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Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions

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

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I. Introduction

1. At its sixty-seventh session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 21 September 2012, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 18th to 25th meetings, on 1, 2, 5, 6, 7, 9 and 16 November 2012. At its 18th meeting, on 1 November, the Committee decided that, owing to unforeseen disruptions in its programme of work, the consideration of chapter IV of the report of the Commission on the work of its sixty-third session, on the topic "Reservations to treaties", would be postponed to the sixty-eighth session of the General Assembly. The Committee considered the item in two parts. The Chair of the Commission at its sixty-fourth session introduced the report of the Commission on the work of that session as follows: chapters I to V and XII at the 18th meeting, on 1 November, and chapters VI to XI at the 20th meeting, on 2 November. At its 25th meeting, on 16 November, the Sixth Committee adopted draft resolution A/C.6/67/L.13, entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions". The draft resolution was adopted by the Assembly at its 56th plenary meeting, on 14 December 2012, as resolution 67/92.

3. By paragraph 32 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-seventh session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of 9 sections: A. Expulsion of aliens; B. Protection of persons in the event of disasters; C. Immunity of State officials from foreign criminal jurisdiction; D. Provisional application of treaties; E. Formation and evidence of customary international law; F. Obligation to extradite or prosecute (*aut dedere aut judicare*); G. Treaties over time; H. Most-Favoured-Nation clause; and I. Other decisions and conclusions of the Commission.

II. Topical summary

A. Expulsion of aliens

1. General comments

4. Several delegations commended the Commission for the adoption, on first reading, of the draft articles on the expulsion of aliens, with some speakers noting the comprehensive and balanced character of the draft articles. Some other delegations, however, reiterated their doubts regarding the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since there already existed detailed regional rules on the subject. The view was also expressed that the topic was not suitable for codification or progressive development at the present time. Some delegations believed that the Commission should focus on the identification of existing rules and should not embark on progressive development. It was also observed that the Commission should clearly distinguish between the provisions of the draft articles reflecting existing law and

those attempting to develop new rules. It was further suggested that the Commission should be cautious in generalizing rules set forth at the regional level and should not give excessive weight to the practice of treaty bodies.

5. Divergent views were expressed as to whether the draft articles should also cover aliens unlawfully present in the expelling State; in this regard, some delegations raised concerns about the fact that the draft articles sought to establish a single legal regime applicable to both categories of aliens.

6. Several delegations stressed the need to ensure a balance between the sovereign right of States to expel aliens and the protection of the rights of the aliens concerned. It was underlined, in particular, that States must comply with international law, including human rights law, the law governing the treatment of aliens, international humanitarian law and refugee law.

7. Some delegations proposed that stronger emphasis be placed on voluntary departure, which should be not only facilitated but also promoted. Moreover, it was suggested that the role played by readmission agreements be enshrined in the Commission's text.

2. Comments on specific aspects of the draft articles

8. Support was expressed for the broad definition of expulsion retained in the draft articles, which covered both expulsion through a formal act and expulsion by conduct. According to another view, the inclusion of the latter within the definition of expulsion was questionable. While some delegations expressed support for the draft article dealing specifically with the prohibition of disguised expulsion, it was also suggested that this notion be clarified. A preference was expressed for excluding issues relating to extradition from the scope of the draft articles. It was suggested that the provision stating the prohibition of expulsion as a means to circumvent an ongoing extradition procedure did not reflect international practice, and it was recommended that the scope of that provision be limited to aliens lawfully present in the territory of the expelling State; however, other delegations indicated their support for the said draft article.

9. While the particular relevance of public order and national security as grounds for the expulsion of an alien was emphasized, it was noted that the unlawfulness of an alien's presence in the expelling State should also be explicitly recognized as a valid ground for his or her expulsion. In relation to the draft article stating the prohibition of expulsion for confiscatory purposes, attention was drawn to the difficulty of assessing the real intentions of the expelling State.

10. The need to avoid any arbitrary detention of aliens pending expulsion was emphasized, in view of the non-punitive nature of such detention. In addition, it was recommended that a maximum duration for detention pending expulsion be set in the draft articles, and the addition of a draft article regarding conditions of detention was also proposed. Moreover, it was suggested that a reference to health considerations be included in the draft article dealing with vulnerable persons. Furthermore, some delegations were of the view that the prohibition of discrimination on the basis of sexual orientation should be reflected in draft articles.

