latter. Others did not favour an evolutionary interpretation of the law of armed conflict. Members noted that the law of occupation was a subset of the law of armed conflict, which only offered "indirect" protection to the environment. Members generally agreed that international human rights law and international environmental law continued to apply in situations of occupation, while the specificities of the law of armed conflict were to be taken into account. According to some members, international humanitarian law, as *lex specialis*, could set aside those bodies of law if the situation of occupation so required. Other members maintained that, in situations of occupation, military necessity did not override- but had to be balanced against- international human rights law and international environmental law obligations. Several members emphasized that the application of international human rights law and international environmental law depended on the type of occupation, its nature and duration. In this regard, some members proposed drawing a distinction between different forms of occupation. Other members pointed out that the focus of the report was on belligerent occupation and that such a distinction was therefore not necessary in this context. Further, a number of members also noted that, while a significant part of the report dealt with international human rights law, the Special Rapporteur had not proposed a draft principle on that basis. Several members suggested the addition of a new draft principle, or a new paragraph, addressing the relevance of international human rights law, while some members were doubtful about the proposal and saw it as beyond the scope of the topic. While agreeing that the right to health was relevant to the protection of the environment, several members encouraged the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food. A suggestion was made to focus on particularly vulnerable populations.

14. Some members questioned the **link drawn between the protection of property rights in situation of occupation and the protection of the environment**. It was pointed out that harm to public or private property could not necessarily be equated to damage to the environment. Others maintained that the protection of the environment had become a core task of the modern State, and that the concept of "usufruct" could be interpreted in the current legal context to accommodate environmental considerations.

15. As regards **the three newly proposed draft principles**, further clarification of certain terms was asked for. With regard to paragraph 2 of draft principle 19, members supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. A number of members suggested that the Occupying Power enjoyed greater latitude to alter environmental legislation than the wording of paragraph 2 permitted, particularly to enhance the protection of the population. The view was expressed that in such cases the local population had to be consulted. It was suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory. It was also suggested that an occupying State was bound

to its own obligations under international law. Several drafting suggestions were made with regard to draft principle 19, including the addition of a further paragraph to the draft principle to reflect the role of international human rights law.

16. With regard to draft principle 20, some members supported the term "sustainable use", while a view was expressed that the term should be clarified. Other members expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation, and questioned its application to situations of occupation. Some members also questioned the link with the concept of usufruct, and how this concept applied to different categories of property, including private property, public goods and natural resources. Other members stressed that occupying States ought to consider sustainability in the administration and exploitation of natural resources. In this regard, a number of members emphasized the importance of the principles of permanent sovereignty over natural resources and of the self-determination of peoples for the draft principles, while other members questioned the relevance of these principles. Members emphasized that the Occupying Power should act for the benefit of the people under occupation, not for its own benefit. A suggestion was made to broaden the principle to apply to economic and social development of the occupied State more generally. Some members also advocated for substituting the word "minimize" with "prevent". Several drafting proposals were made with regard to draft principle 20 as well.

17. As regards draft principle 21, members generally expressed support for the inclusion of the no-harm or due diligence principle, although a view was expressed that the principle had no place in the project. A suggestion was made to include therein the obligation to cooperate to prevent, reduce and control transboundary environmental pollution. Certain drafting suggestions or clarifications were proposed, which included, *inter alia*, those pertaining to the phrases "all the means at its disposal", "significant damage" and "areas beyond national jurisdiction". It was also suggested that the no-harm principle be extended to situations of armed conflict beyond occupation.

4. Present Status of the Topic and Future Work

18. The engaged discussion undertaken by the members while considering the first report of the Special Rapporteur hints towards the members' optimism towards the future work plan of the Special Rapporteur. Speaking on her future plan of work, the Special Rapporteur expressed the intention to address in her next report certain questions relating to the protection of the environment in non-international armed conflicts, questions relating to responsibility and liability for environmental harm in relation to armed conflicts, and issues related to the consolidation of a complete set of draft principles. It was suggested that, in her next report, the Special Rapporteur address the extent to which the draft principles apply to non-international armed conflicts; enforcement measures; compensation for environmental damage; and questions of responsibility and liability. The Special Rapporteur was also encouraged to clarify the role and obligations of non-State actors. A suggestion was made to elaborate on the relevance of the precautionary and "polluter pays" principles with regard to the topic, although opposition to this proposal was expressed.

