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Report of the International Law Commission on the work of its sixty-second session (2010)

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

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I. Introduction

1. At its sixty-fifth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 17 September 2010, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-second session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 19th to 26th and 28th meetings, from 25 to 29 October, and on 1 and 11 November. The Committee considered the item in three parts. The Chairman of the Commission at its sixty-second session introduced the report as follows: chapters I to IV and XIII (Part I) at the 19th meeting, on 25 October; chapter V (Part II) at the 21st meeting, on 27 October; chapters VI and VII (Part II — *continued*) at the 22nd meeting, on 27 October, and chapters VIII, X, XI and XII (Part III) at its 25th meeting, on 29 October. At the 28th meeting, on 11 November, the Sixth Committee adopted draft resolution A/C.6/65/L.20 entitled "Report of the International Law Commission on the work of its sixty-second session". The draft resolution was adopted by the General Assembly at its 57th plenary meeting, on 6 December 2010, as resolution 65/26.

3. By paragraph 24 of its resolution 65/26, 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-fifth session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of 10 sections: A. Reservations to treaties; B. Expulsion of aliens; C. Effects of armed conflicts on treaties; D. Protection of persons in the event of disasters; E. The obligation to extradite or prosecute (*aut dedere aut judicare*); F. Immunity of State officials from foreign criminal jurisdiction; G. Treaties over time; H. The Most-Favoured-Nation clause; I. Shared natural resources; and J. Other decisions and conclusions of the Commission.

II. Topical summary

A. Reservations to treaties

1. General observations

4. Delegations commended the Commission for the provisional adoption of the complete set of draft guidelines, with commentaries, constituting the Guide to Practice on Reservations to Treaties. While a number of delegations looked forward to the final adoption of the Guide to Practice at the sixty-third session of the Commission, some concerns were expressed about the limited period of time that Governments were afforded in order to present comments on the Guide to Practice as a whole.

5. It was observed that a guide to practice, in order to be of practical usefulness, should remain fairly simple and focused. In that regard, some delegations were of the view that the Guide needed to be streamlined and made more user-friendly.

6. Some delegations observed that the Guide to Practice should represent actual practice. In that respect, the view was expressed that the outcome of the Commission's work should not be presented as a "guide to practice" but as a

"study", since a number of guidelines proposed therein were not based on sufficient practice. It was also suggested that the Guide clearly indicate which elements represented codification and which elements represented progressive development.

7. While it was observed that the Guide to Practice usefully filled a number of *lacunae* and clarified certain ambiguities of the 1969 and 1986 Vienna Conventions on the Law of Treaties, some delegations underlined that the Guide was not supposed to depart from the legal regime established in those conventions.

2. Reactions to interpretative declarations

8. While supporting draft guideline 2.9.2 dealing with oppositions to interpretative declarations, a call was made for further clarification regarding those situations in which an opposition could be expressed through the formulation of an alternative interpretation, bearing in mind that an alternative interpretation might be offered by the opposing State merely as a recommendation, or might in fact constitute a new interpretative declaration subject to the rules applicable to interpretative declarations in general. Additional study was also encouraged on the practical effects of the recharacterization as a reservation of a unilateral statement purporting to be an interpretative declaration.

3. Validity/permissibility of reservations, interpretative declarations and reactions thereto

9. While delegations generally supported the distinction between valid and invalid reservations, a suggestion was made to further clarify the definition of the terms "invalid" and "impermissible" reservations.

10. Some support was expressed for draft guideline 3.3.3 on the effect of collective acceptance of an impermissible reservation, although it was suggested that the Commission clarify certain aspects such as the time period within which an objection to such a reservation would need be raised in order to prevent collective acceptance. Some other delegations questioned the soundness of draft guideline 3.3.3, including its compatibility with the objective notion of permissibility retained in the Guide to Practice. Doubts were also expressed concerning the plausibility of the scenario envisaged in that draft guideline, since it was not considered very likely that a State having raised the issue of the alleged impermissibility of a reservation would nonetheless refrain from objecting to the reservation. Furthermore, in the light of draft guideline 3.3.3, doubts were raised as to the correctness of the assertion in draft guideline 3.4.1, that the express acceptance of an impermissible reservation was impermissible. It was also suggested that the question of the permissibility of reactions to reservations be examined further, while taking into account the sovereign right of States to express their opinions about a reservation.

11. Concerning the permissibility of interpretative declarations, the view was expressed that the issue arose only when a treaty expressly prohibited such declarations. With regard to draft guidelines 3.6, 3.6.1 and 3.6.2 on the permissibility of reactions to interpretative declarations, it was suggested that such reactions should not be subject to any conditions for permissibility, since States should retain their freedom to express their views on interpretative declarations formulated by other contracting States or contracting organizations.

4. Effects of reservations and interpretative declarations

12. Support was expressed by some delegations for Part 4 of the Guide to Practice, dealing with the legal effects of reservations and interpretative declarations. In particular, some delegations welcomed the provisions of sections 4.1 and 4.2 on the conditions for and effects of the establishment of a reservation. Concerns were expressed, however, regarding the use of the expression "*reserva establecida*" in the Spanish version of the Guide, a terminology that departed from the Spanish wording of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, where the terms "*reserva ... efectiva*" were used. Furthermore, some doubts were expressed regarding the soundness of draft guideline 4.2.1, according to which the author of a reservation became a contracting State or a contracting organization only once that reservation was established.

13. Several delegations expressed support for draft guideline 4.2.2 on the effect of the establishment of a reservation on the entry into force of a treaty, including for its paragraph 2, which recognized — in derogation from the principle enunciated in paragraph 1 — the possibility, confirmed by the practice of depositaries, of including the author of a reservation in the number of contracting States or organizations required for the treaty to enter into force before the establishment of the reservation, if no contracting State or contracting organization was opposed in a particular case. However, while it was observed that paragraph 2 reflected a well-accepted practice, it was also recommended that the Commission take a stance on the correctness of that practice. According to another view, paragraph 2 could be deleted and the phrase "unless the parties otherwise agree" could be inserted in paragraph 1.

14. Support was expressed for draft guideline 4.2.4 as it recognized the principle of automatic reciprocity of reservations. While some delegations welcomed draft guideline 4.2.5, dealing with non-reciprocal application of obligations to which a reservation relates, clarification was sought on whether, in those situations where reciprocity did not apply, the author of a reservation was entitled to invoke the obligation concerned by the reservation and require the other parties to fulfil it.

15. Support was expressed for the view that the effects of objections to reservations should be distinguished from those of acceptances of reservations. However, a call was made for further clarifications in relation to draft guideline 4.3 dealing with the effect of an objection to a valid reservation.

16. Some delegations expressed support for the draft guidelines pertaining to section 4.4, on the effect of a reservation on rights and obligations outside of the treaty. It was observed, however, that draft guideline 4.4.3 raised the question of the scope of the notion of "peremptory norm of general international law (*jus cogens*)", the content of which remained to be clarified.

17. With respect to the consequences of an invalid reservation, which were dealt with in section 4.5 of the Guide to Practice, concern was expressed about relying too heavily on regional practices relating to human rights treaties, as the solutions applicable to those treaties were not necessarily transposable to other treaties.

18. A number of delegations expressed support for draft guideline 4.5.1 according to which an invalid reservation was null and void, and therefore devoid of legal effect. It was underlined that no distinction should be made, in that context, between the various grounds for invalidity of a reservation. According to a different view, the

relative character of the assessment of the validity of reservations should be recognized, and it should also be clarified that the solution retained in draft guideline 4.5.1 was only applicable when the invalidity of a reservation had been assessed by a third party through a decision that was binding on all contracting States and organizations. It was further suggested that the Commission address the consequences of acts performed in reliance on a reservation that was null and void.