11. Appreciation was expressed for the recognition of the principles of legality and due process in the draft articles. With regard to the procedural rights of aliens subject to expulsion, it was suggested that the draft articles make it clear that the

rights recognized therein are minimum guarantees and are without prejudice to other rights that might be granted by the expelling State. The view was expressed that the procedural rights stated in the draft articles should be accorded both to aliens lawfully present and to aliens unlawfully present in the expelling State. According to a more nuanced position, aliens unlawfully present, even for less than six months, should be accorded certain procedural rights.

12. Some delegations questioned the appropriateness of the draft article recognizing the suspensive effect of an appeal against an expulsion decision. The view was taken that the provision was not acceptable, even as a matter of progressive development, as it did not find sufficient support in State practice. Some other delegations considered that exceptions to the suspensive effect should be recognized in certain situations, taking into account public order and safety considerations, unless the granting of suspensive effect was necessary in order to respect the principle of non-refoulement. It was also stated that international law would require the granting of suspensive effect only in those cases in which the alien could reasonably demonstrate the existence of a risk to his or her life or liberty in the State of destination. According to another view, the Commission should reconsider the appropriateness of limiting the granting of suspensive effect to appeals made by aliens lawfully present in the territory of the expelling State. Other delegations were of the view that the question of the suspensive effect of an appeal against an expulsion decision deserved further consideration, with some of them observing that the issue should be treated with caution in the light of the divergence of national laws on that point. Yet according to another view, it was not advisable for the Commission to elaborate a provision on appeals against an expulsion decision.

13. Concerning the State of destination of an alien subject to expulsion, a view was expressed that the State from which the alien had entered the territory of the expelling State was under no obligation to readmit that alien at the request of the expelling State, if the alien had entered the expelling State lawfully. According to some delegations, the draft article that would prohibit a State that has abolished the death penalty or that does not apply it from expelling an alien to a State in which he or she would be threatened by such penalty was too broad and did not correspond to customary international law. Some other delegations regretted that the draft articles did not clarify the conditions under which diplomatic assurances could be regarded as legally sufficient in order to allow for the expulsion of an alien to a State that applies the death penalty.

14. It was observed that the issue of readmission to the expelling State in the event of unlawful expulsion deserved further consideration in view of limited State practice in that regard.

3. Form of the final outcome of the Commission's work on the topic

15. Some delegations expressed support for a set of draft articles, with some of them envisaging the possibility of a convention being elaborated on that basis. Other delegations expressed a preference for other possible outcomes, such as guidelines, guiding principles or best practices. The view was also expressed that the form of the final outcome of the Commission's work on the topic should be determined at a later stage.

B. Protection of persons in the event of disasters

1. Offers of assistance

16. As regards draft article 12, provisionally adopted by the Drafting Committee in 2012, the view was expressed that offers of assistance should not a priori be regarded as unfriendly acts or interference in the affected State's internal affairs. Nor should offers of assistance be linked to unacceptable or discriminatory conditions. States and other role players offering assistance should acknowledge the affected State's sovereignty and its primary duty to direct, control, coordinate and supervise relief and assistance in the event of disasters.

17. The concern was expressed that the introduction of the concept of "right", in the phrase "right to offer assistance", implying a corresponding duty, was unnecessarily confusing, especially in the light of the Commission's finding that there existed no legal duty for States and international organizations to render assistance. Concern was also expressed with the approach of treating States, the United Nations, other competent intergovernmental organizations and non-governmental organizations on the same juridical footing.

2. Forms of cooperation

18. Several delegations welcomed draft article 5 *bis*, as provisionally adopted by the Drafting Committee in 2012. The view was expressed that there existed a need for all international actors rendering assistance to cooperate among themselves, including as regards needs assessments, situation overview and the delivery of assistance. At the same time, it was recalled that the duty of States to cooperate was to be understood in the context of an affected State retaining the primary responsibility for the protection of persons and the provision of humanitarian assistance on its territory. The view was also expressed that the Commission was correct not to focus on the "right" of States, intergovernmental organizations or non-governmental organizations to offer assistance to an affected State, but rather to emphasize the "duty" of the State that receives offers of assistance to give serious consideration to such offers.

19. The concern was expressed that the listing of types of cooperation could constrain the options available to affected States, and a preference was expressed for a more flexible formulation that could leave open the possibility of the States agreeing on other forms of cooperation.

3. Conditions on the provision of external assistance

20. As regards draft article 13, as provisionally adopted by the Drafting Committee in 2012, the view was expressed that conditions on external assistance imposed by an affected State should first and foremost comply with international human rights law and core humanitarian obligations. Delegations were of the view that any conditions imposed should be reasonable, accord with the duty of States to protect persons on their territories and be based on a needs assessment.