19. It is pertinent to reiterate here that the members agreed, and the Special Rapporteur supported the conclusion, that the report presented little state practice to bolster its findings, thereby calling for the inclusion of State practice from a wider variety of regions. Therefore, the Commission would appreciate receiving any information States may be in the position to provide concerning responsibility, liability or reparation for harm caused to the environment in

relation to armed conflict, *inter alia* case law or agreements or arrangements between the parties.

20. Further, support was also expressed for completing the first reading on the topic in 2019, although it was noted that this was an ambitious goal.

V. Protection of the Atmosphere

1. Introduction

1. At the Seventieth Session, the Commission had before it the Fifth Report of the Special Rapporteur[18], in which the Special Rapporteur first addressed the question of implementation of the draft guidelines at the domestic level. Thereafter, he dealt with the question of compliance at the international level. The Special Rapporteur further considered the question of dispute settlement. In that connection, he emphasized both the need for the peaceful settlement of disputes and the need to take into account the scientific-heavy and fact-intensive character of environmental disputes. The Special Rapporteur proposed three additional draft guidelines concerning implementation, compliance and dispute settlement.

2. The Commission considered the report and adopted the texts and titles of draft guidelines, as revised by the Drafting Committee, 10, 11 and 12. The Commission further adopted, on first reading, the entire set of draft guidelines, including the draft guidelines adopted at its Sixty-Eighth (2016) and Sixty-Ninth (2017) sessions, as a whole as the "Guidelines on Protection of the Atmosphere".

3. At the Seventieth Session, the Commission had before it the fifth report of the Special Rapporteur, which was devoted to questions concerning implementation, compliance and dispute settlement. Following the debate in plenary, the Commission decided to refer the three draft guidelines, as contained in the Special Rapporteur's fifth report, to the Drafting Committee. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, a draft preamble and 12 draft guidelines, together with commentaries thereto, on the protection of the atmosphere. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

2. The Fifth Report of the Special Rapporteur

4. Building on the previous four reports, the Special Rapporteur dealt in the Fifth Report issues relating to implementation, compliance and dispute settlement. The Special Rapporteur considers that these issues are the intrinsic and logical consequences of the obligations and recommendations that have been provisionally adopted so far by the Commission on the topic and, naturally, therefore, an analysis of these issues is in no way intended to expand the scope of the topic under draft guideline 2.

5. "Implementation" refers to measures that States take to make treaty provisions effective in their national laws, while "compliance" refers to mechanisms or procedures at the level of international law to verify whether States in fact adhere to the provisions of a treaty. National implementation in the sense of "measures [that] parties take to make international agreements operative in their domestic law" takes place as legislative, administrative and judicial actions.

6. It is necessary therefore to determine the characteristics of the treaty obligations. It may be useful to distinguish at least the following three types of obligations in relation to national law: a) obligations for which States are required to take appropriate measures within their existing

[18] A/CN.4/711

national law (obligation of measures), b) obligations that require States to follow certain specific methods provided for in a treaty (obligation of methods) for which States must amend their existing national law or enact new legislation if they are not equipped with the particular methods that are specified by the treaty, and c) obligation that requires States to maintain a certain legal or factual level specified by a treaty (obligation of maintenance), rather than aiming for specific measures or adopting specific methods.

7. International law relating to the protection of the atmosphere has thus recognized the primary obligations of States, which leads to the question of secondary rules of State responsibility. It is undeniable today that there is an "obligation" on States not to cause environmental harm. It may be a necessary reminder that the work of the Commission on this topic seeks to establish a cooperative framework for atmospheric protection.

8. Also, Nation States are increasingly asserting jurisdiction and control over activities that occur extraterritorially. With the help of a number of relevant cases in this regard, the Special Rapporteur concluded that States resort to extraterritorial application of their national environmental law in order to fill the gaps of the relevant treaties. Such extraterritorial application in international law may be said to be neither entirely legal nor entirely illegal.[19]

9. The Special Rapporteur, next, states that when it comes to international "compliance", compliance more than the correspondence of behaviour with legal rules, and different theories of international law lead to significantly different concepts of compliance. Compliance refers to mechanisms or procedures at the level of international law to determine whether States in fact adhere to the provisions of the treaty and to the implementing measures that they have instituted. Multilateral environmental agreements relating to the protection of the atmosphere have extensively incorporated non-compliance mechanisms and procedures.

