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Under the guidance of
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Introduction

The focus of the current report is to identify the existing rules of armed conflict that are directly relevant to the protection of the environment in relation to an armed conflict. What makes it all the more complicated is the fact that it is at a juncture of emerging areas of international law. Even though the fundamental step in this direction maybe to classify the kind of conflict involved, as different armed conflicts may have different rules applicable. But the irony of the situation is that there exist certain customary rules such as the principle of humanity, principle of distinction and principle of military necessity which continue to apply irrespective of the kind of conflict. To resolve this dilemma the special Rapporteur referred to the State practice as a primary source of information. Also, the study conducted by the ICRC in respect of identifying the customary rules applicable to armed conflicts was referred to understand the points of intersection of different types of armed conflicts. The information so gathered had a serious shortcoming in the form of non-state armed groups which are currently on the rise, like the Islamic State. But it is impossible in law to bind the non-State actors.

Such a situation has narrowed the scope of the report to an extent as it does not deal with the significant stakeholders. But interestingly the issue has been kept wide enough to include within itself the usage and damage caused due to all the weapons used in an armed conflict. The issue at hand also, does not talk about the situation when a party involved in an armed conflict is in occupation of the territory of the other party.

In order to make the report more precise the special Rapporteur has divided the issue into three temporal phases, namely preventive measure, conduct of hostilities and remedial measures. But several members were of the view that phase II should be the core of the project given that consideration of the other two phases was inherently linked to obligations arising during the armed conflict.

The focus areas in the report

The fundamental question that was sought to be discussed first was the outcome of the present report, whether it would be draft principles or draft articles? Members generally agreed that the focus of the work shall be to clarify the rules and principles of international environmental law applicable in relation to armed conflicts. Some members appeared to be in agreement with the approach of the Special Rapporteur, which would mean that the work of the ILC would be only recommendatory in nature. Members justified the choice by stating that the principles in any way did not reduce the legal normitivity of the issue at hand and were a reflection of the existing rules of law on armed conflict. Also, it is not the intention of the Commission to propose a draft convention, therefore the current approach of the Special Rapporteur appears to be in conformity with the intention of the Commission. Therefore the idea of Draft Article seems to be non-viable.

The Special Rapporteur via the Commission had requested for information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflicts, with examples of such instruments to include but not limited to national

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legislations and regulations; military manuals, standard operating procedures, rules of engagement or status of forces agreements applicable during international operations and environmental management policies related to defence-related activities.

The request recorded a modest response, but in particular reply of Finland is close to reality. It said, 'that the armed forces recognise the need to protect the environment, in addition the environmental law of the host State was respected'. Finland explained that the word 'respected' was carefully selected because it did not imply that the local legislation would at all times be followed i.e. if the conditions were difficult a lower level of environmental protection would at times be justified. This they said was a corollary of interpretations of the NATO doctrines. This interpretation was discussed by several members as stating that there exists a paucity of the customary rules or *lex lata* to protect the environment during armed conflict and thus there was a need for *lex feranda* on the issue. This was also taken to mean by the members that the whole natural environment cannot be civilian in nature as suggested by Draft Principle 1 in Annex I to the Second Report.

Member cited the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241 -242, para. 29 concerning the environment and which had also found reference in the Case Concerning The Gabčikovo-Nagymaros Project (Hungary/Slovakia) that, "*the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*." The question that ensued such reference was that, whether the said obligation, which is a peacetime obligation, applicable also during wartime?

The Members of the Commission welcomed the idea of the Special Rapporteur to take the temporal approach, i.e. the phase prior to, during and post the conflict, as this ensured that the topic could be covered in its entirety. Even though it was known that it would be difficult for the Special Rapporteur to draw clear distinctions at the time of drafting the principles. This indeed was an issue that was observed by the Members of the Commission, as per them the Draft Principles did not reflect the temporal phases, as an instance Draft Principle 3 uses the words 'must be taken into account' gives an indication that the principle elaborates obligations of a State pertaining to the first phase i.e. a time prior to the conflict. Similarly Draft Principle elucidates Phase II obligations of a State. But the other principles are of general character and do not apply to any specific temporal phase, therefore could lead to confusion.

Interestingly enough Mr. Eduardo Valencia-Ospina raised the issue whether the reliance placed by the Special Rapporteur on International Humanitarian Law and analogising the same to apply to the instant case. He stated that there were several norms of International Environmental Law that also apply. According to him, the approach of the Special Rapporteur in relying on IHL is not correct, as it is essentially a law to ensure the protection of humans and not environment and oversimplifies the issue. To take the standard of care required for the protection of humans and environment to be the same would be a blatant error, he said. He also said that the applicability of the environment treaties if fundamental to the issue which the Special Rapporteur fails to discuss. The assumption of IHL being the *lex specialis* in this case is not entirely correct and if so the Report does not give reasons for International Environment Law not being the *lex specialis*. Also it must address the relationship between IHL and the human rights law. He said, the issue of the continued

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applicability of treaties at the time of armed conflict was something that this report should have discussed.

Mr. Valencia-Ospina was also of the view that, the current approach taken by the Special Rapporteur may prove to be detrimental to the Geneva Regime as its extension to the protection of the environment might affect its acceptability. Article 42 of the Hague Regulations 1907 were referred in this case, where, the speaker wondered as to why the issue of occupation has not been discussed in this regard. This argument also found support from Mr. Saboia.

As the discussions moved forward the members suggested that the report must also distinguish between Natural Environment as against Human Environment, at this juncture Mr. Petric had brought up the issue of the indiscriminate laying of mines during the Bosnian War, which even after 20 years of the war were affecting the people living in these areas, making the human environment unsafe. This issue was said could also have an effect on the scope of the report, as the protection of natural environment must also include the fact that the environment should remain safe even after the end of the armed conflict.

It was pointed out by Mr. Murphy that, the protections envisaged under the current report were very generic in nature. He referred to Part IV of the Additional Protocol I, 1977 wherein the articles envisage specific protections to civilian population, civilian objects, objects indispensable for the survival of civilian population and protection of cultural objects and places of worship. He therefore said that the protections envisaged under this report must be in concrete terms and not mere abstractions.