21. Some delegations expressed concerns as to the approach taken in the draft article. The view was expressed that an affected State was not free to impose conditions unilaterally or arbitrarily. Rather, such conditions had to be based on consultations between the affected State and the assisting actors, taking into account

the general principles governing such assistance and the capacities of the assisting actors. Another view was that the affected State should be able to impose any conditions it finds necessary before accepting an offer of external assistance. Other delegations expressed support for the flexibility of the approach taken in the provision, as it was in accord with the need for assisting actors to be sensitive to local factors, including food, culture, religion, language and gender, as well as to the reality that the conditions imposed by an affected State could vary significantly from disaster to disaster.

22. Suggestions for the improvement of draft article 13 included referring to the special needs of women and especially vulnerable or disadvantaged groups, including children, the elderly and persons with disabilities; placing more emphasis on the need for the affected State to remove obstacles in national law that would hamper the speedy provision of assistance in disasters that exceeded its national capacity; and referring to relevant national administrative and policy frameworks during disasters.

4. Facilitation of external assistance

23. While delegations expressed support for draft article 14 as provisionally adopted by the Drafting Committee in 2012, some were of the view that the provision required further elaboration, as there existed more issues to be addressed than those mentioned. Those included questions of confidentiality, liability, the reimbursement of costs, privileges and immunities, the identification of control and competent authorities, overflight and landing rights, telecommunications facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, and the prompt granting of visas or other authorizations free of charge.

5. Termination of external assistance

24. Several delegations welcomed the inclusion of a provision on the termination of external assistance in draft article 15 as provisionally adopted by the Drafting Committee in 2012. Some delegations were of the view that the draft article should clearly reflect the right of the affected State or of the assisting State to terminate the assistance at any time. On the other hand, there were delegations that were of the view that recognizing a uniform and unilateral right of the affected State to terminate the assistance being provided could prejudice the rights of affected persons. Accordingly, the emphasis placed on consultation was welcomed, although a preference was expressed for more clearly linking the consultations to the needs of the affected people. Other delegations expressed doubts as to conditioning the withdrawal of assistance on consultations, which might not always be possible.

25. It was noted that the question of the timing of the duty of consultation regarding the termination was left open. It was also not clear to some delegations what would happen if the consultations proved inconclusive. In addition, it was stated that framing the reference to consultations between the affected State and assisting entities in the form of a legal obligation was inappropriate.

C. Immunity of State officials from foreign criminal jurisdiction

1. General comments

26. Delegations expressed keen interest in the topic, which was acknowledged as difficult, legally complex and politically sensitive, and underlined the importance that they attached to its examination by the Commission. It was underscored that the topic was of critical importance for stability in inter-State relations. Some delegations indicated that one of the reasons the topic was complex and sensitive was because it was situated at the epicentre of tensions between competing interests among States. Thus, the importance of a balanced approach in its examination was underscored. As the Special Rapporteur charts a new path for the topic, some delegations stressed the significance of building upon the strong foundation laid by the previous Special Rapporteur.

27. Some delegations considered it important to determine the acts of a State exercising jurisdiction that were precluded by immunity. It was suggested that the acts so precluded were those subjecting the official to a constraining act of authority.

2. Relationship between immunity *ratione personae* and immunity *ratione materiae*

28. According to some delegations, the distinction between immunity *ratione personae* and immunity *ratione materiae* should be maintained and refined, as it was analytically useful. Some delegations observed that situations giving rise to questions of the conduct-based immunity *ratione materiae* and those raising questions of the status-based immunity *ratione personae* were treated differently in the practice of their States. Other delegations observed that there was no specific distinction in their legal system between immunity *ratione personae* and immunity *ratione materiae*, although in some instances such distinction was recognized in explanatory memorandums accompanying some legislation. It was suggested that, instead of elaborating the topic on the basis of the distinction between immunity *ratione personae* and immunity *ratione materiae*, the Commission address only those aspects of immunity that had not been covered by international instruments, and it was proposed that a distinction be drawn, for purposes of immunity, between official visits and private visits.

29. On the criteria for identifying persons covered by immunity *ratione personae*, it was noted by some delegations that, in the practice of their States, the matter was evidentiary; key questions were the seniority of the individual and the functional need to travel for the purpose of promoting international relations and cooperation. Other delegations observed that State practice was insufficient to provide concrete information in that regard; in the limited cases considered for advice, there was reliance on other State practice and judicial decisions.

