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Report of the International Law Commission on the work of its sixty-seventh session (2015)

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

Contents

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I. Introduction

1. At its seventieth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 18 September 2015, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-seventh session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 17th to 25th and 29th meetings, on 2, 3, 4, 6, 9, 10, 11 and 20 November 2015. The Committee considered the item in three parts. The Chairman of the Commission at its sixty-seventh session introduced the report of the Commission on the work of that session as follows: chapters I to V and XII at the 17th meeting, on 2 November; chapters VI to VIII at the 19th meeting, on 4 November; and chapters IX to XI at the 23rd meeting, on 9 November.

3. At its 29th meeting, on 20 November 2015, the Sixth Committee adopted draft resolution A/C.6/70/L.13, entitled "Report of the International Law Commission on the work of its sixty-seventh session". The draft resolution was adopted by the General Assembly at its 82nd plenary meeting on 23 December 2015, as resolution 70/236, after the Assembly had considered the reports of the Sixth Committee (A/70/509) and the Fifth Committee (A/70/642).

4. The present topical summary has been prepared pursuant to paragraph 37 of resolution 70/236, by which 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 seventieth session of the Assembly. It consists of two parts. The first part contains eight sections, reflecting topics on the current programme of work of the Commission: A. Protection of the atmosphere (A/70/10, chap. V); B. Identification of customary international law (ibid., chap. VI); C. Crimes against humanity (ibid., chap. VII); D. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (ibid., chap. VIII); E. Protection of the environment in relation to armed conflicts (ibid., chap. IX); F. Immunity of State officials from foreign criminal jurisdiction (ibid., chap. X); G. Provisional application of treaties (ibid., chap. XI); and H. Other decisions and conclusions of the Commission (ibid., chap. XII). (The Commission completed the first reading of the topic "Protection of persons in the event of disasters" at its sixty-sixth session and will resume its consideration of the item at its sixty-eighth session in 2016.)

5. The second part contains a section concerning a topic on which the Commission completed work at its sixty-seventh session, namely the most-favoured-nation clause (ibid., chap. IV).

II. Topics on the current programme of work of the Commission

A. Protection of the atmosphere

1. General comments

6. Several delegations supported the Commission's work on the topic to date and welcomed the development of guidelines. A number of delegations, however, questioned the usefulness of the Commission's project in light of other global efforts to protect the atmosphere, also underlining the overlap with a number of

other binding and non-binding instruments. The point was made that wider membership and a more committed implementation of the existing conventions could prove more effective in the protection of the atmosphere than the regulatory framework envisaged by the Commission. There was also some interest expressed in seeing how the Commission's work related to other principles, as well as bilateral and regional treaties on the protection of the atmosphere. The dialogue of the Commission with scientists was commended.

7. Disagreement existed among some delegations as to whether the Special Rapporteur's second report on the protection of the atmosphere (A/CN.4/681) and the adopted draft guidelines remained within the boundaries of the 2013 understanding of the Commission on the scope of the project (see ibid., para. 1, footnote 2). While reiterating that the Commission's work should not interfere with or duplicate relevant political negotiations, some delegations noted that this concern was adequately reflected in the draft guidelines, in particular in the fourth preambular paragraph and in draft guideline 2. In this regard, the criticism was advanced that the language of preambular paragraph 4 and draft guideline 2 literally reflected the 2013 understanding. It was also proposed that preambular paragraph 4 be relocated to draft guideline 2 on the scope of the guidelines.

2. Specific comments

8. Delegations largely supported the Commission's approach of placing the international community's concern with the protection of the atmosphere as a factual statement in the preamble of the draft guidelines. While the reference to the protection of the atmosphere as a "pressing concern of the international community as a whole" was welcomed, it was also suggested to use the formulation "common care of mankind". Some delegations expressed their strong preference for the initial formulation, "common concern of humankind", observing that several treaties, most notably the United Nations Framework Convention on Climate Change, supported this language. Moreover, the point was made that the "common heritage of mankind" was a relevant concept for the topic.

9. In relation to draft guideline 1, some delegations observed that the meaning and the relationship between some of the terms were still not clear. Some other delegations welcomed the short physical description of atmosphere and the omission of controversial parts of the conceptual definition. A number of other delegations requested that the proposed definition of "atmosphere" should not alter or narrow the existing scientific understanding. While the rather high threshold for the definitions of atmospheric pollution and atmospheric degradation was commended by some delegations, it was suggested that the restriction of the definition of atmospheric pollution would be better placed in draft guideline 2 on the scope of the guidelines. The Commission was requested to consider adding "living resources" to the list of elements endangered by atmospheric degradation as contained in draft guideline 1(c). Some delegations also proposed to delete the "transboundary" qualification in draft guideline 1, noting that atmospheric pollution was inevitably transboundary. It was noted that the Commission had removed "energy" from the factors causing pollution in draft guideline 1, which was considered inconsistent with the United Nations Convention on the Law of the Sea. In turn, it was pointed out that, as explained in the commentary, the term "substances" included energy. The definition of pollution in the draft guideline was criticized for following directly the language of the 1979 Convention on Long-Range Transboundary Air

Pollution, which seemed to contradict the understanding set out in the preamble and draft guideline 2. Considering that not all countries and regions might be equally affected, a proposal was made to distinguish between different types of atmospheric pollution and to develop corresponding rules. Furthermore, it was suggested to also consider pollution not caused by human activity.

10. While draft guideline 2 was welcomed, the question was raised as to which aspects of atmospheric protection the Commission would address in light of the limits stated in the draft guideline. The Commission was asked to include pollution through black carbon and tropospheric ozone into its work. It was suggested that the text of the draft guideline should be re-examined and simplified, also to avoid copying the verbatim language of the 2013 understanding, and that a "without prejudice" clause would be more helpful and appropriate than the exclusion of specific substances from the scope of the draft guidelines. It was clarified that the term "human activities" in draft guideline 2 was to be understood as connoting activities under the jurisdiction or control of States. Moreover, it was proposed that paragraph 4 of draft guideline 2 should take better account of the importance of national law in governing airspace. Delegations agreed that there was no need to discuss the question of the delimitation between air space and outer space, which was within the purview of the Legal Subcommittee of the Committee on Outer Space.