10. A "breach" of international law by a State entails its international responsibility, which may be realized either through recourse to dispute settlement procedures or by taking unilateral countermeasures against a non-performing party. In contrast, the concept of "non-compliance" aims at an amicable solution. Non-compliance procedures have been widely adopted in multilateral environmental agreements relating to the protection of the atmosphere.

11. There are generally two major approaches to non-compliance in the practice of multilateral environmental agreements relating to the protection of the atmosphere: the facilitative/promotional approach and the coercive/enforcement approach. There is a basic difference in the philosophy of each, with the facilitative approach stressing the importance of rendering assistance to a non-complying party, whereas the enforcement approach considers

[19] Pursuant to the above, the following draft guideline is proposed:

Draft guideline 10: Implementation

1. States are required to implement in their national law the obligations affirmed by the present draft guidelines relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. National implementation takes the forms of legislative, administrative and judicial actions.
2. Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law, if the actions or omissions are attributable to the States and the damage or risk is proven by clear and convincing evidence.
3. States should also implement in good faith the recommendations contained in the present draft guidelines.
4. The extraterritorial application of national law by a State is permissible when there is a well-founded grounding in international law. It should be exercised with care, taking into account comity among the States concerned. The extraterritorial enforcement of national law by a State should not be exercised in any circumstance.

that compliance can only be achieved by imposing a penalty for a breach of obligations by the non-complying State. These two approaches are sometimes combined to supplement each other.[20]

12. Coming to the issue of dispute settlement, as stated above, non-compliance procedures, set in the framework of multilateral environmental agreements, are intended to induce and facilitate compliance in contrast to dispute settlement, which is normally an adversarial and confrontational system. As a conflict between States develops into a dispute, international law requires that it should be settled by peaceful means, as provided for in Article 33, paragraph 1, of the Charter of the United Nations.

13. Fact-finding may be crucial in some environmental disputes that are of a fact-intensive character requiring reliable scientific findings.

14. It should be stressed that there are also close interactions between non-judicial and judicial means of settling disputes. In the context of disputes relating to the environment and to the protection of the atmosphere States are often required to be well equipped with scientific evidence on which their claims are based. In recent years, the cases brought before the International Court of Justice have been increasingly focused on environmental law cases, which are fact-intensive, involving complicated scientific and technical evidence.[21]

15. Certain legal principles need to be taken into account by international courts and tribunals in assessing scientific evidence: (a) *non ultra petita*, (b) *jura novit curia*, and (c) the standard of proof. Under the doctrine *non ultra petita*, as Article 38 of the statue of the International Court of Justice provides, the Court's function is "to decide in accordance with international law such disputes as are submitted to it". As per the principle of *jura novit curia*, it is for the Court, in the first instance, to find the law that is applicable to the established facts, regardless of whether this particular law was proved or asserted by any of the parties: the Court governs law.

16. Based on *jura novit curia*, the Court can in principle apply any law to any fact, and in theory can evaluate evidence and draw conclusions as it sees appropriate (as long as the Court complies with the *non ultra petita rule*); these are all legal matters.

17. Finally, speaking of standard of proof, it is the criterion by which the adjudicator decides whether the party that asserts certain facts has succeeded in proving those facts to the

[20] Thus, based on an analysis of the foregoing, the following draft guideline is proposed:

Draft guideline 11: Compliance

1. States are required to effectively comply with the international law relating to the protection of the atmosphere in accordance with the rules and procedures of the relevant multilateral environmental agreements.
2. For non-compliance, facilitative and/or enforcement approaches may be adopted, as appropriate.
3. Facilitative measures include providing assistance to non-complying States in a transparent, non-adversarial and non-punitive manner to ensure that those States comply with their international obligations by taking into account their capabilities and special conditions.
4. Enforcement approaches include issuing a caution of non-compliance, termination of rights and privileges under the relevant multilateral environmental agreements and other forms of sanctions. These measures should be adopted only for the purpose of leading non-complying States to return to compliance.