30. Some delegations considered that immunity *ratione personae* applied to the troika. While other delegations did not exclude the possibility of other high-ranking State officials enjoying such immunity, some delegations were not amenable to such extension, noting that present customary international law did not extend such immunity to high-ranking officials other than the troika. In the view of some delegations, immunity *ratione personae* was enjoyed by a limited number of persons and, when considering the current state of the law, account should be taken of the *Arrest Warrant* case, whose dictum referred to other “high-ranking officials”, thus

denoting persons other than the troika. It was considered important that the Commission clarify the extent to which immunity *ratione personae* may apply to any other such persons, as well as the criteria for determining who those individuals would be.

31. Some delegations pointed to case law in which it was determined that an incumbent minister of defence or international trade would be entitled to immunity *ratione personae* under international law. Other delegations argued for the possible extension of such immunity to vice-prime ministers, Government ministers and heads of the legislative branch. Some delegations suggested a cautious approach to any extension of such immunity to other officials, noting that in respect of the troika a distinctive level of representative functions was maintained. It was suggested that careful consideration be given to their status and role, in regular as well as in special circumstances. Some delegations suggested that any extension beyond the troika should be justified and include a careful analysis of customary law. It was also noted that such possible extension should be limited to official visits or include protection against trial processes in absentia.

32. Concerning immunity *ratione materiae*, several delegations considered the definition of the notions of official act, State official, person acting on behalf of a State in an official capacity or representative of the State, as used in the United Nations Convention on Jurisdictional Immunities of States and Their Property, as central. It was suggested that a State official was a person who exercised governmental authority, occupied a particular government office or served in the highest echelons of public service. Some delegations considered the criteria for attribution of the responsibility of the State for a wrongful act a relevant factor in determining whether a person was a State official. However, unlike the previous Special Rapporteur, who had asserted that there were no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other, some other delegations suggested that there might be reason to distinguish between a presumption for such State responsibility and the final determination of immunity, as the purposes behind the two sets of rules were quite different. While some delegations noted that the term “official act” included acts that were unlawful or ultra vires, other delegations noted that the question required further study. It was also contended that the plea of immunity *ratione materiae* in criminal cases was a plea by the State that the act of its official was an act of the State itself and therefore could not be the subject of adjudication by another State. The State that asserted such immunity acknowledged the act of its official as its own, and thereby its international responsibility may be engaged.

3. Possible exceptions to immunity

33. It was noted that this aspect merited particular attention. Some delegations voiced concerns regarding some affirmations in the Commission of the value, under customary international law, of some claims of possible exceptions, noting that State practice on the matter was not well established. Indeed, some delegations doubted that framing the discussion in terms of exceptions to immunity properly reflected the procedural nature of immunity, as procedural justice embodied in immunity could not be sacrificed for the sake of substantive justice against impunity.

34. It was thus suggested that rules and principles in this area need not be construed as exceptions to the rule of immunity of State officials; rather, they constituted specific norms strictly linked to the establishment of the individual criminal responsibility of the officials who commit certain classes of crimes. Indeed, in respect of certain crimes, the responsibility of both the individual and the State to whom such crimes are attributable is engaged. It was thus suggested that the Special Rapporteur might need to work towards reconceptualizing the relationship between jurisdiction and immunity. Moreover, certain delegations expressed some doubt that there were exceptions to immunity *ratione personae*; if any such exceptions existed, it was in respect of immunity *ratione materiae*.

35. It was recalled that there might be exceptions to the rule on immunity *ratione materiae*, where an international agreement constituted a *lex specialis* for certain crimes or in respect of criminal proceedings for acts committed on the territory of the forum State.

36. Some delegations noted that, in relation to countering impunity for the most serious crimes of concern to the international community, no State official should be able to hide behind the veil of immunity. It was nevertheless recognized that different views existed as to the evidence available for the identification of customary law in that regard. Some delegations stressed that an analysis of State practice was crucial in determining whether exceptions to immunity existed. At any rate, the contribution of the Commission would be useful in reaching consensus regarding possible exceptions in respect of international crimes or crimes that constituted breaches of *jus cogens* or *erga omnes* obligations. Some delegations noted that certain exceptions for international crimes were evolving, and the Commission was encouraged to take full consideration of treaties and jurisprudence following the Second World War. Some delegations sought to disclaim that such crimes as genocide could be considered an official act for purposes of immunity, as it was not easy to immediately identify any real functional need for upholding the immunity of State officials in relation to such crimes. It was suggested that it would be vital to clarify such terms as “international crimes”, “grave crimes” and “crimes under international law” for the purpose of this topic. Some delegations argued that the possible exception on the basis of crimes under universal jurisdiction was not convincing, as universal jurisdiction was also applicable to crimes not of an equally serious nature. Other delegations pointed out that the immunity of State officials was not affected by the unlawfulness of the act, since the gravity of the crime would not affect the official character of an act.