11. In relation to draft guideline 4 as proposed by the Special Rapporteur, some delegations recognized the fundamental importance of the obligation to protect the atmosphere, which was the basis for the obligation to cooperate in draft guideline 5. Some delegations observed that the obligation to protect the atmosphere applied *erga omnes* and had *jus cogens* nature. Reference was made to article 48 of the Commission's articles on State responsibility as providing for a possible mechanism to invoke responsibility for a violation of an obligation *erga omnes partes* in relation to the protection of the atmosphere. Some delegations appreciated the Special Rapporteur's decision to further study and analyse the matter. It was emphasized that draft guideline 4 should be based on sound and acceptable legal formulations.

12. Delegations generally supported the inclusion of a duty to cooperate in draft guideline 5. The point was made, however, that the duty to cooperate with respect to the protection of the atmosphere was not customary international law. It was also suggested to refer in the draft guideline to other forms of international cooperation, taking into account the differences between developed and developing countries. Some other delegations noted that the wording "as appropriate" left some room for flexibility, depending on the nature, subject matter and forms of cooperation. In this regard, it was pointed out that the element of flexibility could be strengthened in the text of the draft guideline itself. Some other delegations observed that the formulation "as appropriate" counteracted the idea of a legal obligation. The view was expressed that the obligation to cooperate in international law was vague and undefined, and it was underlined that the formulation "as appropriate" increased the ambiguity of the provision. Several delegations emphasized the need for the commentaries to reflect the principles concerning international cooperation for the protection of the atmosphere, also explaining their relationship with the general obligation to cooperate in international law. Some delegations stressed the significance of individual State action and the respect for State sovereignty when addressing global challenges through joint efforts.

13. Paragraph 2 of draft guideline 5 found support among delegations. The question was raised as to why the Commission had singled out the enhancement of scientific knowledge above all forms of international cooperation, and it was noted that guidance on enhancing scientific knowledge would be better provided by bodies with strong scientific and technical expertise.

3. Future work

14. Some delegations expressed concern regarding the comprehensive nature of the workplan proposed by the Special Rapporteur, which would go beyond the agreed limits of the project as prescribed in draft guideline 2. It was observed that difficulties in the Commission's work on the project could be avoided altogether if the topic was not pursued further, and the Commission was urged to suspend or discontinue its work on the topic.

B. Identification of customary international law

1. General comments

15. Delegations generally commended the Commission for the work accomplished on this topic to date and for the pragmatic approach taken. Delegations also reiterated their support for the two-element approach followed by the Commission, agreeing generally with the conclusion that the two elements ought to be separately ascertained. However, the point was also made that the requirement of a "separate" assessment of each element was too rigid. While the view was expressed that each element should be supported by separate evidence, some delegations noted that, in some situations, the same evidence could be used in order to ascertain the two elements.

16. Some delegations stressed that the respective weight of the two elements could vary with reference to certain types of rules or in relation to different fields. While some delegations stated that the chronological order of the two elements was irrelevant, the suggestion was made that the matter should instead be addressed. The view was also expressed that it was necessary to underline that customary international law was subject to rigorous requirements and that it was not easily created or inferred.

2. Specific comments

(a) The relevance of the practice of international organizations and non-State actors

17. Delegations generally concurred with the conclusion that the practice of international organizations could contribute to the identification of customary international law. Several delegations stressed the importance of such practice in the case of international organizations exercising competences on behalf of Member States, so that, for some delegations, it should in fact be equated to State practice in such cases; some other delegations indicated that such practice should be assessed with caution, and the specific characteristics of the organization should be taken into account.

18. Some delegations emphasized the importance of the contribution of non-State actors to international practice, while some other delegations pointed out that such practice should be discounted for the purpose of the identification of customary international law. Some delegations considered that the practice of non-State actors

could serve as a catalyst for State practice, while some other delegations asked for clarification on this aspect.

(b) The role of inaction

19. Several delegations expressed support for the conclusion that inaction was relevant for identifying customary rules under certain conditions, which needed to be explicitly specified in the text of the draft conclusion. Some other delegations, however, underlined that the relevance of inaction depended on the circumstances of each situation and therefore had to be assessed with caution. In particular, the view was expressed that silence did not necessarily imply acquiescence.

(c) The role of treaties and resolutions

20. A number of delegations stressed that treaties could codify, crystallize or generate new rules of customary international law. Some delegations indicated that the difficulty often resided in identifying the moment when treaty parties acquired the sense of being under a legal obligation extending also to non-parties; the view was expressed that non-State parties should not arbitrarily pick and choose which provisions they deemed to have become customary international law and which they did not. As to bilateral treaties, the point was made by some delegations that their role should be addressed with caution.

21. A number of delegations supported the view that resolutions of international organizations and international conferences could not, in and of themselves, generate customary rules, while other delegations considered this conclusion too categorical. Some delegations advised caution when assessing the evidentiary value of resolutions of international organizations.

22. The observation was also made that only those treaty provisions and resolutions of international organizations possessing a "fundamentally norm-creating character" could generate customary rules.

(d) Judicial decisions and writings

23. Several delegations supported distinguishing between judicial decisions and writings of jurists. In this regard, some delegations pointed out the importance of decisions of international courts. Moreover, while some delegations also highlighted the value of decisions of national courts, some other delegations advised caution when assessing their evidentiary value. The view was expressed by some delegations that judicial decisions of regional judicial bodies should be clearly considered as well, perhaps with the addition of the words "other judicial decisions" to the relevant draft conclusions.