[21] See President Ronnie Abraham's speech before the Sixth Committee on 28 October 2016 (on international environmental law cases before the International Court of Justice), available at www.icj-cij.org/files/press-releases/0/19280.pdf.

satisfaction of the adjudicator. In the fact-intensive/technical cases the Court may also lower the standard of proof if needed, and simply weigh the respective evidence submitted by the parties in order to reach a conclusion. Having less established and detailed rules and standards for evidentiary matters inevitably grants the Court wide general discretionary power in evaluating the relevance and probative value of evidence.[22]

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

18. One of the Members stated that the statement reflected most of the issues raised by Commission members in plenary and that the draft preamble and draft guidelines should be adopted as they stood in order to enable Member States to have their say.

19. Another Member, however, stated that the Drafting Committee had deleted almost half of the text of draft guidelines 10 to 12 as proposed by the Special Rapporteur in his fifth report and had changed what remained beyond recognition, with a result that looked good on paper but risked proving useless in practice. For example, draft guideline 10 (2) and (4), and draft guideline 12 (3) had been removed entirely, while draft guideline 10 (1) had been stripped of its most important provision through the deletion of the reference to States being "required to implement in their national law the obligations affirmed by the present draft guidelines".

20. Another Member was of the opinion that that when the Drafting Committee had discussed paragraph 2 of draft guideline 10, he and other members had expressed concern that, given the Committee's decision to delete the paragraph, dealing with the issue of State responsibility in the commentary might confuse readers. That concern should have been reflected in the statement of the Chair of the Drafting Committee, especially as the text of the statement would be made publicly available.

4. Present Status of the Topic and Future Work

21. Following the adoption of draft guidelines 10 to 12, the Drafting Committee undertook to discuss the entire set of the draft guidelines and the draft preamble. As a consequence, changes were made to draft guidelines 2 and 9. The change to draft guideline 2 bears on substance while the change to guideline 9 is cosmetic.

22. As to draft guideline 2, paragraph 1, the Drafting Committee concluded that the latter word (i.e. "concern"), which had been used in defining the scope of the topic "Identification of customary international law" was more appropriate than the other options.[23]After reviewing

[22] In view of the above, the following draft guideline is proposed by the Special Rapporteur:
Draft guideline 12: Dispute settlement
1. Disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means as established in Article 33, paragraph 1, of the Charter of the United Nations, i.e., through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resorting to regional agencies or arrangements.
2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the rules and procedures concerning, inter alia, the use of experts in order to ensure proper assessment of scientific evidence, if such disputes are to be settled by arbitration or judicial procedures. Such experts may be appointed by each party and cross-examined by the other party. They may also be appointed by the court or tribunal to which the dispute is submitted.
3. It may be taken into consideration, as appropriate, in the judicial settlement of disputes relating to the protection of the atmosphere, that the principle of *jura novit curia* (the court knows the law) applies not only to law but also to facts, thereby requiring necessary assessment of scientific evidence, on the condition of not exceeding the scope of the dispute under the rule of *non ultra petita* (not beyond the request).

[23] **Guideline 2 Scope of the guidelines**

proposed draft guidelines 10, 11 and 12, the Drafting Committee made a few substantial amendments before finally adopting them.[24]

23. On 9 August 2018, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Shinya Murase, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines on the protection of the atmosphere. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines on the protection of the atmosphere, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.
3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.
4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

[24] Guidelines 10-12, as finally adopted by the Committee are as below:

Guideline 10

Implementation

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

Guideline 11

Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.
2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements: (a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions; (b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Guideline 12

Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.
2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

See A/CN.4/L.909. See generally, Protection of the Atmosphere, Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 2 July 2018.

VI. Provisional Application of Treaties

I. Introduction

1. At the Seventieth Session the Commission had before it the Fifth Report of the Special Rapporteur[25], in which he analyzed the comments made by States and international organizations on the 11 draft guidelines provisionally adopted by the Commission at its Sixty-Ninth Session, provided additional information on the practice of international organizations, and submitted two new draft guidelines, 5 *bis* and 8 *bis*, concerning reservations and termination or suspension, respectively, as well as eight draft model clauses.

2. The Commission also had before it the third memorandum prepared by the Secretariat (A/CN.4/707), reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

3. The Commission decided to refer draft guidelines 5 *bis*, 8 *bis* and the eight draft model clauses, to the Drafting Committee, and instructed it to complete the first reading of the entire set of draft guidelines, including those adopted provisionally at the Sixty-Ninth Session (2017).