19. Some delegations expressed support for draft guideline 4.5.2, stating, in its paragraph 1, the presumption of severability of an invalid reservation, according to which the reserving State or international organization was considered to be bound by the treaty without the benefit of the invalid reservation unless a contrary intention of that State or organization could be identified. The view was expressed that the solution retained in the draft guideline was balanced and compatible with the logic of the Vienna Conventions. However, it was suggested that paragraph 2, containing a list of factors potentially relevant in assessing the intention of the author of the reservation, be formulated in a more open manner so as to further emphasize the non-exhaustive nature of that list. While it was proposed that the reasons for the formulation of the reservation be added to the list, it was also suggested that additional explanations be given in the commentary as to how a "contrary intention" was to be identified. According to another view, the relevance or usefulness of some of the factors listed in paragraph 2, such as subsequent reactions of other contracting States and contracting organizations, in assessing the intention of the author of the reservation was doubtful. It was also proposed that the formulation of paragraph 1 be modified so as to refer to an expression of intention by the author of the reservation, while paragraph 2 should be deleted.

20. Some other delegations did not favour the presumption of severability of an invalid reservation stated in draft guideline 4.5.2. In particular, it was observed by some delegations that the presumption of severability proposed by the Commission was incompatible with the principle of consent on which the law of treaties was based, and concerns were also expressed that such a presumption might bring uncertainty to treaty relations. It was further stated that the presumption of severability was not supported by State practice and existing case-law outside specific contexts such as the Council of Europe, and that it also failed to take into account the nature of the treaty. Thus, a preference was expressed by some delegations for the opposite presumption, according to which a State or an international organization having formulated an invalid reservation should be regarded as not being bound by the treaty at all, unless that State or organization had manifested its intention to be bound by the treaty without the benefit of the reservation. Furthermore, some delegations were of the view that the issue addressed in draft guideline 4.5.2 should be analysed further by the Commission.

21. The point was made suggesting the omission from the Guide to Practice of any reference to a right of withdrawal from the treaty by the author of an invalid reservation, since the recognition of such a right would contradict the provisions of the 1969 and 1986 Vienna Conventions concerning withdrawal from a treaty.

22. Some delegations expressed support for the assertion in paragraph 1 of draft guideline 4.5.3 that the nullity of an invalid reservation did not depend on the objection or acceptance by a contracting State or organization. It was suggested, however, that the proviso "unless the treaty so provides" be inserted in the text of the draft guideline in order to capture those situations in which the incompatibility

of a reservation with the object and purpose of the treaty would depend on objections to it being made by a predetermined number of contracting States or organizations.

23. Some delegations welcomed paragraph 2 of draft guideline 4.5.3, which, notwithstanding the principle enunciated in paragraph 1, stated that a State or an international organization that considered a reservation to be invalid should formulate, if it deemed it appropriate, a reasoned objection as soon as possible. While it was proposed that the wording of that paragraph be rendered more flexible in order to avoid conveying the impression that States were under an obligation to react to invalid reservations, appreciation was expressed for the clarification given by the Commission to the effect that the formulation of objections to invalid reservations was not subject to the deadline set in article 20, paragraph 5, of the Vienna Conventions, as was confirmed by State practice. According to a different view, to maintain that there was no need to object to an invalid reservation could give rise to legal uncertainty.

24. The opinion was also expressed that paragraph 1 of draft guideline 4.5.3 could be omitted if some explanations to that effect were given in the commentary to draft guideline 4.5.1, and that paragraph 2 of draft guideline 4.5.3 could be moved into draft guideline 4.5.1.

25. The Commission's analysis of interpretative declarations was welcomed, particularly in view of the absence of specific provisions in the Vienna Conventions concerning the legal effects of such declarations. It was nevertheless observed that interpretative declarations should be examined in the context of article 31, paragraph 2, of the 1969 and 1986 Vienna Conventions. According to another view, section 4.7 of the Guide to Practice did not sufficiently clarify the effect of interpretative declarations; further study was required, in particular, on the circumstances under which an interpretative declaration was opposable to other States and on the relevance that might be attached to the number of authors of a given declaration. Support was expressed for the distinction between "simple" interpretative declarations and conditional interpretative declarations that followed the legal regime of reservations.

5. Reservations and interpretative declarations in the case of succession of States

26. Some delegations expressed appreciation for Part 5 of the Guide to Practice, dealing with reservations and interpretative declarations in the case of succession of States. While it was observed that the provisions of Part 5 represented both codification and progressive development of international law, support was expressed for the pragmatic and flexible approach adopted by the Commission as well as for its intention to remain faithful to the 1978 Vienna Convention on Succession of States in respect of Treaties. According to another view, the fact that the 1978 Vienna Convention had attracted few ratifications and that State practice did not always follow it, inevitably affected, to a certain extent, the value of guidelines that had been elaborated on the assumption that the rules enunciated in that convention corresponded to general international law. In that respect, the point was made that the 1978 Convention was generally regarded as reflecting only in part general international law. It was also suggested that, given the lack of practice supporting general rules of international law on the subject, the Commission refrain

from formulating draft guidelines on reservations to treaties and interpretative declarations in relation to the succession of States.

27. While some doubts were expressed as to the continued need for provisions referring to "newly independent States", the view was also expressed that Part 5 did not consider the position taken by separating States having applied the clean slate rule.

28. The view was expressed supporting the approach adopted by the Commission of extending to successor States other than newly independent States the presumption of the maintenance of reservations formulated by the predecessor State. The draft guidelines concerning the territorial scope of reservations, the timing of the effects of non-maintenance of a reservation and the capacity of the successor State to formulate objections to pre-existing reservations, were also welcomed.

B. Expulsion of aliens

1. General comments

29. While the importance of the topic was emphasized, some delegations questioned its suitability for codification and progressive development. It was suggested that there was an ambiguity as to the purpose of the Commission's work on the topic, as it was not clear whether the intention was to undertake an exercise of codification and progressive development or to draft a new human rights instrument.

30. Attention was drawn to the importance of carefully considering State practice and the views expressed by States in international forums. While it was recommended that the Commission follow a cautious approach by focusing on the rules of customary international law reflecting well-established principles, some delegations expressed a preference for the development of a set of principles covering all relevant rules pertaining to the subject, rather than draft articles codifying customary law to fill gaps in existing treaty law.

31. A call was made for a more focused approach to the subject, and it was proposed that the types of situations to be covered be clarified. Some delegations observed that there was a need to restructure the draft articles in a systematic manner. Clarifications were also sought on the interactions between the draft articles and relevant international and regional instruments. It was further suggested that a definition of "legal" and "illegal" aliens be provided for the purpose of the draft articles.

32. Concerns were expressed about transposing to aliens generally those guarantees that were afforded under special regimes, such as the law of the European Union, in particular regarding the standards applicable for the expulsion of its citizens, or refugee law.

33. Attention was drawn to the distinction between the sovereign right of States to expel aliens and their more limited discretion to enforce the actual departure of an alien through deportation.

34. The view was expressed that the rule prohibiting the expulsion of nationals was well established in international law.

2. The protection of the rights of aliens subject to expulsion

35. Some delegations emphasized that the right of States to expel aliens should be exercised in accordance with international law, including the rules on the protection of human rights and the minimum standard for the treatment of aliens. It was observed that aliens subject to expulsion should be afforded a minimum standard of treatment, regardless of the legality of their presence in the expelling State. While it was suggested that the draft articles focus on the protection of the human rights of aliens subject to expulsion, it was also proposed that the Commission further consider whether the scope and content of those rights should be addressed under the topic.

36. While some delegations welcomed the revised draft articles on the protection of the human rights of persons expelled or being expelled, a call was made for further review of those articles, which were regarded as unduly restraining the sovereign right of States to control admission to their territories and to enforce their immigration laws. The view was expressed that the draft articles should not be too detailed or incorporate rights that were not yet universally accepted. The Commission was thus encouraged to base its work on principles enshrined in the provisions of widely ratified universal human rights treaties, without importing in the draft articles concepts from regional jurisprudence. Some delegations were of the view that only those human rights that were guaranteed by general international law should be stated in the draft articles.