24. Some delegations also called for the adoption of a specific draft conclusion on the relevance of the work of the Commission, adding that it could not be equated to the teachings of the most highly qualified publicists of the various nations.

(e) Particular customary international law and persistent objector rule

25. Several delegations supported the inclusion of a draft conclusion on particular customary rules. However, some delegations requested further clarification, while some other delegations stressed the need for clear and uncontested evidence of a State's participation in the formation of such regional, local or otherwise particular

rules. The view was expressed that, in light of the case law of the International Court of Justice, in this context, the requirement should be of a "long continued" practice rather than a "general" practice.

26. Several delegations welcomed the affirmation of the persistent objector rule, while some other delegations affirmed that it was a contentious issue which was not supported by State practice and international case law. In this regard, some delegations held the view that a persistent objection could not produce effects after a rule had solidified into custom, and some other delegations questioned the applicability of the persistent objector rule in relation to rules of *jus cogens*. Furthermore, the view was expressed that persistent objection could not have effect with relation to general principles of international law, regardless of their status as *jus cogens*.

27. The explicit restriction of the effect of persistent objections to the opposing State was welcomed. Some delegations questioned the requirement to reiterate the objection to the customary rule once the rule had emerged, as the onus to reiterate would be too burdensome on States: in their view, only subsequent conduct of the objector which was explicitly in favour of the rule should be counted as a withdrawal of the objection.

3. Future work

28. Some delegations suggested that the Commission adopt a conclusion on the termination of, or withdrawal from, rules of customary international law. The view was also advanced that studying the role of unilateral acts in the identification of customary rules would be useful. The hope was expressed that the draft conclusions might be adopted on first reading in 2016, so that a second reading might take place in 2018.

C. Crimes against humanity

1. General comments

29. Several delegations acknowledged the importance of ending impunity for the most serious international crimes and the significance of the work initiated by the Commission for the prevention and punishment of crimes against humanity. Delegations generally welcomed the approach of the Commission to the topic, and in particular its objective to avoid any conflict between the draft articles and obligations of States arising under the constituent instruments of international or "hybrid" international courts or tribunals, especially the Rome Statute of the International Criminal Court.

30. It was also suggested that the work of the Commission should contribute to the implementation of the principle of complementarity under the Rome Statute in addressing inter-State cooperation on the prevention of crimes against humanity, and on the investigation, apprehension, prosecution, extradition and punishment at the national level of persons who committed such crimes.

31. A number of delegations expressed their appreciation for the adoption by the Commission of draft articles 1 to 4, welcoming in particular the focus on prevention and punishment of crimes against humanity, and the fact that these draft articles largely reflected existing State practice and the case law of international courts and tribunals.

32. Several delegations suggested that a number of issues be addressed by the Commission, such as the obligation to extradite or prosecute, universal jurisdiction, the obligation to adopt national legislation and ensure the establishment of domestic jurisdiction over crimes against humanity, the inapplicability of statutes of limitations, immunity, and the responsibility of States or non-State actors. At the same time, the Commission was also urged to avoid some issues, in particular civil jurisdiction, immunity and the establishment of a treaty-based monitoring mechanism.

2. Specific comments

33. Some delegations supported the adoption of draft article 1 on the scope of the draft articles. While support was also expressed for draft article 2 on "General obligation", some delegations indicated that the terminology used therein, and in particular the expression "crimes under international law", was ambiguous, and that other expressions — such as "most serious crimes of international concern" or "most serious crimes of concern to the international community" — could be more appropriate. It was also suggested that draft article 2 should indicate that the obligation to prevent and punish crimes against humanity applied at any time, and not solely during an armed conflict.

34. Delegations generally supported the decision of the Commission to base the definition of crimes against humanity, contained in draft article 3, on the definition set out in article 7 of the Rome Statute, which enjoyed broad consensus. Some delegations, however, indicated that this definition could be more precise and that it could take into account additional elements, such as the International Criminal Court Elements of Crimes, or that it could include definitions for the crime of genocide and war crimes. While several delegations supported draft article 3, paragraph 4, which stated that the definition was without prejudice to any broader definition provided for in any international instrument or national law, some other delegations questioned the usefulness of such a provision.

35. A number of delegations welcomed the consideration of the obligation of prevention in draft article 4. In particular, support was expressed for the scope of this obligation, which encompassed all preventive measures, as well as for the indication that such measures of prevention ought to be taken by States in conformity with international law. Some delegations considered that the obligation of States to prevent crimes against humanity, as set forth in draft article 4, paragraph 1, was too broad and could be drafted more cautiously. Some other delegations, however, considered that the content of this obligation should be identified more precisely and that the specific measures of prevention covered by draft article 4 should be reflected explicitly. While supporting the content of draft article 4, paragraph 2, regarding the irrelevance of exceptional circumstances as justification of crimes against humanity, some delegations stressed that it was not specific to the obligation of prevention and that its placement should be reconsidered.

3. Final form

36. Several delegations highlighted the potential benefits of developing a convention on the prevention and punishment of crimes against humanity in the pursuit of accountability and the fight against impunity, and thus supported the elaboration of a convention on the subject in order to fill the existing gap in international law, promote harmonization of national legislations, and facilitate

international cooperation between States. Some delegations, however, were not convinced that a new convention was necessary or desirable, given the existence of the Rome Statute.

37. It was suggested that the efforts of the international community should focus on the establishment of necessary mechanisms of inter-State cooperation for the domestic investigation and prosecution of the most serious crimes of concern to the international community; attention was drawn to the international initiative to conclude a treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes. It was also stressed that outcomes other than a convention, such as guidelines, may be more appropriate for this topic.

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

1. General comments

38. Delegations generally welcomed the adoption of draft conclusion 11. In particular, some delegations appreciated that the commentary thereto reflected the Commission's comprehensive analysis and extensive consideration of the existing case law of international courts and tribunals, which had formed the basis of draft conclusion 11.

