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Report of the International Law Commission on the work of its fifty-eighth session (2006)

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

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Introduction

1. At its sixty-first session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 13 September 2006, to include in its agenda the item entitled "Report of the International Law Commission on the work of its fifty-eighth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 9th to 19th and 21st meetings, which were held on various dates from 23 October to 9 November 2006. The Chairman of the International Law Commission at its fifty-eighth session introduced the report of the Commission: chapters I to III and XIII at the 9th meeting, on 23 October; chapters VI and VII at the 13th meeting, on 27 October; chapters VIII and IX at the 16th meeting, on 31 October; and chapters X, XI and XII at the 18th meeting, on 1 November. At the 21st meeting, on 9 November 2006, the Sixth Committee adopted draft resolution A/C.6/61/L.14, entitled "Report of the International Law Commission on the work of its fifty-eighth session". The draft resolution was adopted by the General Assembly at its 64th plenary meeting, on 4 December 2006, as resolution 61/34.

3. By paragraph 23 of resolution 61/34, 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-first session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. Shared natural resources; B. Responsibility of international organizations; C. Reservations to treaties; D. Effects of armed conflicts on treaties; E. Expulsion of aliens; and F. Obligation to extradite or prosecute (*aut dedere aut judicare*); and G. Other decisions and conclusions of the Commission, contained in the present document.

Topical summary

A. Shared natural resources

1. General remarks

5. Delegations welcomed the completion of the first reading of the draft articles on the law of transboundary aquifers, which represented an enrichment and further development of international law on water resources. The international regulation of the uses of and impacts on shared natural resources was considered of the highest significance, particularly for those States with transboundary aquifers, such as the Guaraní Aquifer. However, the view was expressed that the draft articles went well beyond current law and practice and that context-specific arrangements might be preferable in the light of the wide variety of groundwater resources and the relative scarcity of information regarding them. According to another view, the draft articles provided useful guidance for States on the principles and rules to be included in agreements concerning transboundary aquifers, appeared to strike an appropriate balance between the need to utilize the aquifers and the need to protect them in the long term and reminded non-aquifer States of the need to cooperate with aquifer States. Although some delegations noted with approval that the draft articles had

been largely modelled on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses and reiterated the value of that instrument, other delegations urged caution because the Convention had not yet gained wide acceptance among States.

6. Some delegations welcomed the Commission's willingness to seek the assistance of groundwater experts in preparing the draft articles, noted that the use of technical terms would facilitate the interpretation of the draft articles by scientists and managers of the resources in question and considered it a sound practice which should be encouraged in the future. Suggestions were made regarding the inclusion of a dispute settlement mechanism similar to the one provided for under article 33 of the 1997 Watercourses Convention and provisions calling for the avoidance of wasteful utilization or practices. Given the pace of the Commission's work on the topic, it was suggested that the period set for comments by States be extended to two years.

2. Part I — Introduction

(a) Draft article 1 — Scope

7. Some delegations expressed concern regarding the extension, in subparagraph (b), of the scope of the draft articles to "[o]ther activities that have or are likely to have an impact" on transboundary aquifers or aquifer systems. That formulation was overly broad and could impose unnecessary restrictions on the activities permitted in the area of an aquifer. Suggestions were made to the effect that the Commission should limit the relevant activities to those likely to have "a major impact", or consider deleting subparagraph (b) altogether if it could not carefully identify the activities covered therein. On the other hand, the view was expressed that there was no need to qualify those activities because other draft articles already contained qualifiers, ranging from "effect" to "significant harm", and it was suggested that the terms "impact" and "likely impact" be removed and there be a reference simply to "other activities as described in the [draft] articles". Some other delegations noted with approval the inclusion of the activities in subparagraph (b) and suggested a reference to the activities of non-aquifer States which could have an impact on aquifers be inserted. It was also suggested that there be a clarification of the fact that the draft articles applied only to freshwater resources.

8. Referring to paragraph 2 of the commentary, some delegations stressed that it would be necessary to define the relationship between the draft articles and the 1997 Watercourses Convention, because transboundary aquifers which were hydraulically connected with international watercourses would be subject to both instruments. In particular, there was a potential for conflict between the two legal regimes because each defined the term "equitable and reasonable utilization" differently. Thus, the relationship should be considered when the decision on the final form of the draft articles was taken.