2. The Fifth Report of the Special Rapporteur

4. In his fifth report, the Special Rapporteur took due note of the various comments made by the delegations regarding the draft guidelines and the commentaries thereto at the Seventy-Second Session of the General Assembly.[26] In addition to the initial set of 11 draft guidelines with commentaries, adopted by the Commission at its Sixty Ninth Session, the Special Rapporteur is proposing two more draft guidelines in the present report.

5. Lastly, as previously suggested by the Special Rapporteur in his Fourth Report, and bearing in mind the views of Member States, the present report includes some proposed model clauses, presented for the sole purpose of providing guidance to States and international organizations.

The two additional guidelines proposed by the Special Rapporteur are as follows:

A. Termination or Suspension of the Provisional Application of a Treaty as a Consequence of its Breach

7. The relationship between the provisional application of a treaty and its termination or suspension as a consequence of its breach, as studied by the Special Rapporteur in the Fourth Report, was concluded as being that as the provisional application of a treaty produces legal effects as if the treaty were actually in force, therefore, the prerequisite of the existence of an obligation under international law is met in the case of provisionally applied treaties, and this

[25] A/CN.4/718 + Add.1

[26] The Special Rapporteur noted, in particular, the emphasis placed on the need to clarify three aspects: the reference to a possible "declaration by a State or an international organization that is accepted by the other States or international organizations " in draft guideline 4; the question of the extent of the binding effect of provisional application, in connection with the wording of draft guideline 6; and the modalities for the termination and suspension of provisional application, in relation to draft guideline 8, bearing in mind the need to maintain a degree of flexibility in this matter.

implies that the provisional application of a treaty may be suspended or terminated in accordance with Article 60 of the 1969 Vienna Convention.

8. However, the memorandum by the Secretariat on the provisional application of treaties[27] includes a discussion of the means whereby the provisional application of a treaty may be terminated, but does not refer to anything related to the requirements of Article 60 of the 1969 Vienna Convention. This confirms the apparent lack of practice in this regard, and the Special Rapporteur has also been unable to identify any such practice. In this event the Special Rapporteur has decided to submit Draft Guideline 8 bis for the Commission's consideration and to seek the latter's views as to the relevance of such a guideline.[28]

B. Formulation of Reservations

9. An analysis of the relationship between the provisional application of treaties and the reservations regime provided for in the 1969 Vienna Convention as done in the Fourth Report of the Special Rapporteur concluded that in principle, nothing would prevent a State from formulating reservations as from the time of its agreement to apply a treaty provisionally. This view is based on the fact that the provisional application of treaties produces legal effects and that the purpose of reservations is precisely to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[29]The analysis, however, also indicated that the Special Rapporteur has not yet encountered a treaty that provides for the formulation of reservations as from the time of provisional application, nor has he encountered provisional application provisions that refer to the possibility of formulating reservations. Furthermore, the memorandum by the Secretariat likewise does not identify any cases where a treaty has provided for the formulation of reservations in relation to its provisional application, or cases where a State has formulated reservations to a treaty that is being applied provisionally.

10. In the light of the deliberations in the Sixth Committee the Special Rapporteur considered that it would be useful to add a draft guideline on this issue, out of the same abundance of caution observed in relation to the preceding draft guideline: Draft Guideline 5 bis.[30]

11. The Special Rapporteur in addition also looked into the issue of provisional application of treaty amendments. The memorandum by the Secretariat refers to this possibility and offers several examples drawn from the practice of international organizations.[31] What these examples have in common is the fact that the decision on the provisional application of amendments adopted pursuant to the treaty has been taken by the competent organs established under the treaty, even when the treaty itself is silent on the subject. At the current stage, however, the Special Rapporteur saw no need to propose a draft guideline on this issue, both because there has as yet been little practice in this regard and because the issue is to some

[27] A/CN.4/707, para. 104.

[28] **Draft guideline 8 bis: Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach**

"A material breach of a treaty or a part of a treaty that is being applied provisionally entitles the States or international organizations concerned to invoke the breach as a ground for terminating such provisional application or suspending the treaty's operation in whole or in part, in accordance with the provisions of Article 60 of the 1969 and 1986 Vienna Conventions, respectively."