39. The view was expressed that the term "international organizations" should be understood as referring only to intergovernmental organizations, as the expression had been employed by the Commission in prior texts. It was pointed out that treaty interpretation should be distinguished from the amendment or modification of treaties through the operation of subsequent agreements or subsequent practice, especially in the case of the practice of an international organization in the application of its constituent instrument, and that it was advisable to avoid circumventing the amendment mechanisms set out in constituent instruments.

2. Specific comments

40. A number of delegations welcomed the reaffirmation of the applicability of articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention), which are constituent instruments of international organizations. It was noted that the interpretation of any treaty should be grounded in the treaty itself, and that subsequent practice should be invoked very prudently.

41. Some delegations pointed to the need for an interpretation of the individual treaty establishing an international organization and an assessment of the conduct of that particular organization in order to establish the legal effects of subsequent agreements or practice in relation to it. Support was expressed for the conclusion that subsequent agreements or subsequent practice by the parties to a treaty might arise from or be expressed in the practice of an international organization in the application of its constituent instrument.

42. A number of delegations welcomed the distinction made between a practice that could reflect an agreement or practice of Member States as parties to a treaty and, on the other hand, a practice that expressed or amounted to a subsequent practice under article 31, paragraph 3 (*b*) of the 1969 Vienna Convention.

43. Some delegations emphasized the difficulty of reconciling institutionalized rules of an organization on interpretation with the role of member States as parties to the constituent instrument of an organization in interpreting that instrument. In this respect, the difficulty of determining whether a decision interpreting a constituent instrument had been taken by an organ of the organization or by the Member States that were parties to that instrument was highlighted.

44. It was noted that relevant agreements or practice could result from developments within the organization or as part of its activities, and might manifest themselves in various forms. A determination of whether the parties, by an agreement or a practice, had taken a position regarding the interpretation of the treaty was thus required.

45. Several delegations supported the view that the practice of an international organization in the application of its own constituent instrument, as distinguished from the practice of the Member States, could also contribute to the interpretation of that instrument. According to one view, however, it was doubtful that the practice of an international organization in the application of its constituent instrument could contribute to the interpretation of that instrument when it applied article 31, paragraph 1, and article 32 of the 1969 Vienna Convention; in such cases, the practice of international organizations should be addressed with caution.

46. The view was also expressed that, while the practice of an organization itself could contribute to the determination of the object and purpose of the treaty under article 31, paragraph 1, its relevance for the purpose of interpretation was, on the basis of this view, merely of a confirmatory nature. It was suggested to indicate more explicitly that draft conclusion 11, paragraph 3 applied to the practice of the international organization as such, while paragraph 2 applied to the practice of Member States.

47. A number of delegations welcomed the consideration of the question of whether and when acts of plenary organs of international organizations amounted to subsequent agreement or subsequent practice. The view was expressed that only organs with a broad representation should be taken into account, and the practice of each body should be viewed only within the limits of its competence. Some clarification was requested regarding the relationship between the expression “the practice of an international organization in the application of its constituent instrument” and the expression “established practice of the organization” used in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention) in defining the “rules of the organization”.

48. Delegations generally welcomed the conclusion that, as provided for in article 5 of the 1969 Vienna Convention, the applicability of articles 31 and 32 of the Convention to constituent instruments of international organizations was without prejudice to any relevant rules of the organization, emphasizing that such a clause guaranteed the flexibility required for the interpretation of those treaties. Some delegations suggested referring to article 5 of the Convention as the starting point for dealing with subsequent agreements or practice in the interpretation of constituent instruments of international organizations. It was suggested to provide examples of cases in which the rules of an international organization contained *lex specialis* provisions on the role of subsequent agreements and practice for the interpretation of its constituent treaty.

49. A proposal was made to reflect the practice of international organizations as such in draft conclusions other than draft conclusion 11, and in particular draft conclusion 4, paragraph 3. The view was expressed that the Commission should address in a draft conclusion the question of pronouncements by a treaty monitoring body consisting of independent experts.

50. Some delegations endorsed the view that the work of the United Nations Human Rights treaty bodies greatly contributed to the development of international human rights law, and that their general comments could be considered as interpretative statements. It was suggested, on that matter, that the actions or views of treaty bodies consisting of independent experts did not, in and of themselves, constitute a subsequent agreement or subsequent practice for the purposes of article 31, paragraph 3, of the 1969 Vienna Convention, as they were neither agreements "between the parties" nor practice that established such an agreement.

3. Future work

51. The hope was expressed that the Commission would continue considering the topic in an expeditious manner with a view to submitting a complete, clear and concise set of draft conclusions which would be of great value to all States in the interpretation and application of international treaties, and would ultimately strengthen the rule of law.

E. Protection of the environment in relation to armed conflicts

1. General comments

52. While several delegations indicated the importance they attached to the topic, some other delegations stressed its complexity, expressing concerns regarding the feasibility of undertaking work on this topic and the lack of clarity with regard to its direction. It was suggested that the Commission clarify the needs of the international community in the field prior to moving forward.

2. Specific comments

53. With regard to methodology, some delegations encouraged the Special Rapporteur to analyse further the applicability of the relevant rules and principles of international environmental law in relation to armed conflict, as well as the interrelation between international humanitarian law and international environmental law. In this regard, attention was drawn in particular to rule 44 of the 2005 International Committee of the Red Cross study *Customary International Humanitarian Law*;[1] the duty of care set forth in article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I);[2] and the no-harm rule and the precautionary principle under environmental law.

54. It was also suggested that the contours of the *lex specialis* character of the law of armed conflict, as well as the effects of armed conflict on environmental agreements, could be examined. However, some delegations expressed the view that

[1] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, Cambridge, Cambridge University Press, 2005.