37. While it was emphasized that aliens subject to expulsion were entitled to respect for all their human rights, and while support was expressed for the replacement of the expression “fundamental rights” by the more encompassing expression “human rights”, it was suggested that special attention be paid to those rights that were at particular risk of being violated in the event of expulsion. Specific reference was made to the protection against inhuman or degrading treatment and to property rights.

38. Some delegations considered that human dignity was a general principle rather than a specific human right. The view was expressed that the principle of non-discrimination should apply only to the process afforded to aliens in expulsion proceedings and should not be framed in a manner that would unduly restrain the discretion enjoyed by States to control admission to their territories and to establish grounds for expulsion of aliens under their immigration laws. Concerning the revised draft article 11, paragraph 2, on the prohibition of torture and inhuman or degrading treatment, attention was drawn to the fact that the prohibition applied not only in the territory of the expelling State, but also in a territory under its jurisdiction, as had been confirmed by international judicial or quasi-judicial bodies.

39. Although some support was expressed for the revised draft article 12 on respect for the right to family life, which recognized the need to balance the interests of the expelling State and those of the alien facing expulsion, it was stated that some clarification of that provision was needed. It was suggested that the revised draft article 13 on the specific case of vulnerable persons be further elaborated, also bearing in mind that it would not be appropriate to rule out completely the possibility that such persons be expelled. It was also proposed that the terms “children” and “older persons” in draft article 13 be defined, and clarification was sought regarding the choice of the groups of aliens considered to be vulnerable within the meaning of that provision. The inclusion of other

categories of vulnerable persons, such as victims of human trafficking and wounded or sick persons, and perhaps even single mothers with small children, was also proposed.

40. It was suggested that the revised draft article 14, paragraph 2, stating the obligation of a State having abolished the death penalty not to expel an alien who is under a death sentence to a State in which that person may be executed without having previously obtained an assurance that the death penalty would not be carried out, be given a broader scope so as to cover also those situations where the death penalty had not yet been pronounced but might be imposed in the receiving State. The effectiveness of diplomatic assurances was also questioned. Concerning the revised draft article 15 on the prohibition to expel a person to another country where there was a real risk that he or she would be subjected to torture or to inhuman or degrading treatment, clarification was sought about the cases, envisaged in paragraph 2, in which the receiving State ought to be regarded as unable or unwilling to provide adequate protection against a risk emanating from persons acting in a private capacity.

41. According to another view, the draft articles should not incorporate *non-refoulement* obligations that had no basis in general international law, and States should not be held responsible for anticipating conduct by third parties that they might not be in a position to foresee or control. It was stated, in particular, that the revised draft article 14, paragraph 2, was not acceptable since the obligation set forth therein did not exist under general international law. It was further observed that the death penalty was not prohibited by general international law.

42. The need for ensuring respect for the human rights of aliens detained pending expulsion was underlined. While support was expressed for the proposed draft article B on conditions of detention pending expulsion, it was observed that the draft article overlooked those cases in which expulsion had a punitive character.

43. With regard to procedural guarantees, attention was drawn to article 13 of the International Covenant on Civil and Political Rights. The view was expressed that only those procedural guarantees that were established under international law should be enunciated in the draft articles, and some doubts were raised as to whether certain procedural rights listed in the draft articles reflected universal State practice or *opinio juris* on the subject. Some delegations supported a distinction, in the context of procedural guarantees, between aliens legally and illegally present in the territory of the expelling State. However, the need for further scrutiny of the soundness of such a distinction was mentioned, and some delegations were of the opinion that certain procedural guarantees should be afforded to all categories of aliens. Some other delegations considered that the same procedural guarantees should be afforded to aliens legally and illegally present. Doubts were also expressed as to the appropriateness of drawing distinctions according to the duration of the alien's presence in the territory of the expelling State.

44. Support was expressed by some delegations for the requirement, stated in the proposed draft article B1, that expulsion must take place in pursuance of a decision reached in accordance with the law. It was suggested that the proposed draft article C1 be complemented by a new paragraph requiring States to allow an alien subject to expulsion a reasonable period of time to prepare his or her departure. The view was expressed that the obligation to indicate the reasons justifying an expulsion decision should not be regarded as absolute, especially when national security or

public policy were the grounds for expulsion. It was also observed that the "right to consular protection" was not an individual right but a right of States to protect their nationals through consular assistance.

3. Disguised expulsion and extradition disguised as expulsion

45. Some delegations supported the inclusion of a draft article on the prohibition of disguised expulsion. The view was expressed that disguised expulsions were often targeted at persons belonging to certain ethnic or religious minorities, were discriminatory in character and violated human rights law. It was also observed that disguised expulsion had been condemned by a number of national courts.

46. According to another view, the proposed draft article A on disguised expulsion should be deleted and replaced by a provision setting out the conditions to be met for the expulsion of an alien. While some delegations questioned the appropriateness of the term "disguised expulsion" to describe the situations envisaged in draft article A, a preference was expressed for considering that notion in conjunction with the general definition of expulsion. The view was also expressed that the prohibition of disguised expulsion as formulated in draft article A was too broad, and it was suggested that the wording of that provision be clarified, including with respect to the definition of "disguised expulsion" in paragraph 2. Clarification was also sought regarding the criteria that differentiated disguised expulsion from departure for economic or cultural reasons.

47. While some support was expressed for the proposed draft article 8 stating the prohibition of extradition disguised as expulsion, a number of delegations questioned the inclusion in the draft of a provision that was concerned less with expulsion than with preserving the integrity of the extradition regime. The view was also expressed that the proposed formulation of the prohibition was unclear. While it was noted that the existence of a request for extradition should not constitute an obstacle to expulsion if the conditions for expulsion were met, the point was made that the real issue was whether the safeguards pertaining to extradition had been circumvented by the expulsion decision.

4. Grounds for expulsion

48. Some support was expressed for the proposed draft article 9 on grounds for expulsion. Some delegations emphasized that such grounds must be compatible with international law, and it was suggested that a balance be struck between the interests of the expelling State and those of the alien subject to expulsion.

49. While mention was made of the right of States to expel aliens representing a threat to public order or national security, some delegations observed that the grounds for expulsion were not limited to public order and national security. Reference was made, in particular, to the unlawfulness of an alien's presence in the territory of the expelling State as a possible ground for expulsion. It was observed that an attempt to draw an exhaustive list of grounds for expulsion would be useless, and it was also suggested that those grounds were to be determined by domestic law, provided that the expelling State complied with its international obligations. It was further proposed that the Commission focus on the identification of the grounds prohibited by international law.

5. Mass expulsion

50. The view was expressed that mass expulsion was prohibited by international law, with the possible exception of the case of aliens having demonstrated hostility towards the expelling State during an armed conflict — an issue that should not, however, be covered by the draft articles.

C. Effects of armed conflicts on treaties

1. General comments

51. Support was expressed for the Commission's general approach of adhering to the draft articles adopted on first reading. A doubt was expressed as to whether the draft articles would help promote security in legal relations between subjects of international law.

2. Draft article 1

52. Some support was expressed for the inclusion of non-international armed conflicts within the scope of the draft articles. It was noted that the line between international and non-international armed conflicts could be blurred and both types of conflicts could have the same effects on treaties.

53. In terms of another view, armed conflicts of a non-international nature should be excluded from the scope of the draft articles, since such situations were adequately covered by the provisions of the Vienna Conventions and the 2001 articles on responsibility of States for internationally wrongful acts.

54. As regards the exclusion of international organizations from the scope of the draft articles, support was expressed for the proposal of the Special Rapporteur to cover the issue through an appropriate "without prejudice" clause. The view was expressed that it would not be logical to exclude multilateral treaties to which international organizations, along with States, were parties, especially in view of the growing number of treaties to which such organizations acceded.