(b) Draft article 2 — Use of terms

9. Regarding draft article 2, some delegations expressed support for the proposed definitions of "aquifer" and "aquifer system". However, the definition of "aquifer State" was considered too narrow because aquifers and aquifer systems can also be found in areas under a State's jurisdiction or control but outside its territory. Moreover, when addressing oil and gas it would be necessary to revisit the

definition, bearing in mind the resources found under the continental shelf. With regard to the definition of "recharge zone", it was suggested that the words "that part of" be inserted before the words "the catchment area", because the recharge zone of an aquifer was only that part of a catchment area where infiltration through the soil was significant and/or where surface water contributed directly to the groundwater. With respect to the definition of "discharge zone", it was proposed that (a) the words "or the upward flow system keeps the groundwater table permanently close to the surface" be added to the end of the subparagraph because a discharge zone could exist without any water being present on the surface; and (b) the sea be explicitly included in the list of potential outlets of an aquifer. Some delegations also suggested that there be a clarification of the definitions of the following terms found elsewhere in the draft articles: "significant harm" in draft article 6; "ecosystem" in draft article 9, as had been done in the draft principles on allocation of loss in case of harm arising out of hazardous activities; "precautionary approach" in draft article 11; "significant adverse effect" in draft article 14; "serious harm" in draft article 16; and the phrase "adversely affects, to a significant extent" in draft article 19.

3. Part II — General principles

(a) Draft article 3 — Sovereignty of aquifer States

10. Some delegations welcomed the inclusion in draft article 3 of an express affirmation of the principle of sovereignty of the State over the portion of a transboundary aquifer or aquifer system located within its territory. It was emphasized that the reasonable exploration and utilization of such water resources should not be restricted. In that regard, a proposal was made to change the title of the topic to "transboundary natural resources" to avoid any misconstrual. The provision was also considered significant because it placed the primary responsibility for the use and management of each transboundary aquifer on the State where the aquifer was located. Some delegations were of the view that the reference could be improved by: (a) including a specific reference both to General Assembly resolution 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources and to the principle of State sovereignty regarding the use of transboundary resources; (b) clarifying the exclusive nature of such sovereignty; or (c) stating that the sovereignty of the aquifer State was also governed by the rules and generally accepted principles of international law. On the other hand, it was proposed to emphasize the principle of cooperation between States and to incorporate the principle of mitigation.

(b) Draft article 4 — Equitable and reasonable utilization

11. The inclusion of the principle of equitable and reasonable utilization was welcomed because it had attracted wide support in the 1997 Watercourses Convention. It was noted, however, that draft articles 4 and 5 needed to be considered together for an understanding of the principle. It was suggested that the term "reasonable" be replaced with the term "sustainable" in draft articles 4 and 5, in conformity with recent practice in international environmental law. A preference was also expressed for a specific reference to "sustainable utilization" because utilization, as opposed to exploitation, could be sustainable in the case of transboundary aquifers. Regarding subparagraph (a), it was stated that the term "accrual of benefits" needed clarification. It was further noted that, in subparagraph

(b), the use of the term “aim” made it unclear whether an obligation was created to achieve results or to engage in some particular conduct. It was observed that the obligation to establish an overall utilization plan “individually or jointly”, in subparagraph (c), might favour upstream States. The clarification in the commentary regarding the sustainability of recharging aquifers was welcomed by some delegations, although it was suggested that in paragraph 5 the term “predicted lifespan” was preferable to the term “agreed lifespan”. The view was also expressed that utilization of an aquifer should be considered reasonable as long as no wasteful utilization or abuse took place and other obligations were met, even if it led to depletion. Moreover, it was argued that if an aquifer State did not exercise or gave up its right to utilization of the aquifer, then the standard for equitable use by the other aquifer States would be different.

(c) Draft article 5 — Factors relevant to equitable and reasonable utilization

12. Although some delegations expressed support for draft article 5, textual modifications were also suggested. In subparagraph 1 (d), it was proposed to clarify the provision by including language from the commentary, which read “the comparative size of the aquifer in each aquifer State and the comparative importance of the recharge process in each State where the recharge zone is located”. Although support was expressed for giving special regard to “vital human needs” in determining reasonable and equitable utilization, it was suggested that the phrase be defined by inserting in the draft article the statement of understanding reached during the elaboration of the 1997 Watercourses Convention, which read: “In determining ‘vital human needs’, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.”