[2] United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

the Commission should focus on identifying how existing international humanitarian law related to the environment, rather than introducing principles of other areas of law or studying their interaction. It was observed that any attempt to address questions on concurrent application of bodies of law during armed conflict should be avoided. The importance of not seeking to revise the law of armed conflict was also reiterated.

55. While some delegations cautioned against expanding the scope of the draft principles to non-international armed conflicts, several other delegations supported addressing both types of conflict, while paying due attention to their differences. It was nevertheless stressed that, were the Commission to adopt such a broad approach, an appropriate methodology had to be developed.

56. Moving forward, the Special Rapporteur was encouraged to address a number of issues, including preventive measures and the question of the protection of the maritime environment. For the post-conflict phase, some delegations were of the view that special attention should be given to rehabilitation efforts of the environment, while the questions of reparation and compensation were also highlighted. It was also pointed out that a draft principle on the duty of States to protect the environment in relation to armed conflict through national legislative measures could be valuable.

57. Various views concerning the precise scope of the topic were expressed, including on whether or not to consider issues relating to the exploitation of natural resources, protection of natural and cultural heritage, areas of cultural importance, internal disturbances, human rights, indigenous peoples, and the effect of weapons on the environment.

3. Specific comments on the draft introductory paragraphs and draft principles adopted by the Drafting Committee

58. While some delegations expressed support for the draft principles, including the draft introductory paragraphs, some other delegations voiced concern over the mandatory language employed, noting that certain provisions did not reflect customary international law. It was further observed that the draft principles should more accurately align with the existing laws of armed conflict, and specific revisions to the draft principles were proposed.

59. Concerning the draft introductory paragraphs, the view was expressed that the draft paragraph on scope was too broad, as it seemed to address the environment in its entirety. Furthermore, the Commission was encouraged to define the terms “preventive measures”, “remedial measures” and “damage to the environment” referred to in the draft paragraph on purpose. While some delegations favoured using the existing international humanitarian law definition of “armed conflict”, some doubt was expressed concerning the appropriateness of defining this term for the present project.

60. The importance of defining the term “environment” in the draft principles was emphasized and it was suggested that the definition contained in the Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities[3] could serve as a basis. The appropriateness of transposing a definition from an instrument dealing with peacetime situations to an instrument on situations

[3] General Assembly resolution 61/36 of 4 December 2006, annex.

of armed conflict was nevertheless questioned. Some delegations expressed concern over the inconsistent use of the terms “environment” and “natural environment” in the draft principles and indicated their preferences in this regard.

61. Some delegations recalled the obligation under existing international law to respect and protect the environment. The principles and rules on distinction, proportionality, military necessity and precautions in attack, as referred to in the draft principles, were considered particularly pertinent for the topic. While some delegations cautioned against transposing to the environment the provisions of the law of armed conflict on the protection of civilians or civilian objects, it was also observed that the natural environment benefited from the general protection civilian objects enjoy under that law.

62. Concerning draft principle II-1, General protection of the [natural] environment during armed conflict, while some delegations favoured reflecting the provisions set forth in article 55 (1) of Protocol I that directly addressed the methods or means of warfare, instead of the notion of “care” in paragraph 2, support was also expressed for the latter concept. It was suggested that the commentaries elaborate on the degree of care required. Some delegations also observed that the precise meaning of the terms “widespread, long-term and severe damage” in this context should be examined. The need to clarify in the commentaries that there was no basis for treating the natural environment in its entirety as a civilian object for the purpose of the law of armed conflict was also emphasized.

63. Some delegations voiced their concern that draft principle II-2, Application of the law of armed conflict to the environment, offered an overly broad and ambiguous statement. While the Commission was requested to clarify the applicability of the principles and rules referred to in the provision to the protection of the environment, the view was also expressed that the references to specific principles and rules were superfluous, and that draft principles II-2 and II-3 could be merged.

64. As to draft principle II-3, Environmental considerations, the Commission was requested by some delegations to clarify the practical application of the need to take into account environmental considerations when applying rules of military necessity as set forth in the draft principle. The view was also expressed that the draft principle should either be eliminated or revised with appropriate caveats as to its relevance.

65. While a number of delegations supported draft principle II-4, Prohibition of reprisals, some other delegations expressed serious concern over the inclusion of such a blanket prohibition which, in their view, did not reflect customary international law.

66. Concerning the designation of areas of major environmental and cultural importance as protected zones — in draft principles I-(x), Designation of protected zones; and II-5, Protected zones — a number of delegations generally welcomed the proposal and considered that it deserved further consideration. It was nevertheless observed that clarifications of what such areas encompassed were required. A concern over the broad formulation used with regard to the protected zones was expressed and it was pointed out that a more differentiated approach could be required to take into account the specificities of the various zones contemplated. Some delegations also questioned how the designation of such zones would overlap with related regimes. It was suggested that the differences and synergies between the protected zones and the concept of demilitarized zones in particular be clarified.

4. Final form

67. While some delegations considered non-binding guidelines or principles an appropriate outcome, the view was also expressed in favour of elaborating draft conclusions or draft articles.

F. Immunity of State officials from foreign criminal jurisdiction

1. General comments

68. Delegations commended the Commission for the progress made to date on the topic, underlined its practical significance, stressed the need to draw on State practice from across all regions, and looked forward to the commentaries on those draft articles which were adopted in 2015. Several delegations reiterated that rules on immunity were procedural in nature.

2. Specific comments on the draft articles adopted by the Drafting Committee

69. With respect to draft article 2 (f), defining an "act performed in an official capacity", some delegations expressed support for the Drafting Committee formulation. While a greater focus on national legislation to define this language was suggested, some delegations stressed that national legislation should not be given equal weight to international instruments. Several delegations supported the Drafting Committee's removal of any linkage to the criminal nature of the act in defining the term. Some delegations welcomed the decision of the Drafting Committee to set aside the aspect of "exercising elements of the governmental authority" for the proposed definition. Clarification from the Commission on the difference between "exercise of State authority" in the subparagraph and the phrase "exercise of State functions" in subparagraph (e) of the same article was considered desirable. The concern was raised that the subparagraph (f) as drafted lacked clarity and ran the risk of abuse of immunity *ratione materiae*. The suggestion was made that it would be better to delete subparagraph (f) or to replace the current formulation with the phrase "in the context of exercising State authority".