55. The view was also expressed that the scope of the draft articles should not be restricted to treaties between two or more States of which more than one was a party to the armed conflict, as that would limit the usefulness of the draft articles. At the same time, it was suggested that the Commission should clarify the conditions to be met for a conflict to affect the operation of a treaty when only one State party to the treaty was a party to the conflict. The view was expressed that in such a situation the principles and rules set out in the Vienna Convention on the Law of Treaties for the termination or suspension of treaties appeared to provide an adequate solution.

3. Draft article 2

56. As regards the definition of "armed conflict" in subparagraph (b), support was expressed by some delegations for the proposal to adopt the formulation used by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Duško Tadić* case, with the modification proposed by the Special Rapporteur. Some others were of the view that the *Tadić* decision was unsatisfactory since non-international armed conflict was not limited to situations where at least one State party was a party to the conflict.

57. In terms of a further view, use of the term "protracted" as a threshold for determining whether an armed conflict fell within the scope of the draft articles was not conducive to the stability of treaty relations. Some others preferred retaining "protracted" in order to provide for a minimum threshold with respect to the elements of duration and intensity, which was an essential factor if the draft articles were to cover non-international armed conflicts. The view was also expressed that the expression "organized armed groups" was too broad and might include even armed criminal groups. It was also observed that the phrase "resort to armed force" was not widely accepted in military terminology; and it was suggested that, as an alternative, the expression "use force against" could be used. It was noted that the new wording appeared also to cover occupation, a point that could be clarified in the commentary. In terms of another view, the fact that the draft article conflated the distinct concepts of occupation and armed conflict was a problem. It was also suggested that "embargoes" be covered.

58. Some other delegations expressed a preference for the definition of armed conflict in the Geneva Conventions of 1949 and in Additional Protocol II thereto. In terms of another view, it was not necessary to include a definition of "armed conflict" in the draft articles as it could be left to international humanitarian law to decide when there was an armed conflict which would trigger the applicability of the draft articles. Other suggestions included taking into account the effects of internal armed conflicts on treaties through the inclusion of a *rebus sic stantibus* clause, as well as clarifying in the commentary that the application of the draft articles was not dependent on the discretionary judgement of the parties in question but was automatic on fulfilment of the material conditions for which they provided.

4. Draft article 3

59. Support was expressed by some delegations for the new wording of draft article 3. Support was also expressed for the retention of the term "*ipso facto*", as it accurately reflected the principle reflected in the draft article. In terms of another view, the avoidance of the negative form was desirable. It was also stated that the title of the draft article did not adequately reflect the content, that it should be made more direct, and that the use of the term "absence" should be reconsidered.

5. Draft article 4

60. As regards subparagraph (a), the view was expressed that, in determining the possibility of termination, withdrawal or suspension of the application of a treaty, the intention of the parties was of paramount importance. In terms of a further view, articles 31 and 32 of the Vienna Convention on the Law of Treaties did not seem relevant to determining the intention of the parties.

61. Concerning subparagraph (b), doubts were expressed regarding the criterion of the "nature and extent" of armed conflict since it could contradict and negate the effect of the intention of the parties. A preference was expressed for reinserting a reference to "subject matter" as it provided guidance on the content of treaties susceptible to termination. In terms of a further view, it was not clear how the number of parties could provide evidence for termination or suspension of or withdrawal from a treaty.

62. It was proposed that draft articles 4 and 5 be combined to create a rule according to which the subject matter of a treaty was decisive for its continuation or suspension.

6. Draft article 5

63. While support was expressed for draft article 5, several views existed concerning the indicative list of categories of treaties in the annex. Some delegations expressed support for the list and for retaining it as an annex to the draft articles. It was proposed that the commentary clarify that the list was indicative rather than exhaustive and did not constitute an absolute preclusion of termination or suspension of the operation of the listed treaties in all circumstances. Some others questioned the usefulness of the inclusion of a list. It was noted, for example, that the certainty of continued operation varied among the categories in the list. It was proposed to simply render draft article 5 as a single paragraph of general scope, which could be applied on a case-by-case basis. It was also suggested that a list of specific treaties could be included in the commentary. A preference was expressed for not including the proposed paragraph 2.

64. While agreement was expressed for the inclusion of the categories of treaties relating to international criminal justice and constituent instruments of international organizations, doubts existed regarding the inclusion of treaties on friendship, commercial arbitration, and law-making treaties. It was also noted that the suggestion to include the category of treaties containing rules of a peremptory (*jus cogens*) nature was inconsistent with the logic of the list, since *jus cogens* norms applied independently of any treaty in which they might be reproduced.

7. Draft article 6

65. The view was expressed that, in paragraph 2, the word “lawful” qualifying the reference to “agreements” was inappropriate; and it was proposed that the phrase be replaced by “agreements under international law” or “agreements in accordance with international law”.

8. Draft article 7

66. The view was expressed agreeing with the Special Rapporteur’s suggestion to locate draft article 7 as new draft article 3 *bis*.

9. Draft article 8

67. The view was also expressed that draft article 8 introduced an obligation of notification that was essential for giving stability to treaty relations and strengthening dispute settlement mechanisms. At the same time, it was maintained that the right balance had to be struck between the interests of the States involved in an armed conflict and those of the international community. It was noted, for example, that the provision should avoid excessive formalism, because in cases of armed conflict it might be too cumbersome to require the belligerents to follow a formal notification procedure. It was also maintained that setting a time frame for raising an objection to the termination of a treaty would be artificial in the absence of consistent practice. Accordingly, it was proposed that prescriptive rules on time limits (in paragraph 4) be avoided. The concern was expressed that the provision also appeared to apply to treaties establishing boundaries, which could provide a

basis for a State engaged in armed conflict to change its borders. It was suggested that the draft article could include a *renvoi* to the mechanism of suspension or termination provided for by the treaty. It was also suggested that the treaties covered under draft article 5 be excluded from the ambit of the draft article.

10. Draft articles 9, 10, 11 and 12

68. Support was expressed by some delegations for draft articles 9, 10, 11 and 12.

69. As regards draft article 12, it was suggested that the commentary could clarify that if paragraph 1 was applied, there was no need for paragraph 2. Support was also expressed for the proposed merger of former draft articles 12 and 18.

11. Draft article 13

70. The view was expressed that since it was often difficult to distinguish between the aggressor and victim, it would be more prudent to adopt a cautious approach by including a "without prejudice" clause. In terms of a further view, the inclusion of the phrase "subject to the provisions of article 5", might lead to a situation in which a State's exercise of its right to self-defence was subject to continuing treaty obligations which might be inconsistent with that right.

12. Draft article 15

71. Several delegations expressed support for broadening the scope of draft article 15 to include any threat or use of force in violation of the prohibition set out in Article 2, paragraph 4, of the Charter of the United Nations, instead of a reference to aggression. Some others preferred the first reading formulation since widening the scope of the article to cover any unlawful use of force would not necessarily serve the purpose of the draft articles.

72. The view was expressed that if a reference to aggression were retained, the Charter of the United Nations and General Assembly resolution 3314 (XXIX) offered indispensable practical guidance. Some others were of the view that a reference to General Assembly resolution 3314 (XXIX) was best avoided since it was controversial and its inclusion in draft article 15 failed to properly recognize the process described in the Charter for making an authoritative determination of aggression. Opposition was expressed by some delegations to resorting to the formulation of the crime of aggression in article 8 *bis* of the Rome Statute of the International Criminal Court. Concerns were similarly expressed regarding how a "benefit" to the aggressor State was to be determined and by which authority.