(d) Draft article 6 — Obligation not to cause significant harm to other aquifer States

13. With regard to draft article 6, on the obligation not to cause significant harm to other aquifer States, some delegations regretted the deletion of the provision proposed by the Special Rapporteur concerning compensation for significant harm caused despite all appropriate measures being taken to prevent it. Such a provision was considered consistent with recent developments in the field of international environmental law and well established in other instruments of international law. Moreover, the reason given for its exclusion was considered unconvincing because: (a) although international responsibility was in general based on imputability, in the field of international environmental law strict liability could also be imposed; (b) the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities would apply only to hazardous activities; and (c) the cross reference to draft articles 4 and 5 in paragraph 3 linked the question of compensation to the interplay of those two draft articles. It was further suggested that the draft articles specify what kind of responsibility would be incurred as a result of a violation of the obligation not to cause harm and on what conditions an affected State might obtain reparation. A suggestion was made that a reference to the polluter-pays principle be included. On the other hand, support was also expressed for the exclusion of the provision on compensation, as other bodies and instruments of international law could deal with the legal consequences of significant harm caused to an aquifer State. Although support was expressed for the threshold of significant harm, other delegations objected to its use. In that regard, a reference

merely to “harm”, without qualifiers, to reflect the fragility of transboundary aquifers, was suggested. Regarding paragraph 2, the opinion was expressed that the reference to impact was unnecessary and should be deleted.

(e) Draft article 7 — General obligation to cooperate

14. For some delegations, draft article 7 set adequate parameters for cooperation in achieving the reasonable utilization and appropriate protection of aquifers. However, because the obligation to cooperate was alluded to in various draft articles, the interrelationship among the various mechanisms of cooperation needed to be defined more clearly. The substitution of the term “appropriate protection” for the term “adequate protection” in paragraph 1 was welcomed by some delegations. Although a view was expressed in favour of the mandatory establishment of joint cooperation mechanisms, the contrary view was also expressed, proposing that the wording for paragraph 2 be changed to: “aquifer States should give positive consideration to establishing joint mechanisms of cooperation”.

(f) Draft article 8 — Regular exchange of data and information

15. Regarding draft article 8 on the regular exchange of data and information, it was suggested that the exchange of hydrological and related data and information be required only to the extent permitted by law, as it might be subject to legal regulation. It was observed that paragraph 3 was important and did not place an excessive burden on a State which received a request for information that was not readily available. It was further suggested that the provision refer to capacity-building.

4. Part III — Protection, preservation and management

16. The view was expressed that draft article 9 should apply only in the absence of bilateral and multilateral arrangements on the protection and preservation of ecosystems. Regarding draft article 11, on “Prevention, reduction and control of pollution”, some delegations expressed the view that the term “precautionary principle” should be used instead of the term “precautionary approach”. It was considered that the precautionary principle was already established in international environmental law and that its inclusion in the draft articles would contribute greatly to its general acceptance in international law. However, support was also expressed for the term “precautionary approach”, although it needed further clarification and, in particular, the clause beginning “in view of uncertainty...” should be deleted. It was considered necessary to specify what kind of conduct would qualify as “precautionary” and what consequences failure to engage in such conduct would entail. According to another view, any obligation to take a precautionary approach must be subject to the capabilities of the States concerned, in line with principle 15 of the Rio Declaration on Environment and Development. Concern was expressed that the provision focused excessively on harm to States rather than the protection of the resource itself — the aquifer and the water it contained.

17. Regarding draft article 12, on monitoring, support was expressed for the addition of the phrase “agreed or” in paragraph 2 because requiring harmonized standards and methodology for monitoring imposed too heavy an obligation on States. It was considered important to review the draft articles on monitoring and

management in the light of the varying capabilities of States in that regard. Referring to draft article 13, on management, some delegations, although they emphasized the positive role played by joint management mechanisms and the importance of fostering their development, questioned the value of making them mandatory. A view was expressed in favour of providing for a dispute resolution mechanism in draft article 13, rather than requiring only consultations.

5. Part IV — Activities affecting other States

18. Although some delegations welcomed the current formulation of draft article 14, on planned activities, concern was expressed that it would allow aquifer States to veto planned activities in other States, particularly when considered together with draft articles 1 and 6. Moreover, the point was made that the exchange of information and data was already addressed sufficiently in draft article 8. It was also observed that the assessment of the effects of planned activities should be based on objective grounds, and the affected State should have the right to consult with the State whose planned activity might affect it, even if the latter had not given notice of its plans. A clarification of the fact that a legal regime for activities covered by the draft articles could be established only with the consent of the aquifer State was suggested.