70. Some delegations pointed to the need to interpret "exercise of State authority" broadly, on a case-by-case basis; they felt it should not be determined subjectively by the forum State, but with respect to the laws governing the State of the official concerned. A number of delegations proposed the addition of examples or criteria of official acts in order to assist in defining subparagraph (f). It was proposed by some delegations that such acts should encompass all functions by State officials in their official capacities, without reference to any other capacity in which an official may act. Some delegations suggested that all acts attributable to a State, and not just those performed in the exercise of State authority, would automatically be defined as an "act performed in an official capacity". Some delegations sought further work from the Commission on whether the topic should also cover actions of a person acting under governmental direction and control.

71. Support was expressed by some delegations for the "single act dual responsibility" concept that the Special Rapporteur had set out in her report. A focus on attribution to the State in order to determine the contours of draft article 2 (f) was welcomed by some delegations, though the view was also expressed that the concept of attribution was not helpful in determining what constituted an act performed in

an official capacity. Several delegations made the point that the complex relationship between, on the one hand, attribution to a State under the rules of State responsibility and, on the other, immunity *ratione materiae* under paragraph 2 (f), required further in-depth analysis. It was suggested that further clarifications on subparagraph (f) be provided in the commentary on the subparagraph.

72. With regard to draft article 6, several delegations expressed support for the changes introduced by the Drafting Committee to paragraphs 1 and 2. It was suggested that there was need for clarification of the relationship between draft article 5 and draft article 6, paragraph 1. In particular, the proposal was made to delete the words "only with respect to acts performed in an official capacity" from paragraph 1, as it was duplicative of draft article 5. It was further noted that paragraph 1, as narrowed by draft article 2 (f), appeared to limit the reach of immunity *ratione materiae* from that set out in draft articles 2 (e) and 5, while conversely concern was raised that draft article 6 had confirmed the broad nature of immunity *ratione materiae* that the Commission had presented.

73. Some delegations proposed the deletion of paragraph 3. If the paragraph were retained and not simply reflected in the commentary, it was suggested that it should more fully reflect the relationship between immunity *ratione materiae* and immunity *ratione personae*. Suggestions were also made for the further elaboration on the interrelationship between the temporal aspect of immunity *ratione materiae* and immunity *ratione personae*, as well as of the material scope of immunity *ratione materiae*.

3. Future work

74. On the possible exceptions to immunity *ratione materiae*, several delegations underscored that, given the gradual developments in international criminal law, no State official should be shielded by rules of immunity with respect to the most serious crimes that concerned the international community as a whole, as this would effectively lead to impunity. The Commission was encouraged to ensure consistency with the regime pertaining to immunity with respect to international criminal jurisdiction, especially the International Criminal Court. The Commission was also urged to examine potential exceptions against the background of the growing "humanization" of international law. Several delegations urged the Commission to maintain a careful and cautious focus on State practice and *opinio juris*, as well as international judicial decisions, to determine any potential exceptions to immunity, and not to develop the law beyond these sources.

75. The point was also reiterated that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment constituted *lex specialis* or an exception to the usual rule on immunity *ratione materiae* of a former Head of State, because under the Convention's definition of torture, only persons acting in an official capacity could commit torture. Moreover, a plea of immunity *ratione materiae* would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State. It was also underlined that customary international law at this time had not developed any exceptions to immunity from foreign criminal jurisdiction in respect of international crimes, and that no exceptions to immunity *ratione personae* existed other than by waiver or the exercise of jurisdiction by one's own national courts. The position that all acts performed in the exercise of State authority should enjoy immunity *ratione materiae*

was also expressed. Doubt regarding whether the application of universal jurisdiction or the obligation to extradite or prosecute had any effect on State officials who enjoyed immunity was also noted.

4. Final form

76. In view of the anticipated inclusion of proposals for the progressive development of the law, it was considered appropriate by some delegations for the final form to be a draft treaty. Moreover, a high degree of consensus within the Commission was encouraged, in order to ensure that any outcome of work on the topic was generally acceptable to States.

G. Provisional application of treaties

1. General comments

77. Some delegations expressed support for the Special Rapporteur's preference not to undertake a comparative study of domestic provisions relating to the provisional application of treaties. Some other delegations, on the other hand, stated that a comparative study of domestic provisions and State practice would provide the information needed to enable the Commission to take a broad approach that reflected the diversity of provisions and practices at the national level. Some delegations stressed the importance of an analysis of State practice in the consideration of the topic.

2. Specific comments

78. Several delegations expressed support for the view that the legal effects of provisional application were the same as those after entry into force of the treaty. At the same time, further substantiation and elaboration were called for. The point was also made that the Commission could give further consideration to the extent to which the legal effects of provisional application might differ, both in substance and in form, from those that arose when a treaty was in force. The view was expressed that a provisionally applied treaty was binding only morally and politically, and that any "legal effects" arising therefrom had to be understood in the context of article 18 of the 1969 Vienna Convention, on the obligation to refrain from acts that would defeat the object and purpose of the treaty prior to its entry into force.

79. The comment was also made that a clarification of many issues relating to provisional application would be a matter of interpretation of the treaty in question, and that the Commission's work could help to clarify the concept of provisional application, by making it clear that provisional application of all or part of a treaty was, in fact, application of the treaty. Consequently, any breach of a treaty obligation while the treaty was being applied provisionally would be subject to the rules governing international responsibility.