13. Draft article 16

73. Support was expressed by some delegations for the views of the Special Rapporteur in connection with draft article 16. It was noted that neutrality was not always established by treaty; and could be done by a unilateral declaration. Furthermore, practice showed that neutrality was not overridden by the Charter of the United Nations in general, but only where the Security Council took action under Chapter VII. It was suggested that the Commission should consider the problem of occasional neutrality and the status of non-belligerency in international armed conflicts. The view was also expressed that if a belligerent State was entitled

to suspend a treaty with a neutral State, the reverse should also apply in cases where the treaty was affected by armed conflict.

14. Draft article 17

74. It was suggested that the concepts of "material breach" and "fundamental change of circumstances" be defined. It was also proposed that a new subparagraph consistent with article 57, paragraph (a), of the Vienna Convention on the Law of Treaties (conformity with the provisions of the treaty) be included.

D. Protection of persons in the event of disasters

1. General comments

75. It was recalled that in order to ensure the relevance in practice of the rules being developed, the Commission ought to adhere closely to actual State practice. To that end, it was suggested that it continue to compile and study national legislation, international agreements and the practice of States and non-State actors in order to elucidate the legal and practical aspects of the topic, address any gaps identified and introduce new concepts. It was also suggested that the Commission interact closely with the international organizations operating in the field, including the Office for the Coordination of Humanitarian Affairs and relevant non-governmental organizations.

76. As for the possible form of the Commission's work, the view was expressed that the development of non-binding guidelines, a guide to practice or a framework of principles for States and others engaged in disaster relief would be of more practical value and would enjoy more widespread support and acceptance.

2. Scope of the draft articles

77. It was proposed that the text of draft article 1 could make express reference to the issues relating to the scope *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci* discussed in the commentary to that article. Support was also expressed for the emphasis in the commentary to article 1 on the rights and obligations of States in relation to persons in need of protection; as well as for covering the pre-disaster phase, involving disaster risk reduction and prevention and mitigation activities, as suggested in paragraph (4) of the commentary. In terms of a further view, it was preferable to limit the scope *ratione personae* of the draft articles to natural (to the exclusion of legal persons). It was also suggested that provision be made for the various issues and responsibilities that could arise for assisting and transit States.

3. Purpose

78. Support was expressed by some delegations for the phrase "adequate and effective response" which was considered essential to the protection of persons in disaster situations, as well as for "with full respect for their rights", a reference that comprised not only basic human rights, but also acquired rights.

4. Definition of disaster

79. Agreement was expressed by some delegations with the definition of disaster, provided that it was understood not to include armed conflicts.

80. While support was expressed for delimiting the definition of disaster so as to exclude other serious events that might also disrupt the functioning of society, it was noted that the threshold requirement of a "serious" disruption of the functioning of society was too high and could mean that a disaster that did not disrupt the society as a whole, such as an earthquake in a remote area of a country populated by an ethnic minority, did not entail the Government's obligation to protect. Such a conclusion would conflict with the principle of impartiality.

81. It was also pointed out that if "widespread loss of life, great human suffering and distress, or large-scale material and environmental damage" were only three possible outcomes among others, as the commentary explained, then the words "*inter alia*" should precede them. It was further suggested that the notion of "humanitarian response" also be defined.

5. Relationship with international humanitarian law

82. While it was asserted that disasters arising as a result of armed conflict should not be included in the scope of the draft articles, in terms of a further view, draft article 4 should be construed as permitting the application of the draft articles in situations of armed conflict to the extent that existing rules of international law, and particularly of international humanitarian law, did not apply. The Commission was invited to continue to take into account in its work on the topic the distinction to be made depending on whether or not an armed conflict existed in the event of disaster.

6. Duty to cooperate

83. It was observed that the duty to cooperate set out in draft article 5 was well established as a principle of international law and cooperation was one of the basic tenets of the Charter of the United Nations. The Commission was commended for the reference to cooperation with international and non-governmental organizations and was called upon to consider developing provisions that would deal with the particular issues arising in respect of cooperation with such organizations.

7. Humanitarian principles in disaster response

84. Several delegations expressed support for the inclusion of the principles of humanity, neutrality and impartiality in draft article 6. It was pointed out that the principles embodied elements, albeit encompassing a significant measure of overlap, that were useful in clarifying the underpinnings of third-State conduct with respect to a disaster that occurred in another State. It was proposed that the Commission consider including a reference to the principle of independence, which could entail, for example, a prohibition against the imposition of any conditions other than altruistic ones on the provision of humanitarian assistance. It was also suggested that the Commission include the principle of non-intervention. As regards the title of the provision, it was suggested that it should refer not to humanitarian principles, but to the principles of humanitarian response, so as to avoid confusion with international humanitarian law.

85. As regards the principle of humanity, while it was referred to as an important and distinct guiding principle, some other delegations expressed a preference for locating it in a declaratory part of the instrument, such as the preamble. The concern was expressed that it might be superfluous in the light of draft article 7, and it was proposed that the Commission at least clearly elaborate the relationship between draft articles 6 and 7.

86. The view was expressed that the principle of neutrality was of particular importance so as to ensure that those providing assistance carry out their activities with the sole aim of responding to the disaster in accordance with humanitarian principles and not for purposes of pursuing a political agenda. Some others pointed to the close connection between the principle of neutrality and armed conflict (which had been excluded from the scope of the draft articles), and noted that even if construed more broadly, neutrality presupposed the existence of two opposing parties, which was not the case in the context of disasters. The view was also expressed that, in time of peace, impartiality and non-discrimination would cover the same ground as neutrality.

87. The view was expressed that the principle of impartiality was crucial, and included non-discrimination. Concerning the proportionality component of the principle of impartiality, the view was expressed that the response to a disaster should also be in proportion to the practical needs of affected regions and peoples and to the capacity of affected States for providing their own relief and receiving relief from others.

88. As regards the revised version of the draft article, as adopted by the Drafting Committee in 2010, support was expressed for the inclusion of the reference to the principle of non-discrimination. The view was also expressed that, with regard to the phrase “while taking into account the needs of the particularly vulnerable”, it was important to emphasize that the differential treatment of persons who were in different situations was not necessarily discriminatory.

8. Human dignity

89. While support was expressed for draft article 7, which was described as providing an additional reminder that people were the central concern of the draft articles, doubts were expressed as to its inclusion since it was not clear whether the principle of human dignity should have an additional meaning beyond human rights. In terms of another view, human dignity might not be a human right per se, but rather a foundational principle on which the edifice of all human rights was built. Some others, while agreeing with the relevance of the obligation to respect and protect the inherent dignity of the human person in the context of disaster response, nonetheless noted that the concept was not entirely quantifiable in legal terms, and served more as an overarching concept that should be taken into account in such situations. While some accordingly proposed covering the principle by a reference in the preamble, others preferred retaining it in the text. It was further proposed that the draft articles include a principle that would make it a requirement to protect the interests of the affected society, such as its main values and way of life.

9. Human rights

90. With regard to draft article 8 (“Human Rights”), as adopted by the Drafting Committee in 2010, it was recalled that States had the right to suspend certain

human rights in emergency situations. The view was also expressed that any mention of the respect for human rights in the context of disasters was superfluous since there was no reason to consider that persons affected by disaster might ever be thought of as deprived of their human rights. It was proposed that a reference to human rights be made instead in the preamble to the draft articles.

10. Role of the affected State

91. General agreement was expressed with the assertion that the primary responsibility for the protection of persons and provision of humanitarian assistance on an affected State's territory lay with that State. It was maintained that that entailed taking the lead in evaluating the affected State's need for international assistance and in facilitating, coordinating, directing, controlling and supervising relief operations on its territory. It was noted that that was based on State sovereignty and flowed from the State's obligation towards its own citizens. In addition, as a practical matter, the State where the disaster had taken place was best placed to assess the need to protect and assist. Some delegations called upon the Commission to include a specific mention of the principles of sovereignty and non-intervention, while others were of the view that such reference was not necessary. Support was also expressed for emphasizing the primacy of the domestic law of the affected State.