6. Part V — Miscellaneous provisions

19. As for draft article 15, on scientific and technical cooperation with developing States, it was suggested that another subparagraph be added, reading: “mobilizing financial resources and establishing appropriate mechanisms in order to help them carry out relevant projects and facilitate their capacity-building”. Where the capacity of developing States to manage their aquifers was weak, technical and financial assistance from developed States would be required.

20. With respect to draft article 16, on emergency situations, it was doubted whether the provision reflected customary international law, because States were not obliged to provide assistance in such situations but merely to consider responding to requests for assistance. Moreover, it was not clear whether a special derogation in paragraph 3 was needed in the light of a State’s right to invoke circumstances precluding wrongfulness to justify non-compliance with a particular obligation. The appropriateness of forgoing the safeguards inherent in the invocation of circumstances precluding wrongfulness to protect vital human needs merited further consideration. It was observed that failure to notify the affected States and to take the other measures envisaged under paragraph 2 might trigger its international responsibility under the draft articles, irrespective of responsibility for the emergency itself.

21. With regard to draft article 18, which protected an aquifer State from being compelled to provide data or information the confidentiality of which was essential to its national defence or security, the view was expressed that protection under the draft article should be extended to industrial secrets and intellectual property. In addition, concern was expressed that the provision might conflict with national legislation concerning the confidentiality of certain types of information.

22. Some delegations expressed support for the current drafting and placement of draft article 19, on bilateral and regional agreements and arrangements, although further consideration would be required in the light of the decision on the final

form. It was noted that additional provisions might be needed if the draft articles took the form of a convention, to ensure that it would not supersede existing bilateral or regional arrangements or limit the options open to States in entering into them. Regional agreements should play a primary role in that regard by providing for the specific aspects of each aquifer or aquifer system, and by offering a body of principles acceptable to all neighbouring States. It was suggested that aquifer States be required to negotiate in good faith with other aquifer States adversely affected by an agreement and arrangement to which the latter were not parties.

7. Final form of the draft articles

23. With regard to the final form of the draft articles, some delegations preferred a framework convention which would serve as a basis for subsequent agreements or other detailed arrangements while other delegations preferred the draft articles to take a non-binding form, such as draft principles, guidelines, recommendations or a declaration by the General Assembly. The delegations favouring a draft convention stated that: (a) it should include provisions on the rights and obligations of non-aquifer States to encourage them to become parties to the instrument; and (b) a convention would be the only way to achieve the goals envisaged in the draft articles. The delegations that preferred a non-binding form considered that: (a) draft principles might more efficiently promote the long-term development of the law so as to cement the Commission's approach; (b) an authoritative statement describing international standards and best practice would be immediately influential at the bilateral and regional levels; and (c) since the 1997 Watercourses Convention was still not in force, an insufficient number of States would be motivated to become parties to a convention on shared natural resources. On the other hand, some delegations considered it premature to reach a decision on the final form of the draft articles in the light of the differing views expressed by States and the fact that international practice was still evolving. It was suggested that the question be revisited only after due attention had been given to the application of the draft articles to gaseous substances and liquid substances other than groundwater.

8. Future work on the topic "Shared natural resources"

24. With respect to possible future work on the topic "Shared natural resources", some delegations were of the view that once the Commission had completed its codification work on groundwater it should turn its attention to other shared natural resources, such as oil and natural gas. Although it was noted that the provisions on the utilization of such finite natural resources would closely resemble one another, the view was also expressed that some substantive differences existed that might necessitate a revision of some of the concepts involved. The Commission's experience in adopting the draft articles, along with constructive comments to be offered by States, would facilitate its codification work on other shared natural resources, including oil and gas. Other delegations called for a decision on future work to be made only after the completion of the draft articles on transboundary aquifers, taking into account the comments of States. Concern was expressed regarding the complexity of taking up oil and gas, and that the Commission could face opposition from oil- and gas-producing States that recognized those resources as sovereign property. Moreover, it was noted that guidelines formulated for one natural resource might not be suitable for application to other types of natural resource. The view was expressed that there was no current need for universal rules

relating to oil and gas. Some delegations called on the Commission to commence its consideration of other transboundary resources during the second reading of the draft articles on the law of transboundary aquifers. By continuing the current approach, the Commission would be forgoing the opportunity to develop an overarching set of rules for all shared natural resources. While some delegations regretted that the Commission had not taken a broader approach to the topic from the beginning, other delegations agreed with the Commission's decision to start with groundwater.