80. The view was expressed that any obligations incurred as a result of the provisional application of a treaty did not end with the termination of provisional application of the treaty. The comment was made that, in situations where termination of provisional application by a State would adversely affect third parties acting in good faith, obligations emanating from the provisional application of a treaty might well outlive that termination, which might in turn necessitate a

transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application. In terms of a further view, the question of whether the legal effects of provisional application could continue after its termination merited further examination.

81. While it was admitted that the termination of provisional application was permissible from the standpoint of the law of treaties, the suggestion was made that the Commission could identify a set of obligations, based on international practice and the general principle of good faith and predictability, which would include, for example, the obligation to provide timely advance notice of a State's intention to terminate provisional application. The view was also expressed in favour of limiting the conditions under which the provisional application of a treaty could be terminated to those provided under the 1969 Vienna Convention. It was also suggested that the Commission clarify what constituted an acceptable method of signalling an intention not to become a party to a treaty. It was further recalled that article 25 envisaged provisional application being terminated more easily than the treaty itself. In terms of a further suggestion, an analysis of the customary character of article 25, paragraph 2, of the Convention and its relationship with articles 19 and 46 of the Convention could also prove useful.

82. Moreover, the suggestion was made that the relationship of provisional application to other provisions of the 1969 Vienna Convention, such as those relating to unilateral termination and its consequences, as well as the regime on reservations, be further explored. It was also suggested that the Commission, in analysing the relationship with other provisions, limit itself to situations for which there existed sufficient international practice. Another view was that the Commission's work should not go beyond article 25 of the Convention, particularly as many States had domestic requirements, including at the constitutional level, concerning the acceptance of provisional application of treaties.

83. Some delegations expressed support for the consideration of provisional application of treaties by international organizations. It was observed that both States and international organizations frequently resorted to provisional application. The view was expressed, however, that there were still questions to be reflected upon. For example, the comment was made that it was worth taking a closer look at the provisional application of headquarters agreements, which by their very nature needed to be implemented immediately. It was also suggested that a detailed analysis be made of the practice of regional international organizations and of multilateral treaty depositaries. Some other delegations expressed a preference for the Commission to consider international organizations at a later stage.

84. Doubt was expressed that the 1986 Vienna Convention, in its entirety, reflected customary international law. It was recalled that the Convention had not yet entered into force. In terms of another view, article 25 of that Convention was among those articles which reflected customary international law. The view was expressed that resolutions adopted by an international conference did not necessarily constitute an agreement among the States participating in the conference with regard to provisional application of a treaty.

3. Specific comments on the draft guidelines adopted by the Drafting Committee

85. As regards the draft guidelines, adopted by the Drafting Committee on a provisional basis in 2015, delegations expressed general support for the suppression

of the reference to internal law, to avoid any suggestion that the provisions of domestic law could be relied upon to avoid an international obligation. At the same time, it was observed that, while a State could not avoid its obligations once it had committed itself internationally to the provisional application of a treaty, its internal law would determine whether or not it could make such a commitment.

86. Regarding draft guideline 1, Scope, it was suggested that the scope include the practice developed by international organizations. Some support was expressed for draft guideline 2, Purpose. It was suggested that it be clarified that the reference to "other rules of international law" did not detract from the purpose of the guidelines, which was to supplement the rules of the 1969 Vienna Convention, not to suggest changes to them. As regards draft guideline 3, General rule, the Commission was invited to undertake a more thorough analysis of the cases in which States other than the negotiating States had provisionally applied a treaty. The view was expressed that the phrase "or if in some other manner it has been so agreed" went beyond article 25 of the Convention, which was limited to agreement among the negotiating States.

4. Future work

87. Some suggestions for future work were made, including: studying further the relationship with other provisions of the 1969 Vienna Convention, such as articles 18, 19, 46 and 60; considering which States might agree on the provisional application of treaties (only negotiating States or other States as well); deciding whether provisional application extended to the whole treaty or only to select provisions; analysing the question of the validity of a State's consent to the provisional application of a treaty, when the expression of such consent might be affected by that State's internal law; looking into whether there were time limits to provisional application; analysing the legal nature and consequences of the provisional application of multilateral treaties containing rules on provisional application, and the intention not to apply such a treaty provisionally prior to its entry into force; evaluating the effect of reservations purporting to subject the scope of a treaty's provisional application to the availability of domestic law mechanisms at a given time; and studying whether or not the provisional application of a treaty could have the effect of modifying the content of that treaty.

88. The view was also expressed supporting the Special Rapporteur's intention to consider termination, suspension and reservations, as well as the provisions of internal law regarding the competence to conclude treaties, and the relationship between provisional application and succession of States with respect to treaties. The comment was made advising the Commission against studying the legal effects of the termination of provisional application in respect of treaties granting individual rights.

5. Final form

89. There was support expressed for the formulation of draft guidelines to serve as a practical tool for States and international organizations. It was also suggested that the Commission could develop model clauses on provisional application, although it was admitted that doing so might be challenging due to the differences between national legal systems.

H. Other decisions and conclusions of the Commission

1. *Jus cogens*

90. Several delegations welcomed the inclusion of the topic "*Jus cogens*" in the Commission's programme of work, noting that it would constitute a significant addition to the Commission's work on the sources of international law. Some other delegations considered that there was no pressing need for the Commission to address this topic.

91. It was noted that the topic should be based on a careful study of State practice. The view was expressed that an in-depth study should not be initiated in the absence of sufficient information on State practice, and caution was called for in referencing the limited practice of international courts and tribunals. A number of delegations indicated that the topic should generally be approached with caution.

92. Several delegations considered that the question of the nature of *jus cogens* was of primary importance and should be studied thoroughly. While some delegations called for a complete analysis of the category of *jus cogens* norms, some other delegations indicated that creating an overly extensive list of *jus cogens* norms should be avoided. It was suggested that the Commission address instead the relationship between *jus cogens* and customary international law, the establishment of norms of *jus cogens*, the process of identification of norms of *jus cogens*, and the legal consequences of the *jus cogens* status of a norm.