92. Support was expressed for the version of draft article 9 provisionally adopted by the Drafting Committee, and in particular the reference to the affected State's "duty" to ensure the protection of persons and provision of disaster relief, rather than its "responsibility". In terms of another view, it was not clear what the content of that duty would be in legal terms, to whom it would be owed and what it would entail in practice. It was also suggested that the term "affected State" be defined.

93. General support was expressed for the proposition that external assistance could be provided only with the consent of the affected State, and accordingly that that State retains the right to decide, in the light of the gravity of the disaster and its own rescue and relief capacities, whether to invite other States to participate in those activities. That would include a right to refuse offers of assistance from abroad.

94. Nonetheless, the view was expressed that it was important to balance State sovereignty against human rights protection. Accordingly, the Commission could consider the hypothetical situation where an affected State failed to protect persons in the event of a disaster because it lacked either the capacity or the will to do so. The view was expressed that in such circumstances, the affected State should seek assistance from other States and international organizations in accordance with draft article 5. In terms of a further view, a State should bear responsibility for its refusal to accept assistance, which could constitute an internationally wrongful act if it violated the rights of affected persons under international law. Some others advised caution in making such characterizations, which could have adverse consequences for international relations and justify interventionism.

95. It was also stated that the question of consent to the activities of private and non-governmental actors also deserved further discussion. The view was expressed that while assisting States required consent, non-governmental organizations and other bodies needed simply to comply with the internal laws of the affected State. The view was also expressed that, irrespective of any consent required, the

international community might also have a certain responsibility, at least to offer assistance. It was proposed that, in addition to exploring the right of the international community to provide lawful humanitarian assistance, it was important to explore ways and means of improving the coordination, effectiveness and efficiency of such assistance.

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

1. General comments

96. Several delegations reiterated the importance that they attached to the topic, and its relevance in the fight against impunity, and expressed concern that relatively little progress had been made so far. It was hoped that the Commission would make substantial progress thereon at its sixty-third session. In that context, some delegations considered that the general framework elaborated by the Working Group in 2009 continued to be relevant for the Commission's work. The cautious approach by the Special Rapporteur and the Working Group was also commended and the need for a thorough review of State practice was emphasized.

97. While several delegations welcomed the *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic*, prepared by the Secretariat, it was also suggested that it be expanded to include other aspects of State practice, such as national legislation. For that purpose, reference was made to the comments made by States at the request of the Commission.[1]

98. While some delegations expressed support for the formulation of draft articles on the topic, based on the general framework, the appropriateness of such an endeavour, and the extension of the obligation to extradite or prosecute beyond binding instruments containing such an obligation, was also questioned.

2. Legal bases of the obligation

99. Some delegations considered that the question concerning the legal bases of the obligation to extradite or prosecute, and the content and nature of such obligation, in particular in relation to specific crimes, merited further examination. Some other delegations reiterated their position that the obligation could not yet be regarded as a rule or principle of customary law. It was pointed out that the relevant treaty terms must govern both the crimes in respect of which the obligation arises and the question of implementation. The view was also expressed that the question of a possible customary norm in that area should only be considered after a careful analysis of the scope and content of the obligation under existing treaty regimes, and that any examination thereof required a broader range of reporting by States on relevant practice.

100. Some delegations also expressed support for the examination of the duty to cooperate in the fight against impunity, as underpinning the obligation to extradite or prosecute.

[1] See A/CN.4/579 and Add.1 to 4, A/CN.4/599 and A/CN.4/612.

3. Conditions for the triggering of the obligation and implementation

101. The view was expressed that the Commission should examine the conditions for the triggering of the obligation to extradite or prosecute, the conditions of extradition, and the question of surrendering an alleged offender to an international court or tribunal (the "third alternative"), when the State concerned was unable or unwilling to proceed with prosecution. It was also suggested that the Commission examine the question of when the obligation might be regarded as satisfied in situations where it proved difficult to implement, for example, for evidentiary reasons.

4. Relationship with other principles

102. While the view was expressed that the obligation to extradite or prosecute had to be clearly distinguished from the principle of universal jurisdiction, some delegations considered them to be inextricably linked. In that context, it was suggested that the Special Rapporteur should take into account the report of the Secretary-General prepared on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction (A/65/181). The relationship between the Commission's work on the obligation to extradite or prosecute and that of other topics on its long-term programme of work, in particular the issue of extraterritorial jurisdiction, was also highlighted.

F. Immunity of State officials from foreign criminal jurisdiction

103. Delegations noted with particular concern that there had been relatively little progress in recent sessions on the present topic, which was of immediate practical significance and ongoing concern for many States, including African Union States. Accordingly, it was suggested that high priority should be given to it, with some delegations noting that they looked forward to further progress on the subject.

G. Treaties over time

1. General comments

104. Delegations welcomed the work accomplished during the sixty-second session of the Commission by the Study Group on Treaties over time. In particular, appreciation was expressed for the introductory report, presented by the Chairman of the Study Group, on subsequent agreements and practice in the jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction. Some delegations indicated that they looked forward to the second phase of the consideration of the topic by the Study Group, namely the analysis of the jurisprudence of courts and other independent bodies under special regimes. The Commission was encouraged to complete its work on subsequent agreements and practice as quickly as possible.

105. While some doubts were raised as to the possibility of identifying general principles on the subject beyond what was already reflected in the 1969 Vienna Convention, the view was expressed that work on the topic should aim only at strengthening and complementing, but under no circumstances at modifying, the legal regime established under that Convention. It was also suggested that the

Commission should not seek to develop law outside the scope of the Vienna Convention, but should take a cautious approach with the aim of providing clarification and guidance to States and international organizations.

106. Several delegations emphasized the role of subsequent agreements and practice in the interpretation of treaties, so as to ensure a dynamic interpretation that would take into account changing circumstances and new developments. Reference was also made to the increasingly purpose-oriented and objective interpretation of treaties by international tribunals. However, some delegations underlined the need to strike an appropriate balance between flexibility and stability in treaty relations. It was observed, in particular, that the Commission should maintain a delicate equilibrium between the principle *pacta sunt servanda* and the need to interpret and apply treaty provisions in their context. It was also noted that there were risks involved in allowing practice to easily overcome the wording of a treaty, and the view was expressed that modifications of treaties by practice should only occur in exceptional circumstances. Furthermore, the point was made that taking subsequent practice into account in the interpretation of treaties might raise questions concerning the domestic implementation of treaties.

107. Some delegations underlined the importance of considering State practice in relation to the topic, including with respect to cases that had not been the subject of a judicial or arbitral decision. In that regard, the request for information addressed to Governments in chapter III of the Commission's report on its sixty-second session was welcomed. A particular interest was expressed in obtaining information on the jurisprudence of domestic courts regarding the role of subsequent agreements and practice in the interpretation of treaties.

108. Mention was made of examples of subsequent practice in the interpretation and application of common article 3 of the 1949 Geneva Conventions relating to international humanitarian law and of Additional Protocol II to those conventions, with respect to the criminalization of violations of international humanitarian law in the context of non-international armed conflicts.

2. Issues to be examined

109. It was suggested that the Commission clarify the rules governing the attribution of conduct to a State in the context of subsequent agreements and practice. Further study was also encouraged on the potential role of silence in connection with treaty interpretation, in particular regarding the circumstances under which States were supposed to react to certain conduct.

110. Other issues that were mentioned by delegations for further study include: the question of inter-temporal law; evolutionary interpretation; possible modifications of a treaty through subsequent agreements and practice; the relationship of subsequent agreements and practice with customary international law; and obsolescence. It was also suggested that the Study Group consider the effects of certain acts, events or developments on the continued existence of a treaty; specific mention was made, in that context, of serious violations of the treaty and fundamental changes of circumstances.

111. According to another proposal, issues relating to the implementation of major treaties should be one of the focuses of the Study Group.