4. Procedural aspects of immunity

37. Some delegations underlined the need to address the procedural aspects of immunity, drawing upon recent case law. Others stressed the importance of considering the question of immunity at an early stage of the judicial proceedings.

5. Form of the outcome of the Commission’s work on the topic

38. Some delegations noted that they were open as to the possible outcome, whether a draft convention, guidelines or framework principles. Other delegations welcomed the intention of the Special Rapporteur to prepare draft articles. It was noted that the elaboration of a convention on the basis of such articles seemed to be

an appropriate ultimate goal. Some delegations noted that it was premature at the present stage to discuss the final outcome of the Commission's work.

D. Provisional application of treaties

1. General comments

39. Several delegations welcomed the Commission's commencement of its consideration of the topic. Reference was made to the increasingly prevalent practice of States resorting to the provisional application of treaties, which had given rise to a number of legal issues. The various reasons why States resort to the provisional application of treaties were recalled. For example, it was observed that States made use of the option of provisional application when lengthy national ratification procedures stood in the way of the quick entry into force of a treaty, especially in times of urgency. The Commission was called upon to preserve the inherent flexibility of the institution of the provisional application of treaties, as established under article 25 of the 1969 Vienna Convention on the Law of Treaties.

40. Several delegations observed that provisional application raised a number of problems in relation to domestic law, including constitutional law. It was stated that recourse to the provisional application of treaties should depend on the specific circumstances and the national legislation of each State. If the implementation of a treaty required a change in or the adoption of internal national legislation in a negotiating State, the provisional application of the treaty would be impossible for that State, at least until the relevant law had been changed or adopted. The same was true if the funding envisaged by the treaty required parliamentary approval. Given the diversity of legal positions at the domestic level, doubts were expressed as to the advisability of drawing conclusions as to general rules.

2. Comments on specific issues

41. It was suggested that the Commission clarify the legal situation arising out of the provisional application of a treaty, as well as the nature of obligations created by provisional application and the legal effect of its termination. It was also suggested that the Commission identify the differing forms of provisional application, as well as the procedural steps that were preconditions for provisional application.

42. The key issue to be addressed was the legal effect of provisional application. It was stated that provisional application in itself was not the expression of consent to be bound, nor did it lead to an obligation to declare consent to be bound. Several delegations were of the view that provisional application meant that States agreed to apply a treaty, or certain provisions thereof, as legally binding prior to its entry into force, subject to the conditions provided in the particular provisional application clause, the key distinction being that the obligation to apply the treaty, or provisions thereof, could be more easily terminated during the period of provisional application than after entry into force.

43. As regards the question of the termination of the provisional application of a treaty, it was observed that article 25, paragraph 2, of the Vienna Convention clarified that a State that had determined that it had no intention of being bound by a treaty — because, for example, the necessary parliamentary approval for ratification had been refused — was entitled to end provisional application. It was further noted

that the question of whether and how States that have already consented to be bound by a treaty not yet in force may terminate the provisional application of that treaty might be a different matter, depending on the concrete terms of the treaty. As regards the procedure for termination, the Commission was cautioned against proposing a rule requiring the giving of notice prior to the termination of provisional application, which was not provided for in the Vienna Convention.

44. As regards the relationship to article 18 of the Vienna Convention, general support was expressed for the view of the Commission that provisional application, under article 25, went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. It was pointed out that the obligation not to defeat the object and purpose of a treaty prior to its entry into force was applicable irrespective of the provisional application of the treaty.

45. As a working method, it was suggested that the Commission undertake its consideration of the topic on the basis of a thorough analysis of State practice, several examples of which were provided by delegations in the Sixth Committee.

46. The prevailing view among delegations was that it was still too early to consider the final outcome of the topic. At the same time, some delegations proposed the eventual development of guidelines and model clauses.

E. Formation and evidence of customary international law

47. A number of delegations emphasized the importance and utility of the topic, as well as the significant role played by customary international law at the international and national levels. Certain delegations also stressed the topic's inherent difficulties, including the complexity of assessing the existence of customary international law. Some delegations considered that the Commission should take a practical approach, with a view to providing useful guidance to those called upon to apply rules of customary international law, including at the domestic level. At the same time, some delegations underlined the need to preserve the flexibility of the customary process and its identification. A view was expressed in favour of a broad approach to the topic, including with regard to the sources that ought to be analysed, with some delegations stressing the need to consider the practice of States from various regions of the world.