[29] A/CN.4/699 [and Add.1], paras. 36 and 37.

[30] **Draft guideline 5 bis: Formulation of reservations**

"The present draft guidelines are without prejudice to the right of a State or an international organization to formulate reservations with regard to the provisional application of a treaty or a part of a treaty in accordance with the 1969 and 1986 Vienna Conventions, respectively."

[31] A/CN.4/707, paras. 19–21.

extent covered by draft guideline 4 (b), although that provision does not expressly refer to amendments as such.

12. As mentioned in the concluding chapter of his Fourth Report, the Special Rapporteur proposed some model clauses, as this idea has been widely supported by States. The Special Rapporteur would like to propose eight draft model clauses covering different aspects of provisional application. These model clauses relate to "Time Frame for the provisional application of a treaty", and "Scope of provisional application", respectively.[32]

3. Present Status of the Topic and Future Work

13. The Commission adopted draft guidelines 6 [7], 7 [5 *bis*], 9, 10, 11 and 12. The Commission then proceeded to adopt the entire set of draft guidelines on provisional application of treaties, as the "draft Guide to Provisional Application of Treaties", on first reading. During this process, some of the draft guidelines previously adopted by the Commission, on a provisional basis, were slightly adjusted, and some were re-ordered to introduce greater coherence into the draft guidelines. Due to time constraints, however, the Drafting Committee was not able to conclude its consideration of the eight draft model clauses.

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[32] **A. Time frame for the provisional application of a treaty**

1. Commencement

Draft model clause 1

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from the date of signature (or any subsequent date agreed upon).

Draft model clause 2

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from … [a specified date].

Draft model clause 3

The negotiating [contracting] States [international organizations] agree that the Treaty [articles … of the Treaty] shall be applied provisionally, except by any State [international organization] that notifies the Depositary in writing at the time of signature that it does not consent to such provisional application.

Draft model clause 4

This Treaty shall be applied provisionally from the date on which a State [an international organization] so notifies the other States [international organizations] concerned or deposits a declaration to that effect with the Depositary.

2. Termination

Draft model clause 5

The provisional application of this Treaty shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally.

Draft model clause 6

The provisional application of this Treaty with respect to a State [an international organization] shall be terminated if that State [international organization] notifies the other States [international organizations] (or the Depositary) of its intention not to become a party to the Treaty.

B. Scope of provisional application

1. Treaty as a whole

Draft model clause 7

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply this Treaty shall be bound to observe all the provisions thereof as agreed with the States [international organizations] concerned.

2. Only a part of a treaty

Draft model clause 8

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply articles […] of this Treaty shall be bound to observe the provisions thereof as agreed with the States [international organizations] concerned.

See Juan Manuel Gomez-Robledo, "Fifth Report on the Provisional Application of Treaties", A/CN.4/718, 20 February 2018.

14. Firstly, no changes were made to draft guidelines 1 to 5 [6], as adopted last year. Draft guideline 6 [7], on the "[l]egal effect of provisional application", however, was modified. The Drafting Committee decided to replace the phrase "the same legal effects", found in last year's version, by "a legally binding obligation to apply the treaty or a part thereof". Further, the term "[e]ffects" was modified to the singular "[e]ffect" in the title of draft guideline 6 [7] to align the title with the reference to "legal effect" in new draft guideline 7 [5 bis] on reservations.[33]

15. The Committee stated that Draft guideline 7 [5 bis] is a new provision added this year. It concerns the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. The Drafting Committee, as per the prevailing view decided to adopt a modified version of the revised proposal by the Special Rapporteur for draft guideline 5 bis and to place it after draft guideline 6.[34]

16. Draft guideline 9 addresses the termination and suspension of provisional application. The provision expands on that adopted last year, as then draft guideline 8, on "[t]ermination upon notification of intention not to become a party", through the inclusion of two new paragraphs covering additional scenarios.[35]

17. The title of draft guideline 10, which was provisionally adopted last year as draft guideline 9, has been amended to read "[i]nternal law of States and rules of international organizations, and the observance of provisionally applied treaties".[36] As a consequence, with no substantive changes to the text of former draft guidelines 9, 10 and 11 that are now renumbered as draft