3. Possible outcome of the Commission's work

112. Some delegations expressed support for the elaboration of a repertory of practice from which some guidelines or conclusions could be drawn.

113. While observing that a decision on the possible outcome of the Commission's work on the topic was perhaps premature, a preference was also expressed for the formulation of practice pointers, as there was not enough consistent State practice to permit strict guidelines or conclusions to be elaborated.

H. Most-Favoured-Nation clause

1. General comments

114. Delegations commended the Study Group for its work and took note of the progress made on the initial background papers within the context of its work. Some delegations pointed out that the topic was multifaceted and that the Most-Favoured-Nation clause was particularly pertinent for developing countries, especially with regard to their efforts to attract foreign investment. Accordingly, it was stressed that it was essential when addressing the various issues concerning the topic not to lose sight of the broader context of application of the clause in inter-state relations. It was also noted that, in view of the proliferation of bilateral investment treaties, there had been a consequent shift in importance of the Most-Favoured-Nation clause from trade to investment. Similarly, the strengthened multilateral framework of the World Trade Organization and General Agreement on Tariffs and Trade and the dispute settlement mechanisms thereunder brought about new challenges, which were not present when the Commission formulated the 1978 Draft Articles on Most-Favoured-Nation Clauses. It was highlighted that an undesirable level of uncertainty still surrounded the ambit of Most-Favoured-Nation clause, especially in the area of trade in services and investments. Given the number of bilateral investment agreements and free trade area agreements in existence and being negotiated, the Commission was urged to expedite its work and to provide the much-needed clarity in that area of law. While recognizing the non-traditional manner in which work on the topic was proceeding, it was hoped that the final results of the Study Group would be as interesting and useful as the previous work of the Study Group on the fragmentation of international law.

2. Possible outcome of the Commission's work

115. Some delegations supported the Study Group's intention to formulate guidelines for the interpretation of Most-Favoured-Nation clauses in order to ensure certainty and stability in international investment law. To that end, an analysis of relevant practice and case law by the Study Group seemed to be the right way forward. Indeed, there was agreement expressed for the general orientation taken by the Study Group that it would be premature at that stage to consider the preparation of new draft articles, or a revision of the 1978 draft articles. In view of the limited jurisprudence available on the interpretation of Most-Favoured-Nation provisions under the World Trade Organization agreements and in Free Trade Agreements and the specificity in interpretation of Most-Favoured-Nation clauses in the phase of post-establishment to investment, the suggestion was made that the Study Group ought to be cautious about any attempt to draw universally applicable principles as to the interpretation of Most-Favoured-Nation clauses. Instead, the work of the

Study Group should continue to focus on the issues raised by the use of Most-Favoured-Nation clauses within the specific field in which they were employed, and in particular the field of investment.

116. It was also suggested that a consistent approach to the interpretation of Most-Favoured-Nation clauses, and a clearer understanding of how specific drafting gave rise to differences in interpretation, would both assist States in drafting Most-Favoured-Nation clauses in the future, and tribunals in interpreting those clauses.

117. Some delegations expressed the hope that the work would culminate in the drafting of broad guidelines or model clauses that would bring greater coherence and consistency to the operation of the Most-Favoured-Nation clause in contemporary situations, which would be of benefit to States and arbitral tribunals or a guide to practice, if draft articles were not feasible.

118. While generally accepting the broad approach presented by the Study Group, it was considered advisable that the Study Group also take into account different contexts as well as the different nature of Most-Favoured-Nation clauses in bilateral, regional or global treaties. It was nevertheless considered that there were some issues that could be considered in the context of the work of the Study Group, including the *ejusdem generis* principle, the impact of regional integration on the Most-Favoured-Nation clauses either at the multilateral level (within the General Agreement on Tariffs and Trade and World Trade Organization) or at the bilateral level (under investment agreements); and procedural matters connected with the application of the Most-Favoured-Nation clause

119. The suggestion was also made that it might be useful to study Most-Favoured-Nation clauses under multilateral investment-related treaties, on the one hand, and Most-Favoured-Nation clauses in bilateral investment treaties or free trade area agreements among States, one or more of which were also States parties to the aforesaid multilateral treaties, on the other hand, so as to explore how to reconcile any divergence in the two parallel regimes in the context of the implementation of Most-Favoured-Nation clauses.

120. Despite the work carried out by the Study Group, some delegations continued to express some doubts as to whether the topic was sufficiently viable to allow for the codification or progressive development of international law. In that connection, the Study Group was cautioned against carrying out work that may lead to a forced uniformity of practice and jurisprudence, without any practical utility for States and international organizations.

121. It was thus suggested that the Study Group should attach particular importance to its methods of work, and should reach its conclusions on the basis of solid and coherent findings. That would include, methodologically, taking a step-by-step approach that would entail the Study Group (a) studying the real economic relevance of the Most-Favoured-Nation clause in contemporary times; (b) shedding additional light on the scope of Most-Favoured-Nation clauses and their interpretation and application; and then (c) studying how the Most-Favoured-Nation clauses were to be interpreted and applied.

122. It was also recalled that Most-Favoured-Nation provisions resisted a uniform approach since they were principally a product of treaty formation and tend to differ considerably in their structure, scope and language; they were also dependent on other provisions in the specific agreements in which they were located. Given these

circumstances, it was pointed out that interpretive tools or revised draft articles would not be appropriate outcomes. Instead, the Study Group was encouraged to continue with the study and description of current jurisprudence, which could serve as a useful resource for Governments and practitioners who have an interest in the area.

I. Shared natural resources

1. General comments

123. On the question of possible future work on transboundary oil and gas resources, under the present topic, some delegations appreciated the work of the Working Group on Shared Natural Resources and took note of its recommendations. In particular, several delegations agreed with the assessment that the Commission should not proceed any further with codification work in the field. Indeed, some delegations recalled their long-held view that oil and gas should be treated differently from other natural resources, and previous doubts about the usefulness of the Commission seeking to codify or develop a set of draft articles or guidelines relating to the oil and gas aspects of the topic. It was especially observed that the Commission had been invited to be attentive to questions raised regarding the relevance and utility of continued work on particular topics. It was therefore pleasing to note that, after repeated calls, the Commission had decided to set the matter aside.

2. Comments on the recommendation of the Commission

124. Some delegations noted that they fully subscribed to the views and concerns expressed in the working paper (A/CN.4/621) prepared for the Working Group. It was observed that the working paper took account of the views provided by States about their current practice in that area, as well as the views provided by States on that subject in the Sixth Committee. Echoing some of the comments in the working paper, it was observed that the managing of oil and gas resources pertained to the bilateral interests of States. As such, States were more comfortable in negotiating concrete aspects of management of such resources on a case-by-case basis, bearing in mind the geological features, the needs of the region, the capacity and the efforts of States concerned. While States should indeed be encouraged to cooperate on such matters, experience of negotiating agreements in the area showed that the content of such arrangements and the solutions reached were largely the result of practical considerations based on technical information, which were bound to differ in accordance with the specificities of each case. It was also noted that attempting any sort of codification would affect the established bilateral treaty obligations, as well as agreements assiduously reached at the political level. Accordingly, the matter was best left to bilateral consideration. It was also considered that aspects associated with transboundary oil and gas were not ripe for codification, considering moreover that the situation was peculiar and raised its own specific issues. It also was noted that State practice in the area was divergent because of varying conditions; that presented difficulties for study. While it would have been ideal to continue a coordinated analysis of views of States, regarding the pertinence of the inclusion of the oil and gas aspects in the work of the Commission, it was premature to do so. Acknowledging the difficulties related to the transboundary oil and gas aspects of

the topic, some delegations expressed doubts regarding the possibility of reaching a generally acceptable draft text on the subject.