48. Several delegations were of the view that both the issues of "formation" and "evidence" ought to be examined by the Commission. Certain delegations, however, suggested that the Commission place emphasis on either formation or evidence. The view was expressed that the focus of the Commission's work should be on the ways and methods relating to the identification of customary rules, while another view was expressed that the Commission should concentrate its work on the formation of customary rules.

49. As to the substantive questions to be examined, some delegations suggested that the Commission analyse the constituent elements of custom, including their characterization, relevant weight and possible manifestations. In that respect, it was suggested that the judicial findings of both international and domestic courts be scrutinized. Other issues to which delegations referred included the subdivision of customary international law into general, regional and local rules and the relationship between treaties and custom.

50. Reference was made to the specific role of domestic judges in identifying and creating relevant practice. According to certain delegations, however, the Commission should not overestimate the role of the decisions of domestic courts or the role of unilateral acts in the formation or identification of customary rules. While it was proposed that the Commission examine the role of international organizations in the formation and identification of customary law, the opinion was also expressed that the Commission should not give too much weight to resolutions of international organizations. It was suggested that the Commission's approach should focus on the actual practice of States rather than on written materials.

51. Support was expressed by some delegations for the development of a short glossary on the topic to foster common understanding of relevant terms.

52. As to the possible outcome of the Commission's work on the topic, several delegations supported the elaboration of a set of conclusions with commentaries thereto. The adoption of guidelines was also proposed. According to another view, it was premature for the Commission to decide on the final form of its work.

F. Obligation to extradite or prosecute (*aut dedere aut judicare*)

53. A number of delegations stressed the importance of the topic, although certain delegations noted their concern regarding the lack of progress by the Commission. It was suggested that the slow progress was a result of insufficient research regarding whether the obligation had obtained customary law status.

54. Indeed, several delegations stressed that the Commission should clarify the customary law status of the obligation. Some delegations suggested that a systematic survey of State practice would be useful towards that end, although it was noted that the Commission did not appear to have enough information regarding domestic practice. According to another view, draft article 4 on customary law proposed by the Special Rapporteur merited further consideration and elaboration by the Commission.

55. Certain delegations also expressed doubt as to the existence of a customary obligation. According to several delegations, however, the absence of a customary obligation should not preclude further consideration of the topic or the development of general principles or rules.

56. Some delegations indicated that it would not be advisable for the Commission to harmonize relevant treaty provisions or to focus on their application or interpretation, although it was noted that such an analysis may be appropriate if general principles could be gleaned from the work. According to another view, an analysis of the application of relevant treaty provisions, the resulting challenges and the positions of interested States would contribute to a better understanding of the topic.

57. A number of delegations underscored the need to undertake more systematic identification of the relevant core crimes to which the obligation applied. It was suggested that terrorism should be included as such a crime. The view was also expressed that the identification of crimes would be redundant in the light of the Draft Code of Crimes against the Peace and Security of Mankind.

58. Several delegations welcomed an analysis by the Commission of the recent International Court of Justice judgment on the subject (*Belgium v. Senegal*) and its implications for the topic. Certain delegations indicated that such an analysis was necessary to assess whether or how to proceed with the topic, while others noted that the judgment could give greater impetus to the Commission's work. It was also suggested that the judgment revealed both the validity and continued debatability of the obligation. According to another view, an assessment of the interpretation and implementation of the obligation in particular situations, such as in *Belgium v. Senegal*, would not be useful to the development of the topic.

59. A number of delegations noted the potential usefulness of an analysis of the topic's relationship with universal jurisdiction. Other delegations took the view that the topic should be delinked from universal jurisdiction.

60. Regarding the outcome of the Commission's work, certain delegations urged the Commission to continue its work on the topic as a matter of priority and to produce a final outcome that elaborates rules of international law. It was also suggested that the Commission establish procedural principles for requesting and obtaining extradition. Other delegations questioned the viability of the topic and whether the Commission should continue its work. The view was expressed that the Commission should terminate its consideration of the topic in 2013, and it was proposed that it was time to reconsider whether the topic was relevant to the Commission's mandate. According to another view, doubts expressed regarding future work on the topic by the Commission were grounded in its failure to undertake a systematic approach rather than the viability of the topic. The Commission was urged to develop a workplan that elaborates such an approach and to revisit the objectives of its work on the topic.