2. Future work of the Commission

93. Regarding the long-term programme of work of the Commission, some delegations welcomed the request by the Commission to the Secretariat to review the list of possible future topics established in 1996 and to prepare a list of possible topics. The view was also expressed that the Sixth Committee and the General Assembly should be more involved in the selection of new topics. A proposal was made for the Commission to study a new topic on "Duty of non-recognition as lawful of a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law".

3. Programme and working methods of the Commission

94. A number of delegations noted with appreciation the Commission's recommendation to consider holding part of its future session in New York, stressing that this would have a positive impact on the quality of interaction between the Sixth Committee and the Commission. Some other delegations, however, indicated that there did not seem to be any reason to hold any of its future sessions in New York, since the working conditions at the United Nations Office in Geneva were ideal.

95. The view was expressed that this proposal could be supported as long as it did not generate additional costs. Some delegations indicated that it remained important for the Commission to revert to the proposal contained in paragraph 388 of the report of the Commission on the work of its sixty-third session (A/66/10).

96. Delegations generally welcomed the establishment of the new website of the Commission, noting with satisfaction that it made the Commission's documents more readily accessible. Several delegations welcomed the holding of the

International Law Seminar. A number of delegations supported the continuation of the legal publications prepared by the Codification Division, highlighting their particular significance and value.

III. Topic on which the Commission completed work at its sixty-seventh session

The most-favoured-nation clause

97. The final report of the Study Group on the topic, together with the summary conclusions, was generally welcomed with interest by delegations. Some delegations observed that the report would be a useful tool for promoting legal certainty, consistency and predictability, while some other delegations noted that it would help to safeguard against the fragmentation of international law and that it would foster greater coherence in the approaches taken in the arbitral decisions on most-favoured-nation provisions. Moreover, it was considered that the report would not only be useful to practitioners, decision makers and treaty negotiators, but also serve as an additional resource in addressing questions concerning the interpretation and application of the most-favoured-nation provisions. The point was made that the conclusions would help States make corrections, as appropriate, in the practice of concluding international treaties on investment protection and improve international investment arbitration procedures. Delegations urged wider dissemination of the report.

98. Several delegations considered the report to be a complementary contribution to the 1978 draft articles of the Commission on the same topic, whose core provisions continued to be the basis for the interpretation and application of most-favoured-nation clauses. In particular, their articulation of the *ejusdem generis* principle remained a valuable point of reference. Indeed, several delegations underlined the importance they attached to the *ejusdem generis* principle.

99. Some delegations welcomed in particular the methodical, systematic and comprehensive approach taken by the report, including its grounding in the rules of interpretation as reflected in the 1969 Vienna Convention, in particular articles 31 and 32. Delegations recalled that such an approach was similarly followed in the work of the Commission's Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law. The point was nevertheless made that it was important not to underestimate the influence of other applicable norms in the law of treaties, as well as other factors, including the aims and content of the investment protection agreements and the specific nature of international arbitration procedure. Some delegations underlined the relevance of *pacta sunt servanda*, with some questioning the compatibility of investment agreements with the Charter of the United Nations, and *jus cogens* norms. Some other delegations highlighted the importance of the principle of State consent as a source of treaty rights and obligations, as well as the principle of effectiveness.

100. Some delegations subscribed to the report's general conclusion that the question whether, in investment treaty arbitration, a most-favoured-nation clause applied only to substantive obligations or also to dispute settlement provisions, was a matter ultimately up to the States that negotiated such clauses, and their interpretation was to be determined on a case-by-case basis. Accordingly, States were well advised to

negotiate such clauses in explicit terms. Some delegations stated that, as a matter of policy, their Governments did not apply the most-favoured-nation clause to procedural matters, including dispute settlement provisions, unless the parties expressly agreed otherwise. In was considered by some delegations that consent to jurisdiction or arbitration was not to be presumed, but must be established beyond doubt. The point was also made that, because of the inconsistency in the jurisprudence, a most-favoured-nation provision was not considered to be a core provision in the bilateral investment treaty practice of certain States. Some delegations called for greater involvement of parties in the interpretation of their treaties. Caution was also expressed regarding resort to "evolutive interpretation" in the absence of clear bilateral practice for each particular agreement.

101. There was support expressed by some delegations for the approach taken by the Study Group not to revise the 1978 draft articles or to prepare new articles. The point was made that an outcome in the format of a report, instead of draft articles, provided certain advantages that the Commission should employ in the future, as appropriate, including considering the possibility of undertaking joint studies with the United Nations Commission on International Trade Law. The point was nevertheless made that it was not clear whether the conclusions represented great progress on the topic; moreover, the comment was made that the topic as a whole did not seem to fall within the Commission's mandate to promote the progressive development of international law and its codification.

102. It was also suggested that the Commission could have been more helpful in providing clearer guidance on the interpretative approaches to be followed, given that the case law on the matter was divergent, and could have offered solutions to conflicting interpretations of most-favoured-nation clauses by arbitral tribunals. Some regret was also expressed that the Commission decided not to prepare and submit any model clauses on the matter, as it was felt this would have facilitated greater harmonization of the treaty practice and guaranteed predictability. Moreover, a further point was made that the report might have gone beyond a discursive analysis of the application of the most-favoured-nation clause to substantive and procedural provisions, as well as delving into an assessment of the economic rationale underlying various treaty provisions, including a better understanding of the relationship between the principle of *ejusdem generis* and the notion of "likeness" in some investment treaties. It was further felt that the Commission should have considered the relationship between the application of the most-favoured-nation clause and the fair and equitable standard.

103. A further point was made that the report did not go far enough in addressing fundamental issues regarding the whole system of international investment dispute settlement, which was asymmetrical and unacceptable in its current configuration. The view was also expressed that the most-favoured-nation clause was unworkable in investment treaties.