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[33] **Draft guideline 6 [7]**
Legal effect of provisional application
The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

[34] **Draft guideline 7 [5 bis]**
Reservations
1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied mutatis mutandis, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.
2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

[35] **Draft guideline 9**
Termination and suspension of provisional application
1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.
3. The present draft guideline is without prejudice to the application, mutatis mutandis, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

[36] **Draft guideline 10**
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

guidelines 10, 11 and 12, the Drafting Committee needed to only further align the titles of draft guidelines 11 and 12 with the new title of draft guideline 10.[37]

18. After completing its work on the draft guidelines, the Drafting Committee adopted the title of the entire set of draft guidelines on first reading as the "Guide to Provisional Application of Treaties".

19. The Commission further took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee.

20. The Commission further expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, which had enabled the Commission to bring to a successful conclusion its first reading of the draft Guide to Provisional Application of Treaties. On 2 August 2018, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

[37] **Draft guideline 11**
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties.
Draft guideline 12
Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

VII. Identification of Customary International Law

1. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur. In paragraph 7 of its resolution 67/92 of 14 December 2012, the General Assembly noted with appreciation the decision of the Commission to include the topic in its programme of work. At its sixty-fifth session (2013), the Commission decided to change the title of the topic to "Identification of customary international law".

2. At its sixty-fifth session, the Commission held a general debate on the basis of the Special Rapporteur's first report and a memorandum by the Secretariat entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic". The Commission changed the title of the topic to "Identification of customary international law."

3. From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered four reports by the Special Rapporteur, as well as two memorandums by the Secretariat. At its sixty-eighth session (2016), the Commission adopted, on first reading, a set of 16 draft conclusions on identification of customary international law, together with commentaries thereto. It 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.

4. At the seventieth session, the Commission had before it the fifth report of the Special Rapporteur[38], which addressed the comments and observations made by States on the draft conclusions and commentaries adopted on first reading, as well as ways and means for making the evidence of customary international law more readily available.

5. The Commission also had before it an updated bibliography on the topic contained in an addendum to that report[39], the comments and observations received from Governments[40], and the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available.[41]

6. The Commission adopted, on second reading, a set of 16 draft conclusions, together with commentaries thereto, on identification of customary international law. In accordance with article 23 of its statute, the Commission recommended that the General Assembly, *inter alia*, take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination; commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify

[38] A/CN.4/717
[39] A/CN.4/717
[40] A/CN.4/716
[41] A/CN.4/710

rules of customary international law; and follow up the suggestions in the Secretariat memorandum.

2. The Fifth Report of the Special Rapporteur

7. The fifth report addresses the main comments and observations that have been made on the draft conclusions and commentaries adopted on first reading, both in the 2016 debate in the Sixth Committee and in writing in response to the Commission's request.

8. Chapter I describes the main comments and observations of States on the draft conclusions and commentaries adopted on first reading, and sets out the suggestions of the Special Rapporteur in response. The comments and observations are briefly described, followed by his suggestions, mainly as regards the text of the conclusions but also indicating in general terms, whether changes should be made to the commentaries.

9. Chapter II considers the memorandum prepared by the Secretariat on "Ways and means for making the evidence of customary international law more readily available", and how the suggestions in the memorandum might be taken forward. Chapter III contains the Special Rapporteur's recommendations for the final form of the Commission's output. Annex I indicated the Special Rapporteur's suggested changes to the draft conclusions adopted on first reading and Annex II contains an updated bibliography on the topic.

10. As suggested in the Special Rapporteur's fourth report and supported in the written and oral comments of States, this report proposed that the final outcome under the present topic consist of three components: (*a*) a set of conclusions with commentaries adopted by the Commission; (*b*) the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available; and (*c*) a bibliography

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

11. The Commission considered the fifth report of the Special Rapporteur at its 3396th to 3402nd meetings from 7 to 14 May 2018. At its 3402nd meeting, held on 14 May 2018, the Commission referred draft conclusions 1 to 16 to the Drafting Committee, with the instruction that the Drafting Committee commence the second reading of the draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in plenary on the Special Rapporteur's report.

12. At its 3402nd meeting, on 14 May 2018, the Commission decided to establish a working group, to be chaired by Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission. The working group held two meetings between 3 and 4 May 2018.