G. Treaties over time

61. A number of delegations welcomed the change in the format of the Commission's work on the topic, with effect from the sixty-fifth session, as well as the appointment of Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". While several delegations supported this narrower approach to the subject, as opposed to a broader one that would encompass the various factors affecting the operation of a treaty over the span of its existence, the view was taken that other issues related to treaties over time could also be examined by the Commission.

62. Appreciation was expressed for the six additional preliminary conclusions formulated by the Chair of the Study Group in 2012 (A/67/10, para. 240), which complemented his nine preliminary conclusions of 2011 (A/66/10, para. 344). Several delegations looked forward to the first report by the newly appointed Special Rapporteur, and support was expressed for his decision to synthesize therein the three reports that he had produced in his capacity as Chair of the Study Group. According to a suggestion, the review of decisions by national courts should be made a priority and the results of such a review should be reflected in future reports on the topic.

63. Attention was drawn to the importance of preserving the flexibility that characterizes the use of subsequent agreements and subsequent practice as a means of treaty interpretation. The point was made that a balance should be maintained

between the principle *pacta sunt servanda* and the necessary adjustment of treaty provisions in the light of a changing environment. It was also observed that the existence of formal interpretation procedures did not exclude the consideration of subsequent practice for interpretation purposes. According to another view, the role of subsequent practice in the interpretation of treaties should not be overestimated; moreover, it was doubtful that, in identifying subsequent practice, equal treatment should be given to the various organs of the State. Furthermore, some doubts were expressed regarding the meaning, scope and relevance of the term "social practice".

64. It was noted that the contours of the notion of "subsequent agreements" and "subsequent practice" for purposes of treaty interpretation required clarification. It was suggested that the Commission examine, inter alia, the relevance of the practice of lower-ranking State officials. The point was made that the subsequent practice of all parties to a multilateral treaty carried special weight and should not be placed on the same footing as practice reflecting the position of only some of the parties. The position was taken that, in order to serve as context for the interpretation of a treaty, subsequent practice must, according to article 31 of the 1969 Vienna Convention on the Law of Treaties, embrace all States parties, unless an effect for certain States only is envisaged. The view was also expressed that subsequent practice that was contradicted by the practice of any other party to the treaty should be discounted in order to preserve the principle of consent.

65. Mention was made of the potential role of subsequent agreements and subsequent practice in respect of treaty modification. However, it was also recalled that the United Nations Conference on the Law of Treaties had rejected a draft article providing for the possibility of treaty modification by subsequent practice. It was further suggested that the issue be examined more closely by the Commission.

66. While States and international organizations were encouraged to provide the Commission with information on their practice, the comment was also made that views expressed orally in the Sixth Committee during the discussion of the Commission's report were as important as written submissions and should receive equal consideration.

67. As to the possible outcome of the Commission's work on the topic, support was expressed for the elaboration of a set of general conclusions aimed at providing practical guidance to States. It was suggested that, while preserving a flexible approach to the topic, further efforts should be undertaken to develop conclusions or guidelines with a certain degree of normative content. Furthermore, the view was expressed that the outcome should be aimed at supplementing the relevant provisions of the 1969 Vienna Convention, without modifying or contradicting them.

H. Most-Favoured-Nation clause

68. Delegations commended the Study Group for its work to date, noting that the working papers before it at the sixty-fourth session of the Commission were another significant contribution towards the completion of the Group's work, which — it was hoped — would, overall, assure legal coherence and certainty of the law in the field and help to safeguard against the fragmentation of international law. Delegations affirmed the importance of articles 31 to 33 of the Vienna Convention on the Law of Treaties serving as the point of departure in the work of the Study

Group. It was stressed that treaty interpretation should remain the core focus of the work and that the specific wording of the Most-Favoured-Nation clause was crucial to its interpretation. It was hoped that the work being done by the Study Group would provide authoritative guidance on the interpretation of the clause. The point was nevertheless made doubting the viability of the exercise given its complexity, the topic's close relationship with other areas of international law and the fact that the Commission had previously been seized of it.

69. The point was also made that, despite the progress made, the real economic relevance of the Most-Favoured-Nation clause in contemporary times had yet to be studied, thereby raising doubt as to the eventual utility of work in the area.

70. Some delegations welcomed the intention of the Study Group to locate its work within a broader normative framework of general international law. The need for the Study Group to take into account the work of other relevant institutions, such as the World Trade Organization, the United Nations Conference on Trade and Development and the Organization for Economic Cooperation and Development, was echoed by some delegations.