B. Responsibility of international organizations

1. General comments

25. Some delegations supported the general approach taken by the Commission on the present topic, following the 2001 articles on responsibility of States for internationally wrongful acts. It was suggested that the draft articles could provide the basis for a universal convention. On the other hand, some delegations expressed concern that the approach relied too heavily on analogy to the articles on State responsibility and suggested that it be reviewed. The Commission was also advised to take into account the differences between States and international organizations and among organizations themselves. It was also suggested that a saving clause for regional integration organizations be included.

26. Regarding chapter V, on circumstances precluding wrongfulness, while some delegations noted the lack of relevant practice and questioned the Commission's decision to emulate the corresponding articles on State responsibility, other delegations welcomed the approach of the Commission and the resulting draft articles.

(a) Comments on specific draft articles

(i) Draft article 17 — Consent

27. It was suggested that draft article 17, on consent, be more precisely drafted in order to define what constituted valid consent, the limits of consent and how those limits were determined. Valid consent should not involve any pressure or violation of sovereignty. The issues of implied consent and contradictory assertions regarding consent would also have to be addressed.

(ii) Draft article 18 — Self-defence

28. Some delegations questioned whether the doctrine of self-defence applied to international organizations. It was observed that Article 51 of the Charter of the United Nations applied exclusively to States; the draft article contained elements of the progressive development of international law; and the reference to "principles of international law embodied in the Charter of the United Nations" could be misleading. It was suggested that self-defence as applied to international organizations be distinguished from self-defence as applied to States; any right of the former to act in self-defence could not have the same scope as the right of States to do so; and only certain international organizations would ever be in a position to exercise the right of self-defence. It was noted that draft article 18 did not fully reflect paragraphs 15 to 17 of the Special Rapporteur's report (A/CN.4/564), and

that a clear distinction should be drawn between self-defence and the lawful use of force in reasonable implementation of the purposes of a given mission.

29. With regard to the examples offered in the commentary, it was stated that (a) it was difficult to extrapolate from peacekeeping missions which had specific mandates; (b) acts of defence carried out in the context of a mandate did not constitute self-defence; (c) in the case of administering a territory or deploying an armed force, self-defence was exercised by either the State whose forces were in the territory or the individuals involved, rather than the organization; and (d) the use of force authorized by a political body of the United Nations, such as in paragraph 3, would not constitute self-defence.

(iii) Draft article 19 — Countermeasures; draft article 20 — Force majeure; and draft article 21 — Distress

30. As regards draft article 19, it was suggested that an explicit reference to the Charter of the United Nations be added, to indicate the possible scope of and limitations to countermeasures. As for draft article 20, some delegations noted with approval the inclusion of force majeure as a circumstance precluding wrongfulness, considering the existence of relevant practice. Regarding draft article 21, while some delegations questioned the applicability of distress to international organizations, other delegations welcomed its inclusion in the draft articles, despite the lack of international practice.

(iv) Draft article 22 — Necessity

31. Although some delegations agreed with the basic premise of this provision, others recommended its deletion since international organizations should not be able to invoke necessity as a circumstance precluding wrongfulness. Other delegations made the following comments and suggestions concerning its provision: the formulation must be properly balanced in order to prevent indiscriminate use of the concept to justify wrongful acts; the expressions “essential interest”, “international community as a whole” and “function to protect that interest” should be clarified; an organization should be able to protect the essential interests of a member State since otherwise States would be reluctant to transfer powers to international organizations; necessity should be extended to cover an essential interest of the organization itself; the activities of an international organization might endanger essential interests that they did not have the function to protect; necessity should apply to any essential interest that the organization, in accordance with international law, has the function to protect; the principle of necessity should be tied to the mandate of the organization; not all the functions which an organization was vested with in its constituent instrument were to be regarded as essential interests.

(v) Draft article 23 — Compliance with peremptory norms

32. While agreement was expressed with the principle that international organizations were bound by peremptory norms, it was questioned whether they could breach them.

(vi) Chapter X — Responsibility of a State in connection with the act of an international organization

33. While some delegations welcomed chapter (x) since such matters were not dealt with in the articles on State responsibility, others questioned its inclusion since it related to the responsibility of States. It was suggested that the provisions be contained in chapter II. It was also suggested that a specific provision on responsibility of Member States that committed a wrongful act by implementing a binding decision of the organization be included.