The Commission also expressed their concern on the issue of exploitation of natural resources by parties to the armed conflict and that the Special Rapporteur was cautioned on the method of simply transposing the protection of civilians or civilian objects to the protection of the environment. Though the report is restricted in its scope to not deal with issues of natural resources as a cause of armed conflict. But the members pointed out that, the Report does not talk about the exploitation of the natural resources, which can fit into all of the temporal phases. Though this issue did not find mention in the speeches of most of the members, but it merits a mention in the report.

The members usually divided their speech in two [i] General Comments, which have been discussed above; [ii] Opinion on Draft Principles and suggested changes. The Draft Principles according to the member needed some tweaks so as to be acceptable.

Draft Principles

The discussion in this regard started with the unconventional approach taken by the Special Rapporteur in drafting the preamble, many pointed out that the preamble did not contain the traditional preambular clauses and that such an approach was unwarranted. The Purpose, Scope and the Use of Terms being the elements of the Preamble should be incorporated as Principles. Though linguistically the above approach may not appear to be correct, but it in anyway did not affect the normitivity of the principles. This practice, then, would be consistent with the practice of the Commission when it comes to drafting of preamble. Another concern about the structure of the Draft Principle was raised, wherein the members expressed their concerns that the principle did not reflect the temporal

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approach taken by the Special Rapporteur and that, the same should also be incorporated so as to avoid any instances of confusion as to its applicability to the different temporal phases.

Scope

As regards the scope, members had two suggestions to make. Firstly, an element of threshold which would indicate that the topic aimed at addressing situations of a certain degree of damage caused to the environment during armed conflict. Secondly, the present work of the Special Rapporteur should cover both, International Armed Conflicts and Non-international Armed Conflict.

The issue of non-State armed groups divided the Commission. The members were of the opinion that at the moment, the non-State armed groups pose a greater threat than the inter-State wars and therefore should have been dealt with by the Special Rapporteur. But at the same time, it was also acknowledged that there could be practical difficulties in examining the practice of non-State armed groups and the lack of publicly available information makes the task all the more difficult.

Though the Special Rapporteur has excluded the discussions on specific weapons that are prohibited by international treaties, namely Chemical and Biological weapons. A few members of the Commission were of the view that such weapons too should be included within the scope of the topic under consideration. Also, the scope was discussed in light of Nuclear Weapons. It was suggested that the draft principles must address the question of nuclear weapons by means of a "without prejudice" clause due to the declarations made by the States upon ratification of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts concerning its non-applicability.

There were several suggestions pertaining to the determination of the scope in light of the distinction between the human environment and natural environment and infringement of human rights caused by the actions affecting the natural resources should be dealt with. The principles as enumerated in the ENMOD Convention *esp.* the obligation, "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury" was said to be relevance towards the scope of the draft principles. Finally, the General Assembly resolution 47/37 of 25 November 1992 was cited to suggest the inclusion of the obligation of prohibition against destruction as draft principle 1 used the word "attacks" but did not indicate the notion of "destruction".

Purpose

Many members also raised objections with usage of the word 'collateral damage' as it appears to be a real principle in itself rather than the purpose. It was also, said that the incidental harm to nature was very different from the incidental harm caused to civilian objects, and the same shall be therefore clarified. Finally, the distinction between intentional and collateral damage was also sought to be clarified.

Use of Terms

As far as the definition of environment was concerned, though the Special Rapporteur had made it clear that, these definitions were only of provisional nature, a few members had a

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few suggestions to make in this regard. In particular, Mr. Marcelo Vázquez-Bermudez suggested that the term environment must include within its ambit the natural environment, the human heritage and the mixed heritage. He also pointed out that the indigenous people have a right over the resources and territory and that dangerous substance should not be placed on their territory without their consent. Another concern raised was that the peacetime definition of environment could not be transposed in a situation of armed conflict, therefore the situation of armed conflict requires its own definition of "environment".

Draft Principle 1: The natural environment is civilian in nature and may not be the object of an attack, unless and until portions of it become a military objective. It shall be respected and protected, consistent with applicable international law and, in particular, international humanitarian law.

As regards the Draft Principle 1, Mr. Sean Murphy suggested that the usage of the 'shall' must be replaced with 'should' to make it consistent with the intention of the Commission. The usage of the phrase "natural environment is civilian in nature" is inappropriate as it classifies the whole environment as a civilian object and thereby cannot be a subject of attack even if the attack may be in conformity with the principles of International Humanitarian Law. A practical difficulty, as pointed out my Mr. Murphy was concerning the Ruses of war, where the troops camouflage themselves in the nature, it was said that this could lead to confusion with the concept of the Ruses of war. There are several other concerns with this phrase as there are activities of the military which may lead to harm being caused to the natural environment, like the movement of military and the protection of civilian population.

Another gap that was observed in this principle was the usage of the word 'natural environment', the Report under the heading Use of Terms defines 'environment', usage of the word natural environment could lead to confusion as it leads to believe that the 'environment' and the 'natural environment' are distinct.

As regards the structure of this principle, Ms. Concepción Escobar Hernández suggested that the second sentence must be made the first sentence so that the aim of the principle could be explained in a better manner. She said, "Environment as whole should be protected and respected and once such a feeling has been invoked, then the Speical Rapporteur could develop the idea of designating different portions of the environment as civilian or military in nature."

Mr. Nugroho Wisnumurti and Sir Michael Wood, pointed out that the use of the words 'portions' seems to be inappropriate and the same should be replaced with the word 'part'. Members also sought a clarification on the use of phrase, "consistent with applicable international law and, in particular, international humanitarian law" and requested the Special Rapporteur to clarify which principles or rules of International Humanitarian Law would apply here.

Draft Principle 2: During an armed conflict, fundamental principles and rules of international humanitarian law, including the principles of precautions in attack, distinction and proportionality and the rules on military necessity, shall be applied in a manner so as to enhance the strongest possible protection of the environment.

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As far as the Draft Principle 2 is concerned, members suggested the deletion of the adjectives or qualifying remarks used before the word 'principles', as it could change the nature of these principles. The usage of the phrase 'strongest possible' was also not appreciated by the Members as it would then require a threshold so as to merit such protection, and they therefore suggested the removal of these words with the word 'appropriate'. Another suggestion put forth in this regard was the inclusion of the principle of humanity also in the list of the principles stated in the draft principle.

Draft Principle 3: Environmental considerations must be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives.

The members' opinion on this principle was that, this principle applies to a time prior to the armed conflict due to the phrase must be taken into account. A few members also suggested the use of the word 'legitimate' instead of the word 'lawful'.

Draft Principle 4: Attacks against the natural environment by way of reprisals are prohibited.

The use of the word 'natural environment' needs to be relooked at, as the Use of Terms clause defines only 'environment', this it was said, could lead to different interpretations. The use of the term 'reprisals' was also questioned and further clarity in this regard was sought from the Special Rapporteur. Mr. Maurice Kamto raised a query with regard to the use of the word 'Attacks', i.e. a plural usage of the word, and asked for more clarity on the meaning of the word.

Draft Principle 5: States should designate areas of major ecological importance as demilitarized zones before the commencement of an armed conflict, or at least at its outset.

The Members on Draft Principle 5 had two major problems, [i] use of the word designate; and [ii] use of the phrase 'areas of major ecological importance'.

i. The members sought a clarification on the means by which such an area could be designated as an area of major ecological importance, could it be by unilateral declaration of States or by a bilateral agreement between parties to the conflict.
ii. Members sought greater clarity on the phrase 'areas of major ecological importance' and requested instances as to which areas could merit to be classified as areas of major ecological importance.

A few members were of the opinion that this principle is very generic in nature and needs to be reformulated to provide for specifics.

Members also observed that though Nuclear Weapons were discussed in the Report, but the same did not find place in any of the Draft Principles *esp.* Draft Principle 5. They were of the opinion that Nuclear Weapons should find a special consideration in light of the topic.

Summing up the Report

At the end of the debate, the Special Rapporteur summed the whole discussion as it took place. She addressed a few vital debate points in her speech in the 3269th Meeting of the International Law Commission.

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- **Choice of outcome as principles** – The Special Rapporteur had contemplated a list of principles that shall be applicable to the various temporal phases as explained earlier. The current principles are only those which apply to the second phase i.e. during armed conflict.
- **Law of Armed conflict as *lex specialis*** - On this issue the Special Rapporteur said that, the assessment of the law of armed conflict becomes inevitable due to the temporal phase the current report deals with. There are other laws that apply too but, they apply to the other temporal phases. The IHL also find extensive significance due to this reason and the robust support of the ICRC
- **Environment v. Natural Environment** – The title of the topic prescribes the protection of the 'environment' in general. The Special Rapporteur said that the word 'environment' was very broad in ambit and thus in specific cases the 'natural environment' had to be used. Also, other international conventions and instruments elucidate the legal obligations in terms of the 'natural environment' and thus to be in consonance with such legal obligations, the Special Rapporteur has used the 'natural environment'.
- **Natural Environment is civilian in nature** – The Special Rapporteur said that an object can be either a civilian object or a military object, if the environment was not a military object then it has to be a civilian object. The natural environment if not civilian in nature then what else could it be when there is no third option.
- **Collateral Damage** – The word has been extensively used in the military manuals but does not find place in the Geneva Conventions. The Special Rapporteur here conceded the issue and agreed to delete the word 'collateral'.
- **Use of the words 'reprisals' in Draft Principle 4** – The Special Rapporteur stated that, the intent was to create a standard of conduct for States., i.e. States were not entitled to attach the natural environment even by means of reprisals. She also demanded that the ILC charged with the work of the progressive development of international law must recognise such a prohibition.
- **Area of major ecological importance** – The phrase points towards those areas which are crucial for the ecosystem, though she agreed that a more precise meaning to this phrase should have been provided in the Report.
- **Non-State Actors** – The Special Rapporteur expressed her inability to find State practice with regard to this issue, as the information was not easily and publicly available.

Drafting Committee

The members of the ILC referred the draft principles so proposed to the Drafting Committee. In the Plenary the members expressed their reservations with regard to the draft principles, but everybody agreed with the idea that these draft principles contained. Essentially, the drafting committee made drafting changes to the draft principles but did not alter the central idea of the Special Rapporteur.

The Special Rapporteur explained her intent behind having an unconventional preambular clause and sought to justify it. Before presenting the principles before the Drafting Committee, the Special Rapporteur as per the suggestions of the members, changed the format of numbering of principle from "Draft Principle 1" to "Draft Principle II – 1" which signifies that the principles under discussion are the ones that belong to the second temporal phase.

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The Special Rapporteur informed that the use of terms is only an indicative definition to facilitate the discussions. The Special Rapporteur while introducing the draft principles indicated that the purpose of the draft principles was to enhance the protection of the environment by preventive and remedial measures. The Members at this point raised objection with the usage of the word 'enhance' as it could mean that the Commission is seeking to develop international law on the issue. But the same was clarified by the Special Rapporteur that, it only envisaged general kinds of protection. The purpose also indicates to the temporal phases as the words 'preventive and remedial measures' cover the pre-conflict, during and post-conflict phases respectively. Here the word remedial was preferred over the word restorative as it was believed to be more wide and clear.

The Special Rapporteur for ease of reference, renumbered the draft principles. They now also indicate the phase to which it applies, for eg. Draft Principle II-1 means principle applicable to phase two i.e. during the conflict. It was also clarified by the Special Rapporteur that the Draft Principles apply to both International and Non-International Armed Conflict.

Draft Principle I – (x) – Designation of protected zones
States shall designate areas of major environmental and cultural importance as protected zones before the commencement of an armed conflict.

This principle numbered I – (x), states the obligations of the State to take measures necessary to the protection and preservation of the environment before the outbreak of an armed conflict. The obligations of the States include the obligation not to attack such zones i.e. areas of major environmental and cultural importance. The committee had lengthy discussions on the issue of designations of areas as demilitarized zones, and it was decided that such a usage being misfit, was improper and was then replaced by 'protected zones'. Also, the issue of designation of such zones was clarified to give the maximum possible flexibility by using the words agreement or otherwise which could include unilateral declarations or bilateral agreements between States or International Organisations. Another issue that caught the eye of the members was the concept of cultural importance, the Special Rapporteur made it clear that it was not her intention to replicate the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954 but to address the close link between the cultural property and the environment and the dependence thereon.

In the principles pertaining to the second temporal phase, the Draft Principle II – 1 came up for consideration first.

Draft Principle II – 1 – General Protection of the environment during armed conflict.

The [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

Care shall be taken to protect the [natural] environment against widespread, long-term and severe damage.

No part of the [natural] environment may be attacked unless it becomes a military objective.

The Committee decided to discontinue the usage of the phrase "the natural environment is of civilian nature" and replaced with the phrase, "the natural environment must be

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protected and respected" where the usage of the word natural is still under consideration. This principle envisages a general protection of the natural environment, and seeks to encourage a sense of respect for the natural environment. The wording of para 1 of the first principle has been done such that the obligation subsists in the other temporal phases too.

Para 2 of the draft principle seeks to replicate the obligation under Article 51 of the Additional Protocol I.

Para 3 suggests that the environment in itself is not a military object, but parts of it can become military object in certain situations. This para was inspired from Rule 43 of the ICRC Study.

Draft Principle II – 2 – Application of the Law of Armed Conflict to the environment.
The law of Armed Conflict, including the principles and rules on distinction, proportionality, military necessity and precaution in attack, shall be applied to the [natural] environment, with a view to its protection.

In the initial proposal of the principle, the Special Rapporteur had inadvertently used a qualifier for the principles which was later removed by the drafting committee as it was considered to be too superfluous and vague. The initial proposal of this principle also included the words strongest possible protection of the environment, the members were apprehensive on such usage of words as it could be interpreted in a manner to create a hierarchy between the protection to be accorded to the environment and civilian. Also, the principles and rules so listed in the adopted principle is not exhaustive list but only an indicative one. The phrase, 'with a view to its protection' indicates the objective of the principle.

Draft Principle II – 3 – Environmental considerations
Environmental considerations shall be taken in to account when applying the principle of distinction and the rules on military necessity.

This principle, inspired from the Advisory Opinion of the ICJ in the Nuclear Weapons Test case, recognizes the added value of the specificity of the principle of military necessity and distinction when it comes to the protection of the environment during armed conflict. The obligation envisaged under the principle is pertaining to military conduct rather than military object.

Draft Principle II – 4 – Prohibition of reprisals
Attacks against the [natural] environment by way of reprisals are prohibited.

This principle is reflective of the Customary International Law on the issue of the protection of the civilians from active hostilities. The principle has been structured in such a manner that it reflects the compromise between two groups on the issue of its applicability to International Armed Conflicts and Non- International Armed Conflicts. The idea is to limit the proposition to IAC with a simultaneous encouragement not to turn to reprisals in NIAC. This idea may not be apparent from the bare reading of the principle, therefore the committee decided to make it explicit in the Commentary.

Draft Principle II – 5 – Protected zones

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Designated areas of major environmental and cultural importance shall be respected as protected zones as long as they are not a military objective.

The principle covers only the designated areas under DP I – (x). It also envisages the agreements with the Non-State Armed groups and seeks to protect such zones as long as they are not military objectives either in whole or in part.

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Immunity of State Officials from Foreign Criminal Jurisdiction, 4th Report
Special Rapporteur – Ms. Concepción Escobar Hernández

Introduction

The approach of the Commission has been to distinguish the two concepts, immunity *ratione materiae* and immunity *ratione personae,* from a normative perspective with a view to establish a different legal regime for them. The central theme of the current report, as was correctly pointed out by Mr. Caflisch, "when can an individual claim to have acted in an official capacity and therefore be eligible for immunity from suit in a foreign jurisdiction?"

The Special Rapporteur has deduced the normative elements of the immunity *ratione materiae* are, namely:

a) Subjective scope i.e. what persons benefit from such immunity?
b) Material scope i.e. what types of acts performed by these persons are covered by immunity?
c) Temporal scope i.e. over what period of time can immunity be invoked and applied?

The third report has already dealt with the subjective scope and the current report therefore analyses the material and the temporal scope of such immunity *ratione materiae.*

The Special Rapporteur then moved on to elaborate the essence of the current issue i.e. "**act performed in an official capacity**". Some members raised this requirement to the level of exclusivity, stating that the only thing required was that the act must have been performed in an official capacity irrespective of the fact who carried out the act. This idea she said stems from both, subjective and material, link with the State. Since, this concept is in usage and undefined, the current report seeks to make an analysis to define the contours of the concept.

The Special Rapporteur also stressed on the distinction between act performed in an official capacity and act performed in private capacity, i.e. acts done with the sole purpose of benefit to self. In such an instance, the official will not benefit from immunity *ratione materiae,* said the Special Rapporteur. The Special Rapporteur also stated that this distinction should not be confused with *acta jure imperii* and *acta jure gestionis*, act performed in an official capacity may include certain *jure gestionis* acts. The Special Rapporteur therefore makes an attempt to define the concept by referring to the national and international judicial practice, the Treaty practice and the other works of the International Law Commission.

The Special Rapporteur therefore lists the characteristics of an act performed in an official capacity, namely –

- The act is of a criminal nature
- The act is attributable to the State
- The act involves the exercise of sovereignty and elements of the governmental authority

The Special Rapporteur makes an in depth analysis of these characteristics in her fourth report to define the contours of the concept. And after such characterisation of the act is done, she moves on to define the concept as "*an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.*"

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Next, was the temporal nature of the act so performed, though the indefinite nature of the act was not questioned but, a few members raised their concerns with the parallel applicability of the two different legal regimes to the troika. The discussion on the temporal element of immunity *ratione materiae* led to draft article 6 which posits this interesting debate of the two parallel regimes for the troika when in office, as para 3 of draft article 6 states that the troika enjoy immunity *ratione materiae* both while they are in office and after their term of office has ended. This contentious point was discussed at length by the drafting committee.

Focus areas in the report

The commissioners started off by providing their comments on the scope of the topic. It was emphasised that the scope of the topic was under heavy criticism in the 64th Session of the Commission, and the Commission then decided to refer the issue of the scope of the crimes that the immunity would cover to the member States for their comments. Mr. Murase reiterated that, he requested the Special Rapporteur to include the issue of the crimes that were covered by the immunity which the Special Rapporteur has failed to address in her current report. The members also questioned the purpose of the report, seeking a clarification from the Special Rapporteur whether the task before the commission is to establish immunity, at the risk of impunity, for high ranking State officials or is the Commission trying to articulate rules to restrict the scope of immunity in order to avoid impunity for serious international crimes?

It was also brought to the notice of the Commission, that this report does not make any reference to Article 27 of the ICC Statute which apparently sets a diametrically opposite regime of prosecution of State officials as Article 27 does not distinguish on the basis of official capacity, and there the members warned the Special Rapporteur to tread her steps carefully in justifying such a position as the ICC Statute has received ratification from 123 States, giving it almost a universal character. Here Mr. Murase referred to the statement made by the Commissioner for Human Rights in his address to the Commission, that the work of the Commission must be mutually supportive of rather than adversarial to the work of the ICC and International Courts and Tribunals.

An interesting point that was raised before the commission was with regard to the approach of the Special Rapporteur. The focus of the Fourth report seems to be defining the acts that are performed in an official capacity, but the Special Rapporteur in her own report states that, the national judicial practice and legislations are of not much relevance when it comes to an analysis of the concept. Also, the international judicial practice has been too scattered and indirect on this point, thereby leading the members to the conclusion that the approach of the Special Rapporteur in using this concept to determine the scope of immunity *ratione materiae* is inadequate.

The members pointed out the methodological flaw in the approach that was taken by the Special Rapporteur. It was said that para 32 posits "national law to be irrelevant for the purposes of this discussion", but most members did not agree with this proposition as they believed that it constitutes practice and is therefore relevant to the discussion. The Special Rapporteur therefore shifts her focus on the national and international practice in relation to defining the term Acts Performed in official Capacity. The issue therefore arises is how to connect such examples, whether in national and international jurisprudence, with the definition so proposed. At this juncture, Mr. Mahmoud Hmoud (Jordan) said, "*To describe the*

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act as being in the exercise of elements of governmental authority, as the Special Rapporteur settled for in her proposal for article 2(f), or being an expression of sovereignty or acts exercising state or public function, does not give a clear direction on how to implement this in practice." It was also said that the judicial practice referred to by the Special Rapporteur is unbalanced in favour of American and European jurisprudence and therefore does not reflect the International practice in this regard.

Another assertion that received heavy criticism by the Members of the Commission was the premature inference that the acts of the State officials are of criminal nature. It is only natural to say that the nature of the act ought to be determined by the court and the question of immunity precedes the merits of the case. Here the members cited the International Court of Justice in the Arrest Warrants case drew a distinction between immunity and criminal responsibility when it said, "*while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.*" But the approach of the Special Rapporteur suggests that, an accused official in criminal proceedings has to admit of committing a crime before they can benefit from the immunity. According to some members, such a problem has arisen due to the flawed approach of the Special Rapporteur to search for acts which qualify for immunity. It was pointed out by the Members that it is not the nature of the act that qualifies, but what determines the immunity is the capacity in which the act was performed. The approach therefore should be to determine the capacity in which the act has been committed. Mr. Nolte put the issue very succinctly, that the international law of immunity requires that the national court must adopt a neutral criteria to determine whether a particular official or act comes within its jurisdiction and if the existence of state immunity depended on such jurisdiction, then in such a case the law would be superfluous.

Mr. Dire Tladi [South Africa] pointed out that there is from the first report of the Special Rapporteur a constant flirtation with the main issue of – exceptions – but it is never addressed and the same can be seen in the current report too. An example of this practice, he said, can be found in para 126, which is by no means the only instance, of the report where the Special Rapporteur states that "characterisation of international crimes as 'acts performed in official capacity' does not mean that a State official can automatically benefit from immunity *ratione materiae*" but then she quickly turns away and declares that, an analysis of the effect of the international crimes in respect of immunity could be explored more fully in the context of exceptions, in her next report. Mr. Nolte too felt the same and was convinced that the procedural aspects of immunity must be dealt with either before or simultaneously with the issue of exceptions.

Members also pointed out to the specifics of the report and said that para 21 of the report refers to the three conditions to be met for the official to be able to benefit from immunity *ratione materiae,* the first condition reads, 'the individual may be considered a State official'. The words 'may be considered' do not provide any clarity in its intent. The conclusion presented in para 22 of the report, "the only relevant consideration in determining the applicability of immunity *ratione materiae* is whether the act concerned is an act performed in official capacity" i.e. the relevant question remains whether the individual is an official or not, doesn't appear to be very clear and need further clarifications.

Some members also expressed their discontent with regard to the approach of the Special Rapporteur in para 31 which reads "Furthermore, it should be noted that the distinction between "act performed in an official capacity" and "act performed in a private capacity"

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has no relation whatsoever to the distinction between lawful and unlawful acts. On the contrary, when used in the context of immunity of State officials from foreign criminal jurisdiction, the first two categories of acts are both considered, by definition, to be criminally unlawful." Members pointed out that for officials to secure immunity one has to show unlawfulness is a theme that runs throughout the report.

The assertion of the Special Rapporteur that, "any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed." This was not acceptable to the members. They said the decisive question in such a situation is that, whether the act so done by the individual which gives rise to immunity *ratione materiae* benefits the individual in his or her capacity as a State official.

Most members appeared to be on the same page with the Special Rapporteur when she links the immunity *ratione materiae* with the sovereign equality of States i.e. *par in parem non habet imperium*. But some members believed that it is not the work of the Commission to elaborate the essence of sovereignty but the Special Rapporteur should discussed the immunity from the perspective of acts performed in an official capacity in the sense of public functions or sovereign prerogatives of a State rather than just focussing on acts performed in private capacity.

As far as the concept of 'single act, dual responsibility' is concerned, the approach of the Special Rapporteur here found support from all the members of the Commission wherein, the acts performed by State official in an official capacity is not only attributable to the person but also to the State for the purpose of State Responsibility. This it was said, correctly links the act of a State official with the State.

In her report the Special Rapporteur characterised acts of a State official to be of criminal nature. Though the topic under consideration is immunities from foreign criminal jurisdiction and which also tells us about the scope of the mandate. But it is one thing to say, this project covers only immunity from criminal jurisdiction and totally another thing to say acts performed in official capacity are criminal acts. This proposition does not have a basis in law and practice of States. Members also acknowledged the fact that this could not be the intent of the Special Rapporteur and must have arisen due to error in drafting.

Towards the end of the Statements, the Members commented on the temporal element of the issue and the applicability of immunity *ratione materiae* for an indefinite period received a general consensus and was not objected to by any of the member of the Commission.

The Commission appeared divided on the issue of international crimes being acts performed in an official capacity or not. The current report does not address the question and defers it to section on exceptions that the Special Rapporteur would deal with in her next report, though this approach was not much appreciated in the Commission. The members argued from both sides, some stating that those who consider international crimes not as official acts reason on the faulty premise that, the mere gross illegality of the act prevents international law from regarding them as acts of the State.

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Comments on Draft Articles

Draft Article 2(f) – Act performed in official capacity
An "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

The Members pointed out that the use of the phrase "elements of governmental authority" is ambiguous and leads to many questions, and therefore use of such phraseology can be avoided. The scope of the definition could also be much wider, as there are many functions of the State which are delegated to private contractors and many activities being carried out in public and private partnership, Mr. Petric believed that even these activities must find a status of an official act.

Also, there was no need for a reference to the criminal nature of the act and that a general definition of an act performed in an official capacity is not at all required since the question of immunity would have to be dealt with on a case by case basis.

Draft Article 6 – Scope of immunity *ratione materiae*

1. **State officials, when acting in that capacity, enjoy immunity *ratione materiae*, both while they are in office and after their term of office has ended.**
2. **Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.**
3. **Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article.**

Some suggested the usage of the phrase "*both while they are in office and after their term of office has ended*" in para 1 to be redundant. Also the usage of the word "exclusively" concerned the members too.

Earlier in Draft Article 2(e) the term 'officials' had faced the same objections which stated that the troika are officials for the purposes of immunity *ratione materiae.* Para 3 of the Draft Article 6 reiterates what the Commission had decided not to include as it was felt that it was not necessary. It goes without saying that the troika were officials for the purposes of immunities. This article is directed towards the same intention and to put beyond doubt that after the end of their tenure in office, the troika enjoyed immunity *ratione materiae.* Many members were unconvinced with the idea of including the same paragraph which had earlier been objected to by them.

Some members also set their expectation for the future plan of the work. The members expected the Special Rapporteur to completely deal with the normative elements of immunity *ratione personae* and immunity *ratione materiae* which included dealing with the procedural aspects of the immunity too. Only once the ground work for the two legal regimes is done, should the Special Rapporteur move on the exceptions to such immunity.

Mr. Murphy pointed out that, the usage of the words, in 'office' and 'term of office', could mean differently for different legal jurisdictions and the same should be addressed in the Drafting Committee.

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It was also suggested by the members to restructure the Draft Article 6 so as to maintain a degree of parallelism with Draft Article 4 and thus it could read, "*Such immunity covers all acts performed by State officials in an official capacity.*"

Drafting Committee
Draft Article 2 – Definitions – Defines the central concepts of the topic.

Draft Article 2(f) – Act Performed in Official Capacity
An "act performed in an official capacity" means a conduct of a State official in the exercise of [governmental authority][sovereign authority] that may constitute an act in respect of which the forum State could exercise its criminal jurisdiction.

The first issue that came up for consideration in the drafting committee meetings was whether the definition of such a concept was required or not? The Special Rapporteur emphasised that the definition for such a concept was central to the current report and immunity *rationae materiae.* But the other Members of the Drafting Committee suggested that if State official has to benefit from immunity *rationae materiae,* the official must 'act as such', the same method was used in Draft Article 4 that was previously adopted by the Commission.

During the Plenary meetings of the Commission many Members suggested the usage of the term conduct over act so as to avoid any ambiguity. But the Special Rapporteur maintained that the usage of the term act was more consistent with the intent of the mandate. The drafting Committee therefore preferred the usage of the term 'act' over 'conduct'.

The Drafting Committee also, sought to reword the Article in a sense to maintain the logical continuity to the definition of State Official. The usage of the phrase 'exercise of elements of governmental authority' was not consistent with the 2001 articles on State Responsibilities and such usage was not found to be correct in context, as reference to governmental authority was too narrow and restricted the scope of the definition to a specific State function. The other options in this regard was the usage of the concept of Sovereign authority, the same was again not preferred as it was not the task of the International Law Commission to define the term 'sovereignty'. After due deliberations in the Committee the Committee settled for the concept of 'State Authority' instead as it was not overly restrictive and finds reference in Article 2(e) as well. The word 'authority' was preferred over 'function' due to the fact that a crime was not a State function.

But at the same time it is important to note that the use of the term State Authority was not a unanimous decision and as few preferred State functions, which according to them would have mirrored the functional immunity and the position taken under previous articles too.

The Committee also agreed to delete the reference to the element of crime in the definition of the 'act performed in official capacity'. It was said that if the same were not done then, it would have led to a misinterpretation that every act performed in official capacity is a criminal act.

Adopted text – **An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.**

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Draft Article 6 – Scope of Immunity *ratione materiae*

1. **Immunity *ratione materiae* covers only acts performed in an official capacity by State officials during the time of exercise of their official functions.**
2. **State officials acting as such enjoy immunity *ratione materiae* while they are exercising official functions and thereafter.**
3. **Such immunity *ratione materiae* applies to those who enoy immunity *ratione materiae* after the end of their term of office.**

The Proposed Draft Article seeks to set out the material and temporal elements of the immunity *ratione materiae*. The present article is heavily dependent on Draft Article 2(f).

It was suggested during the Plenary Meetings that the order of para 1 and 2 should be reversed as it depends on the nature of the act performed. Para 1 of the Draft Article seeks to expound the material element of immunity *ratione materiae.* The wording used by the Special Rapporteur is a clear and direct statement on the material scope of the act performed in official capacity. It seeks to distinguish between the types of acts performed i.e acts perfumed in official capacity and acts performed in private capacity, and complements Article 5 i.e category of persons who enjoy such immunity. As suggested by Mr. Murphy the earlier reference to the 'term of office', which is not applicable to all State officials, was away with in the redrafted and adopted article.

As far as Para 2 is concerned which expounds the temporal aspect of the immunity i.e. immunity *ratione materiae* continues to subsist after the individuals concerned have ceased to be State officials. It does not envisage a strict temporal scope as the immunity *ratione personae.* The current paragraph is inspired from other international instruments *esp.* Article 39(2) of Vienna Convention on Diplomatic Relations, 1969 and Section 4 of the Convention on the Privileges and Immunities of the United Nations. Thus the benefit of immunity *ratione materiae* continues after after the official ceases to be so and has a direct nexus with the nature of the act. The Committee also debated on the usage of the term 'individuals' instead of 'State official' so as to reflect the position so agreed by the Commission under Draft Article 2(e).

The Drafting Committee debated at length on the need for para 3 and an alternative was presented by the Members that the essence of para 3 could be explained in the commentary to the current Draft Articles. But it was then decided to continue with the recommendation of the Special Rapporteur i.e. to reword the paragraph but to retain the essence of it in Draft Article 6 as it was very different from the previous paragraphs and it was only practical to include it. It deals with the specific case of individuals who enjoyed immunity *ratione personae* in the context of immunity *ratione materiae.* It deals with specific circumstances and also seeks to explain the relationship between immunity *ratione personae* and immunity *ratione materiae.* The debate also went on to discuss the applicability of the two kinds of immunities to the individual when he is in office, thereby giving him/ her a choice. The SR and the Chairman of the Drafting Committee, Mr. Forteau (France) indicated that such a position would lead to a murky situation as immunity *ratione materiae* may have certain exceptions and the complainant may seek to raise them, it would therefore be better to keep the two regimes separate. This position was supported by the other Members who indicated that, the commentary adopted in the 2013 and 2014 categorically stated that immunity *ratione materiae stricto sensu* applied only after the end of term of office i.e. when immunity *ratione personae* ceases to have effect. The purpose of para 3 is to create a regime of immunity *ratione materiae* after the end of the term of office i.e when the State official ceases to be so.

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As against immunity *ratione personae* whcih applies to both acts performed in official capacity as well as acts performed in private capacity, immunity *ratione materiae* applies only to the former.

Adopted text –

1. **State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.**
2. **Immunity *ratione materiae* with respect to acts performed in an official capacity continue to subsist after the individuals concerned have ceased to be State officials.**
3. **Individuals, who enjoyed immunity *ratione materiae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.**

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Provisional Application of Treaties, 3rd Report
Special Rapporteur - Juan Manuel Gómez-Robledo

Introduction

The purpose of Provisional Application of Treaties constitutes a means to contribute to its more likely entry into force and that, given its flexibility, provisional application accelerates the acceptance of international law. It was also agreed by the Commission that the rights and obligations of a State under provisional application of a treaty are the same as if the treaty were in force and therefore the breach of such obligations constitutes an internationally wrongful act.

The Special Rapporteur has made an analysis of the comments that he received from the various States. He notes that from the comments it becomes clear that, none of the comments made indicate that the provisional application of treaties is prohibited by their domestic laws. Here he refers to Botswana, where there is no provision for provisional application of treaty but there does not exist any prohibition against it as well. But the sentiment was clear that, provisional application of treaties must meet their constitutional requirements. It was also observed that countries like the US take the route of executive agreements for provisional application of treaties. The Special Rapporteur then moves on to analyse the relationship of provisional application to other provisions of the VCLT 1969.

The Special Rapporteur has sought to make analysis of those provisions whose relationship to provisional application is most evident, namely, article 11 (Means of expressing consent to be bound by a treaty); article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force); article 24 (Entry into force); article 26 ("*Pacta sunt servanda*") and article 27 (Internal law and observance of treaties). The Special Rapporteur has made an attempt to draw parallels between entry into force of a treaty and its provisional application.

The Special Rapporteur then moved on to discuss, according to the mandate of the Commission, the provisional application with regard to international organisations. It is a known fact and was also determined by the ICJ in the Advisory Opinion on the Reparation for injuries suffered in the service of the United Nations that international organisations is an international person, therefore it is also subject to international law. Though the inherent rights of international organisations devolve from its rules as against the State which is a subject of international law. On the one hand, the report seeks to examine treaties by which two or more States decided to constitute an international organization, and treaties adopted within an international organization, in accordance with article 5 of the 1969 Vienna Convention. On the other hand, the report also examines the treaties concluded between States and international organizations or between international organizations that are governed by the 1986 Vienna Convention and may be the constituent instrument of a new international organization or entity or, as is very common, are intended to regulate matters relating to the headquarters of an international organization previously established under a different treaty.

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Focus Areas of the topic

The members started off by making their comments on the main purpose of the topic. They said the main purpose of the topic is the interpretation i.e. what do States mean when they agree to provisionally apply a treaty? The commission, it was said, should seek to address this query to avoid any sort of ambiguity. Mr. Nolte on this issue also requested the Special Rapporteur to be clear on the meaning of the term provisional application, as it could mean both i.e. one having legal effects and vice versa.

Few members also raised their concern with the interpretation of the Special Rapporteur in his analysis of the Yukos Arbitration wherein he states that, 'a particular interpretation is only possible if it is unambiguous'. It was said that they have not come across such a rule of interpretation and that he must avoid any influence from the domestic legislations on this issue.

Members also pointed out the contradictory approach of the Special Rapporteur when he refuses to deal with internal law (in para 10) and then seeks to analyse the comments and reports on national practice and expresses his intention to collect more such State practice before presenting the conclusions (in para 136). But the Members were in a general agreement that, it would be appropriate to collect more details pertaining to State practice on the topic.

Mr. Tladi made his reservations with para 19 of the report wherein, the Special Rapporteur notes that for several States, the provisional application is subject to the same procedure as the accession to the treaty. Mr. Tladi said, if so were the case then the topic of provisional application would lose its meaning and in no case would any State then prefer provisional application if the effects of it were to be the same as accession to the treaty.

Most Member pointed out that the Special Rapporteur had failed to clarify the distinction between provisional application and the entry in force of a treaty. This difference, it was said, is fundamental to the topic and must be clarified as to the difference in their legal effects and obligations that devolve. The same was also reiterated by Mr. Park and he said that it would have been better if a detailed and systematic analysis of the legal effects concerning provisional application and Article 24 i.e. entry into force was done.

Members also pointed out that there were certain propositions which required a detailed analysis, like the issue of delayed ratification after provisional application of treaties. States may delay ratification processes and try to justify their positions by stating that they are already obligations that apply to them by way of provisional application. This may lead to the notion that the exceptional nature of provisional application can become the norm for an ungratified treaty.

In general the proposition of the Special Rapporteur in para 70 that, 'once a treaty is being provisionally applied, internal law may not be invoked as justification for failure to comply with the obligations deriving from the provisional application' found unanimous support. It was also asserted that though internal law may be used to block provisional application, but only in situations where the treaty or agreement itself provides for such a hindrance of internal law as was seen in Article 45(1) of the Energy Charter Treaty.

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As far as the provisional application of treaties with regard to International Organisations was concerned, Members raised their apprehensions of a domino effect in such cases, as the International Organisation that itself comes into effect through provisional application may provisionally apply certain treaties that it may enter into. Such a scenario creates a high level of unpredictability and irregularity within international relations. It was also suggested that the guidelines concerning the provisional application of treaties must not be combined with those for States, as there are significant differences in the Conventions of 1969 and 1986. Therefore it would be advisable to create two separate regimes for them.

Mr. Park stated that, the Special Rapporteur has classified the treaties of International Organisations into three, namely –

i. Provisional application of constituent treaties of IOs.
ii. Provisional application of treaties adopted under the auspices of IOs and
iii. Provisional application of treaties to which IOs are parties.

It is clear that for the first two categories Article 25 of the VCLT 1969 is applicable but the third category is dealt with by Article 25 of the 1986 Vienna Convention. At this juncture a fundamental question was raised by Mr. Park, i.e. Does Article 25 of the 1986 Convention also have the effect of customary international law? He states that though the Special Rapporteur asserts it to have such effect but there seems to be inadequate practice to justify such a proposition.

Comments on Draft Guidelines

Since the Drafting Committee could only discussed and adopt Draft Guideline one, this report shall not discuss the other Draft guidelines. The Members suggested that the Draft Guidelines must have titles to them so that the intent and meaning of them becomes explicit.

Draft Guideline 1 – States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

The Members in unison advised the deletion of the second part of the guideline which reads, 'provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.' It was proposed by the Members that the second part should read, 'The agreement to provisionally apply a treaty may limit the extent of the provisional application, in particular by making reference to internal law in whole or in part.' The exact wording of such guideline was left to the Drafting Committee for further deliberations.

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Interim report of Drafting Committee on provisional application of treaties

Mr. Forteau being the chairman of the Drafting Committee, presented the interim report providing the information on the progress made by the Drafting Committee on the topic. It was decided by the Committee that additional draft guidelines were required to support the proposed draft guidelines in the name of the scope and purpose.

The Sequence in which they were adopted was quite unusual as the proposed draft guideline 1 later on was adopted as draft guideline 3 as there was a need felt for it to be supplemented by more draft guidelines in the form of scope and purpose. The draft guideline 3 so adopted on was titled as general rule for the provisional application of treaties.

The outcome of the report was also debated in the Committee and the use of draft guidelines was preferred over draft conclusions as the purpose of the exercise in terms of the annex of the 2011 report was to provide States with some guidance on the issue.

Draft Guideline 1 – Scope - The present guidelines address the provisional application of treaties

Article 25 of the Vienna Convention on the Law of Treaties sets forth the general rule on provisional application of treaties by States.

The word 'address' that has been used, is not a term usually used by the Commission. The other option is the word 'applicable', but the same is also not used as it conveys a different meaning. After due deliberations, the word 'concern', was deemed more appropriate as it provided more guidance to States.

As far as the inclusion of IOs within the current discussion is concerned, the Special Rapporteur indicated his intent to separate States and IOs and deal with the issue of IOs later. Notwithstanding the intent of the Special Rapporteur to focus on States first, it does not exclude regional blocs like the EU from its applicability.

Adopted text – **The present guidelines concerns the provisional application of treaties.**

Draft Guideline 2 – Purpose – The purpose of the present draft guideline is to provide orientation on the legal regime of the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties as well as any other relevant rule.

This guidelines seeks to fill in the intermediary provision between draft guideline 1 and draft guideline 3. The essence which here is proposed as the purpose of the current work was earlier para 2 of the proposed scope under draft guideline 1. The inclusion of the same within draft guideline 3 was also considered but it was deemed appropriate in light of the practice of the Commission to create a new draft guideline.

The instant purpose suffers from the flaw of imprecision with regard to its applicability to the IOs regime sought to be separately created by the Special Rapporteur. It was also acknowledged that Article 25 does not reflect all the practice on provisional application

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of treaties and does not have the status of customary international law. The present purpose was moulded as per the needs of the current topic as it only seeks to provide guidance to users concerning the law and practice on provisional application of treaties. The initial usage of the word 'orientation' was not deemed appropriate by the Committee and the word 'guidance' was preferred over it for the sake of clarity. Also, the present work does not seek to create a new legal regime but the idea of clarifying the law and practice with regard to provisional application of treaties is more in line with the mandate of the Commission.

Adopted text - **The purpose of the present draft guideline is to provide guidance regarding the law and practice the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of International Law.**

Draft Guideline 3 – General Rule – States may provisionally apply a treaty or a part of a treaty, prior to its entry into force, when the treaty itself so provides, or when they have in some other manner so agreed.

As can be seen in the newly proposed text of the Special Rapporteur, the reference to Internal law or mandate of IOs Was taken for simplicity sake. The new formulation seeks to track the language of the VCLT i.e. pending its entry into force reflects the formulation of A. 25. The concept of entry into force was debated and it was said that it was to be understood with regard to A. 24 of the VCLT which covered entry into force in itself and for each State.

The first and the last clauses of the proposed draft guideline were debated, so as to capture the State who provisionally apply the treaty and whose consent was required for the provisional application of a treaty. It was also said that the usage of the words "may provisionally apply a treaty" reflects the State autonomy to provisionally apply a treaty.

The question that then arose was, whether the draft guideline should recognise the possibility of provisional application of a treaty by State who was not a negotiating State. Here, the Committee decided that a broader formulation is being preferred, i.e. a third State unconnected to the negotiation could also provisionally apply a treaty. The Special Rapporteur reasoned that the formulation in this regard had been done in passive form so as to restate that the treaty may be provisionally applied and in addition to treaties providing for provisional application, such provisional application may take place by way of an agreement in any manner.

As far as the second part is concerned, the reference to internal law and the requirements of internal law were removed. As was suggested by the Members in the Plenary, the Agreement itself may restrict the provisional application by referring it to the internal law as was seen in Article 45 of the Energy Charter Treaty. With regards the issue it was deemed better to have a different guideline for the issue as it would then be more in line with the practice of the Commission.

Adopted text – **A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.**