71. The hope was expressed by some delegations that the Study Group would be in a position to explore further the relationship between bilateral investment treaties and investment in trade in services, the relevance of national treatment standards, fair and equitable treatment, guarantees against expropriation and access to investor-State arbitration.

72. Other delegations nevertheless urged the Study Group to be conscious of not overly broadening the scope of its work, for instance by addressing such areas as the relationship between bilateral investment treaties and human rights.

73. Some delegations doubted that the work of the Study Group was amenable to the elaboration of draft articles. The intention of the Study Group not to revise the Commission's 1978 draft articles on the Most-Favoured-Nation clause or to prepare new draft articles but to present a report drawing attention to the issues that had arisen and trends in the practice and, where appropriate, making recommendations was thus welcomed by some delegations. In view of the numerous treaties that had been concluded containing Most-Favoured-Nation clauses, some delegations cautioned against any attempts at making them uniform, noting further that Most-Favoured-Nation provisions were a product of specific treaty formation, tended to differ considerably in their structure, scope and language and were dependent on other provisions in the specific agreements in which they were located. Other delegations noted that the elaboration of guidelines, including model clauses, could add a practical dimension to the work. It was anticipated that the report would serve as a useful resource tool for Governments, policymakers and practitioners interested in the field.

74. The indication by the Study Group of its intention to complete its work within the next two or three sessions of the Commission was welcomed by some delegations.

I. Other decisions and conclusions of the Commission

75. Delegations acknowledged the significant contribution of the Commission in the progressive development of international law and its codification and

highlighted the importance of the comments and observations of States in the discharge of the Commission's functions.

76. Some delegations stressed the importance of enhanced dialogue between the Commission and the Sixth Committee, including the possibility of the Committee proposing topics for study by the Commission. They also affirmed their preference for the issuance of the report of the Commission in due advance of its consideration in the Sixth Committee, as this facilitated meaningful contributions to the debate. Also underscored by some delegations was the significance of the interactive dialogue between the Sixth Committee and members of the Commission, including Special Rapporteurs, and their support for concrete action to assure assistance to Special Rapporteurs, whose work was crucial to the functioning of the Commission.

77. The Commission was encouraged to continue to take cost-saving measures, while it was also underlined that such measures should not compromise the quality of its work. It was also encouraged to continue to improve its working methods. However, doubts as to the utility of the study group format were expressed.

78. A number of delegations took note of the inclusion of the topics "Formation and evidence of customary international law" and "Provisional application of treaties" in the programme of work of the Commission. Noting that the topic "Protection of the atmosphere" had not been included in the Commission's programme of work, some delegations urged that it not be added in the future, as it was premature to do so, the topic was not suitable for codification, was highly scientific and technical and was already the subject of regulation or discussion in other forums. It was hoped that any concerns over the topic would be addressed so as to allow the Commission to begin work on the legal aspects of the issue in an appropriate manner. The possibility of establishing a study group for such a purpose was also mentioned.

79. Support was expressed by some delegations for the inclusion of the topic "Protection of the environment in relation to armed conflicts" in the Commission's programme of work. Other delegations, however, viewed it as too specialized for consideration by the Commission.

80. The topic "Fair and equitable treatment standard in international investment law" was viewed by some delegations to be of great relevance and worthy of inclusion in the programme of work in the future, while others doubted the usefulness of its inclusion, noting that the Commission should instead focus its work on the topic "Most-Favoured-Nation clause".

81. Some delegations expressed the wish for the Commission to convene at least one session in New York during its quinquennium. On the other hand, some delegations, preferring instead that the Commission continue meeting at its headquarters in Geneva, questioned how such a measure could improve the work of the Commission or its cooperation with the Sixth Committee and raised the question of the budgetary implications of convening such a session in New York.

82. Voluntary contributions to the trust fund on the elimination of the backlog in the publication of the *Yearbook of the International Law Commission* were encouraged, as were voluntary contributions to enable participation in the International Law Seminar in Geneva.

83. Delegations acknowledged the support of the Codification Division of the Office of Legal Affairs to the overall activities of the Commission and its Special Rapporteurs, including the management and updating of the website concerning the Commission's work. They welcomed the availability of the provisional summary records of the Commission on the website as a further means of promoting awareness in a timely manner of the substance of the discussions among Commission members. It was also noted that the reports and publications of the Commission contributed to the realization of its objective in the progressive development and codification of international law, and in that regard the publication of the eighth edition of *The Work of the International Law Commission* was welcomed.