125. The significant work that the Commission had already undertaken on the topic was appreciated, suggesting that the focus in the Sixth Committee should be on the law of transboundary aquifers and how State practice in that regard could be consolidated on the basis of the 2006 draft articles prepared by the Commission. Indeed, it was observed that now that the oil and gas aspects had been disposed of, there did not seem to be any outstanding work remaining on the topic. Accordingly, it was considered that the topic should cease to be part of the agenda of the Commission.

126. Some delegations while agreeing with the decision of the Commission nevertheless expressed a willingness to go along with any consensus among States that would allow the Commission to take up the consideration of the transboundary oil and gas only if the Commission could find ways to exclude the sensitive issues concerning land and maritime boundaries from its scope.

127. Other delegations declined to endorse the decision not to proceed further with the consideration of the oil and gas aspects and outlined several reasons therefor. It was viewed for instance that the question concerning transboundary oil and gas was extremely relevant and particularly complex in contemporary world affairs. Accordingly, international regulation and guidance on the matter would have constituted a fundamental contribution towards the prevention of conflict, particularly considering that the risk of armed conflict was exacerbated by distributional issues over the allocation of natural resources, including concerning prospective revenue and benefits of oil and gas exploitation. Moreover, there were political, economic and environmental considerations justifying a claim for an international regulation and guidance. It was also noted that there were similarities between groundwater resources and oil and gas, legally as well as geologically, suggesting that, in general terms, the legal principles at stake would *a fortiori* apply to both types of resources. In addition, it was recalled that the 2000 syllabus on "Shared Natural Resources" was intended to focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas". Accordingly, the decision of the Commission was considered to be a regressive step that went against the Commission's own workplan on the topic.

128. It was also countered that the reasons advanced by the Commission were not particularly convincing. In particular, the question of maritime delimitation should not have been a stumbling block as the issue could have been set aside through a "without prejudice" clause. Moreover, it was argued that the Commission should have based its decision on a predominantly technical study.

129. The point was also made that while the issues raised were complex, the option of collecting and analysing information about State practice concerning oil and gas could be re-evaluated with a view to devising general guidelines applicable to all cases. In a similar vein, it was suggested that the Commission could have pursued a middle course of identifying at least some basic elements (reflecting a "template of elements" relating to applicable practice, shared principles and features, and best practices and lessons learned) that might guide States in negotiating agreements on transboundary oil and gas deposits.

J. Other decisions and conclusions of the Commission

130. Delegations expressed support for the International Law Commission, viewing it as a valuable institution, whose time-tested strengths, combined with innovation in its working methods and receptiveness to the current needs and priorities of the international community, offered possibilities for its continued relevance in the progressive development of international law and its codification. It was highlighted that by making a pivotal contribution to the progressive development of international law and its codification, the Commission strengthens and promotes the rule of law. In that regard, the Commission's reiteration of its commitment to the rule of law in all its activities was also welcomed.

131. Concerning cooperation between the Commission and the Sixth Committee, some delegations recognized the valuable support of the Commission to the activities of the General Assembly, in particular of its Sixth Committee, while also stressing the importance of the interactive dialogue between members of the Commission and the Sixth Committee during the General Assembly.

132. While appreciating the receipt, in advance, of Chapters II and III, of the report of the Commission, some delegations underlined the benefits of receiving the entire report well in advance of the debate in the Sixth Committee. The point was also made that any late availability of the report had a negative bearing on the required in-depth engagement on the report between States and the Commission.

133. Commenting on the current programme of work of the Commission, some delegations stressed the need to maintain momentum on certain topics, which were of importance for States, noting with particular concern that there had been relatively little progress in recent sessions on topics such as "Immunity of State Officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere, aut judicare*)". While noting that it was by no means certain that clear rules could be deduced from State practice on every aspect of the aforementioned topics, and that there was a readily identifiable divergence in the views of States and in the doctrine, it was observed that important work could still be done by the Commission to establish a basis for a more informed dialogue between the Commission and States.

134. Some delegations also invited the Commission to be responsive to questions raised regarding the relevance and utility of continued work on certain topics on the current work programme, such as "Expulsion of Aliens", concerning which, it was argued, detailed rules already existed and other forums were deeply engaged in the application and monitoring of their compliance. However, some other delegations noted that they attached no less importance to such topics.

135. Noting that the Commission intended to complete its work on "Reservations to Treaties" and "Responsibility of International Organizations" in 2011, and that the time allowed for comments thereon was not entirely adequate, the suggestion was made to reconsider the time frame for completion of work on the two topics.

136. Concerning the working methods of the Commission, some delegations saw merit in the possibility of the Commission concentrating and making good progress on one or two topics on its programme of work per session instead of making slow progress on all topics on its agenda. On the other hand, it was observed that the Commission should keep an appropriate balance in work and attention accorded to

the different topics on its programme of work. It was also suggested that the Commission should establish deadlines and completion dates for topics on its programme of work.

137. Since the success of individual topics also depended on the engagement of States and the work of Special Rapporteurs, the Commission, through its Planning Group, was encouraged to explore how legal advisers of Governments might contribute to the work of the Commission outside of the more formal mechanisms. It was stressed that the comments and observations made by States on the work of the Commission, as well as doctrinal material, jurisprudence and evidence of State practice, assisted the Commission in the efficient discharge of its mandate under its Statute and were beneficial to its work.

138. The question was raised whether the Commission had been fully engaged in the crucial and present needs of the international community and whether its work covered fully and effectively the mainstream issues of international law. In that connection, reservations were expressed regarding the recent tendency towards the establishment of Study Groups, when the main task of the Commission had been, and should remain, the elaboration of draft articles, rather than the conduct of research studies. Indeed, some delegations noted with regret that outcomes emanating from the work of the Commission in recent years had not culminated, logically as it should be, in the elaboration of legally binding instruments. However, it was noted that the current programme of work of the Commission demonstrated a trend towards a differentiated approach to the development of individual topics of international law, and away from the view that the only appropriate outcome of the Commission's work should be codification of the law in the form of a convention. Thus, these differentiated approaches of a kind appropriate to the particular work of the Commission on given topics were supported by some delegations.

139. Concerning future topics for possible consideration by the Commission, the following were suggested: (a) "Hierarchy in international law" and related issues such as *jus cogens*; (b) "Environmental protection of the atmosphere"; (c) "Internet-related international crimes"; and (d) "International humanitarian law and its application to non-State actors in contemporary conflicts". Recognizing that many of the structural issues in international law had already been addressed by the Commission, thereby making it harder to identify new topics of practical utility, the Commission was encouraged, in considering potential new topics, to weigh their utility to States, in keeping with the Commission's mandate.

140. Some delegations welcomed the indication that the Commission will continue at its next session its discussion on "Settlement of dispute clauses". Particular attention was drawn to work that would explore options for settlement of disputes involving International Organizations.

141. On the relevant roles played by the Special Rapporteurs and the chairpersons of Working or Study Groups in the work of the Commission, some delegations took cognizance of the extra burdens placed upon them and underlined the importance of exploring ways to further support their activities. It was particularly noted that the question of adequate financial assistance to the Special Rapporteurs needed to be re-examined. Delegations appreciated the work of Special Rapporteurs and acknowledged their role as independent experts, with functions distinct from the Secretariat. Some delegations also echoed the importance that Special Rapporteurs issue reports in a timely manner.

142. Some delegations also welcomed the voluntary contributions to the respective trust funds in order to reduce the backlog of the *Yearbook* of the Commission and to facilitate participation in and continuation of the International Law Seminar, and invited further contributions towards such efforts.

143. Some delegations encouraged cooperation between the Commission and other bodies, including the International Court of Justice, regional organizations, as well as other legal bodies such as the recently established African Union Commission of International Law.

144. Delegations also welcomed the support rendered by the Codification Division of the Office of Legal Affairs to the overall activities of the Commission. The Secretariat was commended for the maintenance of and improvements to the website on the work of the Commission, and the early publication of the relevant documents, the summary of the report of the Commission and the report on the website were especially appreciated.