13. At its 3441st meeting, held on 2 August 2018, the Commission requested that the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available be reissued to reflect the text of the draft conclusions and commentaries adopted on second reading.

14. The Commission considered the report of the Drafting Committee[42] at its 3412th meeting, held on 25 May 2018, and adopted the entire set of draft conclusions on second reading.

15. Further, the Commission expressed its deep appreciation and warm congratulations for the outstanding contribution made by the Special rapporteur to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification of customary international law.

The text of the draft conclusions adopted by the Commission on second reading is reproduced here.

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

[42] A/CN.4/L.908

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

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

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

4. Present Status of the Topic

16. As stated earlier, the Commission at its 3412th meeting, held on 25 May 2018, and adopted the entire set of draft conclusions on second reading At its 3444th meeting, on 6 August 2018, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(*a*) take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination;

(*b*) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

(*c*) note the bibliography prepared by the Special Rapporteur;

(*d*) note the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available, which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

(*e*) follow up the suggestions in the Secretariat memorandum by:

(i) calling to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) requesting the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law, including their timely publication; and

(iii) also requesting the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available through an online database to be updated periodically based on information received from States, international organizations and other entities concerned.

VIII. Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties

1. Introduction

1. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish at its following session a Study Group on the topic. At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.

2. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chair, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction; the jurisprudence under special regimes relating to subsequent agreements and subsequent practice; and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.

3. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group, decided: (*a*) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (*b*) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered the topic on the basis of four successive reports submitted by the Special Rapporteur.

4. At its sixty-eighth session (2016), the Commission adopted on first reading a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, together with commentaries thereto.13 It 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.

5. At its seventieth session, the Commission had before it the fifth report of the Special Rapporteur[43], as well as comments and observations received from Governments[44]. The fifth report addressed the comments and observations made by States on the draft conclusions and commentaries adopted on first reading and made recommendations for each draft conclusion.

6. The Commission adopted, on second reading, a set of 13 draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In accordance with article 23 of its statute, the Commission recommended that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the

[43] A/CN.4/715
[44] A/CN.4/712 and Add.1

commentaries thereto, to the attention of States and all who may be called upon to interpret treaties.

2. The Fifth Report of the Special Rapporteur

7. The fifth report provides a basis for the second reading of the draft conclusions by the Commission and focuses on the comments and observations by States and international organizations. It also addresses all the comments and observations made by States and international organizations in the Sixth Committee of the General Assembly between 2013 and 2016, when considering the annual reports of the Commission.

8. The report, after summarizing and assessing general comments and observations on the topic, specific comments and observations regarding individual draft conclusions are presented and considered in sequence, followed by a recommendation of the Special Rapporteur for each draft conclusion. It concludes with a recommendation of the Special Rapporteur regarding the final form of the draft conclusions in conformity with article 23 of its Statute. The annex contains the draft conclusions adopted on first reading in 2016, with the changes recommended by the Special Rapporteur.

9. The proposed draft conclusions serve to reaffirm and to clarify the law, in particular in relation to articles 31 and 32 of the Vienna Convention. They are therefore a contribution to the work of codification of international law, without, however, aiming at replacing an existing convention or eventually becoming a convention themselves

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

10. At its 3390th, 3391st and 3393rd to 3396th meetings, from 30 April to 7 May 2018, the Commission considered the fifth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in plenary on the Special Rapporteur's report.

11. The Commission considered the report of the Drafting Committee at its 3406th meeting, held on 18 May 2018, and adopted the entire set of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on second reading. At its 3444th to 3448th meetings, from 6 to 8 August 2018, the Commission adopted the commentaries to the draft conclusions.

12. Further, the Commission expressed its deep appreciation and warm congratulations for the outstanding contribution the Special rapporteur made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

The draft conclusions are as follows:

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two
Basic rules and definitions

Conclusion 2
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (*a*), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (*b*), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible

interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (*b*), depends, *inter alia*, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four
Specific aspects

Conclusion 11
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (*a*), or give rise to subsequent practice under article 31, paragraph 3 (*b*), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Conclusion 12
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Conclusion 13
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (*b*), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

4. Present Status of the topic

13. At its 3448th meeting, held on 8 August 2018, the Commission adopted the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Further, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and

(b) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties.