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Report of the International Law Commission on the work of its sixty-third session (2011)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat

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I. Introduction

1. At its sixty-sixth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 16 September 2011, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-third session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 18th to 28th meetings and at its 30th meeting, from 24 to 28 October and on 31 October, and on 1, 2, 4 and 11 November 2011. The Committee considered the item in three parts. The Chair of the Commission at its sixty-third session introduced the report as follows: chapters I to V (Part I) at the 18th meeting, on 24 October; chapters VI, VIII and IX (Part II) at the 21st meeting, on 27 October; and chapters VII, X, XI, XII and XIII (Part III) at its 25th meeting, on 31 October. At the 30th meeting, on 11 November, the Sixth Committee adopted draft resolution A/C.6/66/L.26 entitled "Report of the International Law Commission on the work of its sixty-third session". The draft resolution was adopted by the General Assembly at its 82nd plenary meeting, on 9 December 2011, as resolution 66/98.

3. By paragraph 31 of the resolution, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-sixth session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of 10 sections: A. Immunity of State officials from foreign criminal jurisdiction; B. Expulsion of aliens; C. Protection of persons in the event of disasters; D. The obligation to extradite or prosecute (*aut dedere aut judicare*); E. Treaties over time; F. Most-Favoured-Nation clause; and G. Other decisions and conclusions of the Commission. The remaining sections, also dealing with topics completed by the Commission at its sixty-third session, appear in an addendum: H. Reservations to treaties; I. Responsibility of international organizations; and J. Effects of armed conflicts on treaties.

II. Topical summary

A. Immunity of State officials from foreign criminal jurisdiction

1. General comments

4. Delegations considered the topic to be of great significance and the Commission was urged to give priority to it. While some delegations stressed the importance of the underlying principles of sovereignty and equality of States in the consideration of the topic, some other delegations emphasized that rules of customary international law evolve and that the question of immunity needed to be considered in the light of the developments in international law relating to international crimes. In that context, they particularly noted the normative relevance of the Nuremberg principles, as well as international criminal justice overall. It was suggested that the Commission should aim at promoting greater coherence of international law and strike a balance between stability in international relations and the need to avoid impunity for grave crimes under international law. While some delegations emphasized that the Commission should approach the topic *de lege lata* and *de lege ferenda*, other delegations were of the view that the topic should be

considered only *de lege lata*. Suggestions were also made that the Commission should first address the topic *de lege lata* and thereafter consider developing rules *de lege ferenda*. In that context, attention was drawn to the relevance to the topic of jurisprudence, regulations and international agreements covering the privileges and immunities of State officials, including headquarters agreements, as well as agreements relating to the status of members of special missions.

5. It was further suggested that the issue of the inviolability of State officials be included in the study of the topic, given the close links between the two notions. Several delegations supported the establishment of a working group.

2. Scope of immunity

6. On the question of which officials would enjoy immunity *ratione personae*, support was expressed for the notion that the troika (Heads of State or Government and Ministers for Foreign Affairs) enjoyed such immunity *de lege lata* and some delegations were of the view that it could also be extended to other officials. In that regard, it was suggested that the Commission formulate criteria for determining which other high-ranking officials might enjoy immunity *ratione personae*. Such criteria should be restrictive in nature. In contrast, it was also observed that there were insufficient precedents to support the conclusion that customary international law extended such immunity to other high-ranking officials. Thus, such immunity ought to be limited to the troika. The point was also made that immunity *ratione personae* for the troika should be interpreted restrictively with regard to grave crimes under international law and that the Commission should address this question *de lege ferenda*.

7. Concerning immunity *ratione materiae*, views were expressed that a clear definition of "official acts" was required. In that regard, the Commission was encouraged to establish criteria for determining whether an official had acted in an official capacity and to consider to what extent an "act of an official" was different from an "act falling within official functions". While the view was expressed that acts *ultra vires* should not be covered by immunity, it was also suggested that the question merited further study.

8. Noting the different underlying purposes of the rules on the responsibility of States for internationally wrongful acts and the rules on immunity, it was pointed out that there may be reason to distinguish between a presumption of State responsibility and the final determination of the latter. It was also observed that employing the criterion for attribution of State responsibility in determining the existence of immunity *ratione materiae* would require the Commission to clarify the question of "control".

9. Maintaining the distinction between immunity *ratione personae* and immunity *ratione materiae*, both when considering the substantive and procedural aspects of the topic, was considered essential.

3. Possible exceptions to immunity

10. Some delegations expressed support for the assumption that immunity was the general rule to which exceptions had to be established. Nevertheless, a concern with such a point of departure was expressed, and it was also pointed out that too high a standard had been applied in establishing exceptions to the rule. While some

delegations believed that immunity ought not be invoked for grave crimes under international law, and in particular with regard to immunity *ratione materiae*, other delegations noted that there did not seem to be any evidence in customary law to support the existence of exceptions to immunity. It was particularly noted that immunity *ratione personae* was absolute, including with regard to grave crimes. It was further observed that exceptions to immunity could erode the foundation of international relations, induce politically motivated indictments, and raise due process concerns. Some delegations stressed, however, that concerns regarding potential abuse in cases of exceptions to immunity could be avoided through appropriate safeguards and that the Commission should consider this aspect of the topic. It was also noted that immunity should not be equated with impunity, and the relevance of waivers, including by treaty, prosecution by the State of the official or international criminal institutions, and judicial cooperation was emphasized. Referring to the underlying purpose of immunity — to preserve the dignity of the State — it was also pointed out that the procedural bar to criminal prosecution should cease once such prosecution no longer posed a threat to stability in international relations. In that context, the approach suggested by the Institute of International Law[1] concerning immunity *ratione personae*, in which it recommended that States waive such immunity when grave crimes had been committed or when the exercise of the official's functions would not be impeded by the measures envisaged, was deemed worth considering.

11. Comments were also made concerning the rationales for exceptions to immunity. In particular, suggestions were made that peremptory norms of international law criminalizing certain acts prevailed over the rule of immunity; that developments concerning grave crimes under international law ought to be considered as *lex specialis*, and that such crimes could not be considered "official acts" for the purpose of immunity *ratione materiae*. In contrast, the view was also expressed that it did not appear that any of the grounds adduced to justify exceptions could be considered a norm under international law. In that regard, the importance of not losing sight of the distinction between jurisdiction and immunity when considering this question was emphasized.

12. It was further observed that the question of immunity *ratione personae* in respect of such crimes might be examined in the light of the international criminal law instruments to which the States concerned were parties, on the assumption that by ratifying such treaties parties renounced ipso facto the right to invoke immunity as between them.

4. Procedural aspects of immunity

13. Concerning the invocation of immunity, the view was expressed that this prerogative was vested in the State of the official. Some delegations stressed that the question of immunity needed to be addressed as early as possible in judicial proceedings, and it was pointed out that, inter alia, the State initiating judicial proceedings should communicate in writing with the State of the official; that the waiver of immunity should be based on the same criteria as that used for State immunity; that an express waiver should be irrevocable; and that a case-by-case analysis by both the State asserting jurisdiction and the State of the official would

[1] Resolution of 26 August 2001 on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law.

be required to determine whether or not an act could be considered "official" for the purpose of immunity *ratione materiae*. The view was also expressed that the right to waive immunity was vested in the State of the official and, unless provided for by a treaty obligation, that the waiver should be express. It was suggested that the Commission examine whether a State that had not invoked immunity at first instance might invoke it during appeal. It was also pointed out that non-invocation of immunity should not be automatically considered a waiver.

B. Expulsion of aliens

1. General comments

14. Several delegations emphasized the importance, complexity and sensitivity of the topic. Other delegations reiterated their doubts about the usefulness of the Commission's work on this topic, and a view was expressed that the topic was not suitable for codification and progressive development. The comment was made that the general orientation of the Commission's work on this topic remained unclear.

15. Several delegations welcomed the restructured summary of the draft articles contained in the Special Rapporteur's seventh report (see A/CN.4/642). According to one proposal, the draft articles should not cover aliens whose status was regulated by special norms, such as refugees.

16. A view was expressed that the Commission should focus its attention on well-established principles, as reflected in widely ratified international conventions, and should not attempt to identify new rights that would be specific to the expulsion context or import concepts from regional jurisprudence. The point was also made that the Commission should reflect, in the draft articles, existing principles of international law without attempting to design a new human rights instrument. It was further observed that the draft articles should not only ensure a high level of protection to the aliens concerned, but also be generally acceptable for States.

17. The Commission was encouraged to pursue its analysis of State practice and relevant international instruments and jurisprudence. The need to pay special attention to contemporary practice was emphasized. Attention was drawn to the distinction between the standards of the European Union applicable to the expulsion of its citizens, and the European Union standards governing the expulsion of third-country nationals; some delegations emphasized the relevance of the latter for the present topic.

18. A number of delegations pointed to the need to reconcile the right of States to expel aliens and the limits imposed on that right by international law, including those relating to the protection of human rights, the principle of non-discrimination and the prohibition of mass expulsions. A view was expressed that the draft articles should not unduly restrict the sovereign right of States to control admission to their territories and to enforce their immigration laws. It was observed that States had the right to expel aliens posing a threat to national security or public order, as defined according to their national laws. It was also suggested that a distinction be made between a State's right to compel an alien to leave its territory through the adoption of an expulsion decision, and the State's more limited discretion to force his or her departure through deportation.

2. Comments on various draft articles as proposed by the Special Rapporteur and on specific issues[2]

19. Different views were expressed on the revised draft article 8 on expulsion in connection with extradition. Some delegations doubted that a provision concerning the relations between expulsion and extradition had its place in the draft articles; it was recalled that expulsion and extradition were governed by separate legal regimes, and the view was expressed that issues relating to extradition should be excluded from the draft articles. The inclusion of a provision stating that the draft articles were without prejudice to international obligations regarding extradition was also proposed. Concerning the content of draft article 8, some support was expressed for the idea that the existence of an extradition request did not by itself constitute a circumstance preventing expulsion. According to another opinion, draft article 8, as well as draft article A on disguised expulsion proposed in the Special Rapporteur's sixth report (A/CN.4/625), were not consistent with the settled practices and obligations of States under multilateral and bilateral treaty regimes. It was also suggested that further consideration be given to the issue of expulsion in connection with extradition.

20. Several delegations welcomed draft article D1, dealing with the implementation of the expulsion decision, particularly as it encouraged States to facilitate the voluntary departure of aliens being expelled. However, some delegations were of the view that this provision needed to be clarified or nuanced, also taking into account a number of factors such as possible threats to public order and national security. It was suggested that the Commission reaffirm the right of States to use coercive measures to implement an expulsion decision, as long as such measures were compatible with human rights and human dignity. The point was made, however, that only proportionate measures could be taken by the expelling State.

21. While some support was expressed for draft article E1 on the State of destination of expelled aliens, some delegations were of the view that this provision required further examination or needed to be restructured. Attention was drawn to the importance of establishing criteria that would assist in determining priorities with regard to the possible States of destination. It was suggested that the Commission recognize the alien's right to choose a State of destination that would be willing to accept him or her. While attention was drawn, in that context, to the importance of readmission agreements, some delegations emphasized that no alien should be expelled to a State where his or her life or personal freedom would be threatened or where he or she might be subjected to torture or other cruel, inhuman or degrading treatment. The importance of cooperation between the States involved in an expulsion process was underlined. In that regard, it was proposed that the draft articles state an obligation for the expelling State to inform the State of destination of an expulsion decision, and it was also suggested that the Commission envisage the possibility of enunciating an obligation for the States concerned to cooperate with a view to assessing a person's nationality. It was further suggested that a draft article be devoted to those cases in which an expulsion decision could not be implemented owing to the absence of any possible State of destination.

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[2] For the text of the draft articles as considered by the Commission, see A/CN.4/625 and Add.1 and Add.2.

22. While some delegations expressed support for draft article F1 on the human rights obligations of the State of transit, some other delegations believed that the exact wording of this provision should be reconsidered. The point was made, in particular, that human rights rules applicable in the expelling State did not apply as such in the transit State, which was obliged only to observe its own domestic laws and the rules set out in international instruments to which it was itself a party.

23. Some delegations expressed support for draft article G1 on the protection of the property rights of aliens subject to expulsion, including the prohibition of expulsion for confiscatory purposes. However, attention was drawn to the difficulty of assessing the intentions of States and to the possible existence of situations where the confiscation of an alien's property could constitute a legitimate sanction. It was also suggested that an exception to the above-mentioned prohibition be recognized for cases in which property was acquired illegally. According to another view, apart from the prohibition of confiscatory expulsions, there was no need to elaborate a specific or privileged regime governing the property of aliens being expelled.

24. While some support was expressed for draft article H1 on the right of return of unlawfully expelled aliens, several delegations believed that this provision required further clarification or was too broad. In particular, some delegations considered that a right of return could be recognized only for aliens lawfully present in the expelling State. Furthermore, some delegations considered that a right of return existed only in those cases where an expulsion decision had been annulled on a substantive ground.

25. While some delegations supported draft article I1 on the responsibility of States in cases of unlawful expulsions, the view was expressed that this provision should be formulated more precisely. It was proposed, in particular, that the draft article be reworded to make it clear that an expelling State could be held responsible only for violations of rules of international law. It was also observed that the concept of "damages for the interruption of the life plan" was not universally recognized nor was it an emerging concept. While some delegations supported the inclusion of draft article J1 on diplomatic protection, others suggested that an appropriate explanation in the commentaries would be sufficient.

26. A view was expressed that the right of appeal against an expulsion decision should be recognized as a basic human right. According to a different opinion, the advisability of formulating a provision on appeals against an expulsion decision was doubtful, owing to insufficient State practice. Some other delegations were of the view that, under international law, appeals against an expulsion decision were available only to aliens lawfully present in the expelling State. While attention was drawn to the case law of the European Court of Human Rights underlining the importance of the granting of suspensive effect to an appeal, particularly in the light of the right to an effective remedy, several delegations expressed the view that no rule of general international law required the expelling State to grant suspensive effect to an appeal against an expulsion decision. It was suggested that such an obligation existed only in those cases where the principle of non-refoulement applied.

3. Possible outcome of the work of the topic

27. Some delegations expressed a preference for the elaboration of draft guidelines or principles enunciating best practices, rather than draft articles for potential

inclusion in an international convention. According to a different view, a set of draft articles would be preferable to mere guidelines.

C. Protection of persons in the event of disasters

1. General comments

28. The International Law Commission was commended for its efforts at clarifying the specific legal framework pertaining to access in disaster situations, for the inclusion of the fundamental principles governing disaster relief and for the recognition of several duties on the part of affected States.

2. Draft articles 5 (Duty to cooperate), 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Human rights)

29. Several delegations emphasized the importance of draft article 5 on the duty to cooperate. Concurrence was expressed with the view that the duty to cooperate ought to be understood within the context of the principle that the affected State has the primary responsibility for protection of persons and provision of humanitarian assistance on its territory.

30. Some delegations advised clarifying the term “the particularly vulnerable” in draft article 6 concerning humanitarian principles in disaster response.

31. Draft article 7 on human dignity was deemed especially significant as it was the first time that it had appeared as an autonomous provision in the body of a future international instrument.

32. A delegation suggested that in draft article 8 concerning human rights the rights to be respected be listed.

3. Draft articles 9 (Role of the affected State), 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance)

33. While draft article 9 on the role of the affected State met with general approval, a suggestion was made that specific reference to persons with disabilities be included.

34. While some delegations welcomed the inclusion of draft article 10, concerning the duty of the affected State to seek assistance, and draft article 11, regarding consent of the affected State to external assistance, some others were of the view, also expressed by some Commission members and recorded in the respective commentaries, that draft article 10 and draft article 11, paragraph 2, should be reworded in hortatory, rather than obligatory, terms, to the effect that affected States should seek external assistance in cases where a disaster exceeded national response capacity and that consent to external assistance should not be withheld arbitrarily. According to those delegations, a legal duty on the part of the affected State had no basis in customary international law or State practice. Several delegations called for additional explanation of the concept of arbitrariness.

35. At the same time, some delegations also emphasized that when an affected State was unable or unwilling to ensure protection and provide assistance to those within its territory, it should not decline external assistance.

4. Right to offer assistance

36. A number of delegations supported the proposed inclusion of a further draft article on the right of the international community to offer assistance. It was maintained that, taken together with draft articles 10 and 11, the proposed provision constituted a reaffirmation, rather than an infringement, of the fundamental international law principle of sovereignty and of its corollary, non-intervention, which was explicitly enshrined in draft article 9. The right of non-affected States was merely to offer, not to provide, assistance, and the affected State remained free to accept in whole or in part any offer of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal by the affected State in situations in which a disaster exceeded its national response capacity. The duty to seek (in draft article 10), unlike a duty to request, did not imply that the affected State must give consent in advance. Moreover, the affected State retained the right to determine whether a particular disaster exceeded its response capacity, in line with the principle of sovereignty of States.

37. Some other delegations doubted the usefulness of such a provision. It was suggested that if the provision was included, the phrase “shall have the right” should be deleted, even though such a right was clearly limited to the offer of assistance and did not extend to the provision thereof. In that connection, it was stressed that the focus should be on the duty of the affected State to give serious consideration to any offers of assistance that it received. A number of delegations, moreover, expressed the view that the entities mentioned in the proposed draft article should not all be placed on the same legal footing.

38. There was also general agreement with the position of the Secretary-General on implementing the responsibility to protect (A/63/677, para. 10 (b)) that to extend that concept to include the response to natural disasters would stretch it beyond recognition or operational utility. Nevertheless, it was pointed out that the statement by the Secretary-General was subject to the caveat “until Member States decide otherwise” and that, in the view of some delegations, the time had come to expand the concept of the responsibility to protect accordingly.

5. Duty to provide assistance

39. While most delegations replied in the negative to the question of whether States had a duty to provide assistance when requested by an affected State, there was a suggestion to formulate such an obligation as a strong recommendation, while another pointed to the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response,[3] which obliged States parties not to provide assistance on request but to respond promptly to such a request.

[3] Available from http://www.aseansec.org/17579.htm.

D. The obligation to extradite or prosecute (*aut dedere aut judicare*)

1. General comments

40. Recognizing that there had been little substantial progress on this topic, delegations acknowledged with appreciation the submission, in 2011, of the fourth report by the Special Rapporteur (A/CN.4/648), with some delegations emphasizing the significance of the Commission's continued work on the topic during the new quinquennium starting in 2012. Nevertheless, other delegations, considering, in particular, that it had been on the agenda since 2005 and thus far no draft article had been referred to the Drafting Committee, signalled that they continued to harbour serious doubts as to its future. Indeed, some shared the view that the Commission should consider the possibility of concluding its consideration of the topic.

2. Approaches to the topic

41. Some delegations underscored the continuing relevance of the 2009 general framework prepared by the Working Group of the Commission and the need to address the issues identified therein. It was recognized that the topic was difficult and complex, with implications for other areas of the law, albeit distinct, such as universal jurisdiction, international criminal jurisdiction and the question of immunity of State officials. It was noted in particular that any analysis of the obligation to extradite or prosecute would be incomplete without taking into account universal jurisdiction, and, while some delegations stated that it would be better for the Commission to address the two aspects together, others cautioned against the advisability of linking the two subjects.

42. It was emphasized that the topic required a systematic in-depth analysis of conventional and customary international law, as well as national legislation with some delegations noting that the topic should cover both substantive and procedural aspects, including the types of crimes for which the obligation applied and the extradition mechanisms used. It was also argued that the focus should be on the obligation and how State practice evidenced the relevant rules. The need for a more elaborate consideration of the customary law nature of the obligation and for more systematic identification of the core crimes was stressed by some delegations.

43. While some delegations pointed to the treaty origins of the obligation, particularly bilateral agreements on extradition or mutual legal assistance, others doubted the existence under customary international law of the obligation to extradite or prosecute, noting that it derived only under treaty law or domestic law. Indeed, it was stressed that there was not a sufficient basis in customary international law or in State practice to formulate draft articles that would extend the obligation beyond binding international legal instruments that contain such an obligation. The treaties in question governed both the crimes in respect of which the obligation arose and the question of whether the custodial State had discretion as to whether to extradite or prosecute.

44. While observing that the obligation found its source in both treaties and custom, some delegations conceded that further detailed analysis of State practice was clearly required, including on whether the accumulation of treaties containing the obligation and their wider acceptance by States signified the existence of an emerging rule of custom. Such an analysis would enable the Commission to draw concrete conclusions.

45. Commenting on State practice, some delegations observed that their domestic legislation, as well as bilateral extradition and multilateral treaties, contained provisions concerning the obligation to extradite or prosecute. In some instances, the legislation on extradition was residual in nature, applying in the absence of treaty relations with a State seeking extradition. Moreover, the legislation in question, as well as bilateral extradition treaties, did not specify any core crimes nor any particular category of crimes concerning which extradition would apply. Other delegations observed that although their domestic law did not explicitly refer to *aut dedere aut judicare* there were relevant provisions in that regard with respect to specific crimes. Indeed, the principle *aut dedere aut judicare* was applied regularly and consistently, both in domestic implementing legislation giving effect to relevant conventions and in related case law. Some delegations also noted that none of their national courts had relied on customary international law to implement the obligation to extradite or prosecute.

3. Comments on the draft articles as proposed by the Special Rapporteur

46. Concerning draft article 2, on the duty to cooperate, some delegations favoured the general thrust of reflecting the duty to cooperate in the fight against impunity, as the duty to cooperate was overarching. They nevertheless pointed to the need to reconsider the scope, in particular distinguishing the nature of the obligation in relation to States and vis-à-vis international tribunals, as well as the terminology used and the drafting, with some perceiving it as ambiguous, vague or abstract. The point was also made that the fight against impunity was essentially a political goal, which was far from crystallizing into an explicit legal obligation.

47. In respect of draft article 3, entitled “Treaty as a source of the obligation to extradite or prosecute”, and draft article 4, entitled “International custom as a source of the obligation *aut dedere aut iudicare*”, it was noted that it was unclear what purpose was served by the restatement of the principle *pacta sunt servanda*. Moreover, the utility of a categorization based on the source of the obligation was questioned, it being noted that the focus should be on defining the crimes to which the obligation applied, as well as the applicable conditions and procedures. Some delegations suggested that the obligation applied to (a) the crime of genocide; (b) crimes against humanity; and (c) war crimes. Others, however, were more inclined to have a more expansive list covering all international crimes. Indeed, the point was made that all crimes fall under the scope of the obligation, with the exception of military and political crimes.

48. While acknowledging the emerging connection between certain international crimes and *jus cogens*, some delegations questioned the relevance of the reference to the latter in draft article 4. It was doubted that the prohibition under customary international law of a specific conduct or a characterization of a breach of that norm as a crime under customary international law would automatically produce a customary international law obligation on the part of States to extradite or prosecute. It was also noted that the draft article raised questions regarding the principle of legality.

E. Treaties over time

1. General comments

49. Several delegations expressed support for the Commission's work on the topic while attention was also drawn to the links between this topic and earlier work on the fragmentation of international law. The view was expressed that the Commission's work should aim at complementing the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations without attempting to amend them. It was recalled that article 31 of those conventions constituted the main reference in treaty interpretation.

50. It was suggested that the Commission further clarify its objectives and methods of work in relation to this topic. Some delegations indicated that they would welcome a decision by the Commission to modify its working methods with respect to the topic so as to follow the procedure involving the appointment of a Special Rapporteur.

51. Some delegations favoured a broad approach to the topic, covering different aspects of the application of treaties over time. Thus, a view was expressed in support of covering, inter alia, the relations between treaties and custom, especially between subsequent practice as a means of treaty interpretation and as an element of the formation of new rules of customary international law. According to another opinion, it was preferable for the Commission to limit its work to the issue of subsequent agreements and practice.

52. It was proposed that the Commission continue its analysis of jurisprudence and practice on subsequent agreements and practice, and a suggestion was made that the Commission give priority to compiling decisions of domestic courts relating to subsequent agreements and practice and seek information from Governments on such decisions.

53. States and international organizations were encouraged to provide the Commission with relevant instances of practice. In particular, the provision of information on relevant jurisprudence of national courts was encouraged.

2. Specific comments

54. The importance of elucidating subsequent agreements and practice as a means of treaty interpretation was emphasized. It was observed, in particular, that major treaties aged and contexts changed, and that many international treaties could not be easily amended, yet they must continue to fulfil their purpose. It was suggested that the Commission address the definition of "subsequent practice" and also invite Governments to present their views on that point. A view was expressed that the role of subsequent practice as a means of treaty interpretation should not be overestimated, and that the various State organs should probably not be treated equally in identifying subsequent practice. It was suggested that the Commission, in clarifying the practical and legal significance of subsequent agreements and practice, consider the procedural requirement for, and the legal significance of, interpretative resolutions adopted by treaty governing bodies. It was also proposed that the Commission further consider the notion of subsequent practice of the parties to a multilateral treaty, and in particular the question of whether that notion would

necessarily imply participation by all the parties. Moreover, it was observed that the Commission should clarify the extent to which subsequent agreements and practice could depart from the literal meaning of the treaty and continue to serve as a means of interpretation without becoming an amendment to the original treaty or a violation of the treaty. A call was made for further analysis of the question of the possible modification of a treaty by subsequent practice. The view was expressed that the evolutionary approach in treaty interpretation was not a special kind of interpretation by subsequent practice, as it did not represent the practice of States parties to a treaty, but rather the general development and evolution of the political environment. Doubts were raised concerning the meaning, scope and role of the term "social practice".

55. Some delegations expressed appreciation for the preliminary conclusions of the Chair of the Study Group, based on the discussions held in the Study Group. In that connection, regarding the role of subsequent practice and agreements, reference was made to the need to distinguish between different types of treaties according to their substance and their object and purpose. Some reservations were nonetheless expressed about any attempt to classify international judicial institutions according to the methods of interpretation that they would usually apply.

3. Possible outcome of work on the topic

56. Concerning the outcome of the Commission's work, some support was expressed for the elaboration of conclusions on the basis of a repertory of practice. According to a suggestion, the Study Group should produce guidelines that could be relied upon by international courts and tribunals in assessing the relevance of subsequent agreements and practice. Some delegations looked forward to the completion of the work on this topic during the next quinquiennium.

F. Most-Favoured-Nation clause

1. General comments

57. Delegations commended the Study Group for the progress made in its work, with some noting that the current exercise could constitute an important contribution towards greater coherence, certainty and stability of international law in this field, and would help to prevent the risk of fragmentation and influence the practice of States. Delegations also expressed support for the completion of the topic within the two-session time frame contemplated by the Study Group. At the same, recalling that the Commission was not taking up the subject for the first time, albeit at the present instance focusing on investment, the view was expressed doubting the viability of the topic in terms of its possible codification, noting further that the subject was complex, and closely related to and intertwined with other fields of international law, particularly private international law, trade law and investment, areas within the domain of the United Nations Commission on International Trade Law (UNCITRAL) and the World Trade Organization (WTO).

2. Approaches to the topic

58. Stressing the practical significance of the topic, it was thus suggested that the Study Group should provide a clearer indication of its goals and methods of work and focus on bringing some added value, taking into account the efforts undertaken

by other actors in the area, notably the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD). Moreover, recognizing that the relevance of the Most-Favoured-Nation clause was not limited to trade and investment law, the attention of the Study Group, in addition to its anticipated work on the question of the clause in relation to trade in services and investment agreements, as well as fair and equitable treatment and national treatment standards, was drawn to other areas worthy of consideration, including international agreements on navigational matters, bilateral agreements regarding the status of diplomatic and consular staff and headquarters agreements with international organizations.

59. It was stressed that the Vienna Convention on the Law of Treaties should be the point of departure in the work of the Study Group and should thus remain the authoritative guide in interpreting treaties. It was also acknowledged that the source of the right to most-favoured-nation treatment was the basic treaty and not the third-party treaty. It was also observed that the concurring and dissenting opinion in *Impregilo S.p.A. v. Argentine Republic*,[4] could provide a framework for clarifying issues surrounding the application of the Most-Favoured-Nation clause in dispute settlement.

3. Possible outcome of work on the topic

60. In terms of the final form, some delegations supported the intention of the Study Group to prepare a report, confirming that the outcome did not necessarily need to be draft articles or a revision of the 1978 draft articles, but a substantial report providing the general background, analysing the case law, drawing attention to the trends in practice and, where appropriate, making recommendations, including guidelines or model clauses. It was hoped that the final product would be of practical utility to Member States, tribunals, policymakers and practitioners. It was asserted that the most-favoured-nation provisions were principally a product of treaty formation and that they tended to differ considerably in their structure, scope and language; they also were dependent on other provisions in the specific agreements in which they were located, and thus resisted a uniform approach. It was suggested that the overall objective should be to elaborate a non-legally binding set of guidelines for States.

G. Other decisions and conclusions of the Commission

61. Delegations acknowledged the Commission's essential role in the codification and progressive development of international law, while also emphasizing the importance of interaction between the Commission and Member States and the need to strengthen cooperation with other bodies, including the Asian-African Legal Consultative Organization.

62. Several delegations commended the establishment of the Working Group on methods of work by the Commission, whose conclusions they considered would enhance efficiency. Concern was nevertheless expressed by some delegations over the slow pace of work on certain topics, and the Commission was urged to take a

[4] Available from http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2171_En&caseId=C109.

proactive stance to ensure progress on each topic on its agenda. Recognizing the important role of the Special Rapporteurs, some delegations considered it important to find alternative ways of supporting their work, and recognized the need to revisit the question of honorariums. Support was also expressed for the retention of split sessions.

63. Concerning the outcome of the Commission's work, while some delegations stressed that the Commission should concentrate on elaborating draft articles and not limit itself to producing "soft law" instruments, the combination of various types of outputs was also seen as a welcome development.

64. While several delegations welcomed the inclusion of five new topics on the Commission's long-term programme of work, the Commission was also cautioned against overburdening its agenda and was urged to focus on current topics.

65. On the proposed new topics, some delegations expressed support for the topic "Formation and evidence of customary international law", and it was suggested that the outcome should result in a practical guide, with commentaries, for judges, government lawyers and practitioners. The aim should not be to codify the topic itself. It was nevertheless observed that it would be difficult to systematize the formative process without undermining the very essence of custom, its flexibility and constant evolution. Concerning the methodology, the importance of making a differentiation between State practice and jurisprudence of international courts and tribunals on the one hand, and the practice and jurisprudence of domestic courts, on the other, was stressed. The Commission was also urged to proceed with caution in considering the role of unilateral acts in identifying customary international law.

66. Regarding the topic "Protection of the atmosphere", some delegations considered it highly relevant for further review and systematization in order to respond to a growing concern of the international community concerning the environment. Others questioned the appropriateness of including such a technically complex topic which was already the subject of ongoing negotiations among States.

67. Some delegations considered that work on the topic "Provisional application of treaties" would be valuable in clarifying or supplementing the provisions under article 25 of the Vienna Convention on the Law of Treaties. While it was suggested that the Commission should prepare a study on the implementation of article 25, caution was also urged in proposing any rule that would create a conflict with the existing provisions. Although the appropriateness of undertaking any study on this topic was questioned as well, as the topic was considered both narrow and based on the domestic law of States, it was suggested that it might prove useful to consider the legal consequences of the provisional application of treaties over an extended period of time.

68. Some delegations expressed support for the topic "The fair and equitable treatment standard in international investment law" and considered that it would be of great relevance for legal practice. Existing jurisprudence would benefit from an authoritative study and articulation of relevant principles, which would facilitate consistency in interpretation and enhance legal certainty for Governments and investors. The interrelationship between the topic and the Most-Favoured-Nation clause was nevertheless also noted and it was suggested that work on the clause should be concluded prior to taking up this related new topic. The appropriateness of including the topic was also questioned in the light of the subject's narrowness,

which did not lend itself to the development of general rules, and of the number of already existing rules and mechanisms in that area. In that regard, close cooperation with and due regard for the work already undertaken by other entities in this field was considered essential. Referring to the lack of multilateral consensus on investment issues, the feasibility of reaching a common understanding regarding, in particular, the meaning of "fair and equitable treatment" was also doubted. It was nevertheless suggested that the Commission might wish to study whether investment treaty case law has de facto taken the place of customary international law as a source of obligation regarding foreign investment.

69. While some delegations welcomed the inclusion of the topic "Protection of the environment in relation to armed conflicts", others questioned its usefulness in the light of existing relevant rules under the Geneva Conventions. It was also observed that the International Committee of the Red Cross (ICRC) had earlier reported a lack of support among States to undertake work on the subject. The importance of cooperating closely with ICRC in the consideration of the topic was emphasized.

70. A suggestion was further made reiterating the proposal that the Commission consider issues relating to international humanitarian law and its application to non-State armed groups in contemporary conflicts.