(vii) Draft article 25 — Aid or assistance by a State in the commission of an internationally wrongful act by an international organization; draft article 26 — Direction and control exercised by a State over commission of an internationally wrongful act by an international organization; and draft article 27 — Coercion of an international organization by a State

34. Although some delegations welcomed draft articles 25 to 27, which followed the corresponding provisions of the State responsibility articles, others noted that the provisions were based on little or no State practice, did not adequately address the different nature of States and international organizations and failed to delineate their relationship to draft article 29. It was also observed that there was some overlap between draft articles 26 and 27; that the terminology needed clarification and examples should be provided; and that the provisions could be replaced by a savings clause, with commentary.

35. Regarding article 25, some delegations requested clarification in the commentary of the form and threshold for aid or assistance that would give rise to the State's responsibility, including by elaborating on the element of intent requirement. Concern was expressed that financial contribution to the annual budget of the organization or providing national contingents under the operational control and command of an international organization might constitute "aid or assistance" under the provision. It was suggested that the provision be clearly distinguished from draft article 15.

36. As regards draft article 26, some delegations suggested that the concept of "direction and control" needed clarification and that sources other than the constituent instrument and rules of the organization be considered.

37. As for draft article 27, it was noted that responsibility should be limited to a member State having major influence over the commission of an internationally wrongful act by an international organization. It was also suggested that coercion be extended to acts that would be internationally wrongful if committed by the coercing State by amending subparagraph (a) to read: "The act would, but for the coercion, be an internationally wrongful act of the international organization or of the coercing State".

(viii) Draft article 28 — International responsibility in case of provision of competence to an international organization

38. While some delegations expressed support for the basic premise of draft article 28 and noted the relevance of the jurisprudence of the European Court of Human Rights, others questioned the basis for such a provision and noted the lack of practice and relevant examples cited in the commentary.

39. The following comments and suggestions were made: there had to be clarification of the scope and the application of the provision as well as of the notions of "providing the organization with competence" and "circumvention"; the term "circumvents" should be replaced by a more neutral term; the intent of a State in providing an organization with competence should also be taken into account; distinctions should be drawn between general and specific provisions of competence, as well as between implied and express provisions of competence; paragraph 2 should be limited to cases where the international organization was not itself bound by the obligation breached; a monitoring mechanism for compliance with international obligations could be addressed in the text or the commentary; and draft articles 15 and 28 should be aligned.

40. There were different views as to whether a State could incur international responsibility merely by transferring competence to an international organization. It was noted that there was no circumvention if the State transferred powers to an international organization which was not bound by the State's own treaty obligations but whose legal system offered a comparable level of guarantees.

(ix) Draft article 29 — Responsibility of a State member of an international organization for the internationally wrongful act of that organization

41. As regards draft article 29, some delegations stressed that a State should not incur international responsibility merely based on its membership in an international organization. While some delegations agreed with the Commission that responsibility of a State under draft article 29 would be subsidiary, the view was expressed that a member State should bear the main responsibility for an act by an international organization if it played a major or leading role in the commission of an act. Differing views were expressed regarding whether to retain the current wording or to reformulate the provision in negative terms as proposed by the Special Rapporteur, by setting forth the general rule followed by the two exceptions.

42. Although some delegations supported the two bases of responsibility contained in paragraph 1, the provision was considered excessively broad and vague. In particular, it was observed that: the phrases "has accepted responsibility" and "has led the injured party to rely on its responsibility" required clarification; paragraph 1 (a) might result in a member State being obliged to provide compensation contrary to its own intention since it did not require consent to be explicit; the application of subparagraph 1 (b) to a mixed agreement between the European Community and a non-member might be problematic; subparagraph 1 (b) was vague and might be unnecessary if 1 (a) included tacit acceptance; and it was suggested that the fact that the responsibility was incurred vis-à-vis the victim of the act and not the organization be specified in the text of the draft article. Consideration should also be given to the issue of whether such responsibility was restricted to third States and to the role of the constituent instrument and the rules of the organization in determining questions of responsibility. It was further suggested that the Commission should reconsider the terminology, especially the relationship between responsibility and liability.

(b) Comments on questions

(i) Question (a)

43. Regarding the first question posed by the Commission, in paragraph 28 of its report (A/61/10),[1] some delegations expressed the view that, in the light of the independent legal personality of international organizations, member States had no obligation to compensate parties injured by the organization, even if the organization was not in a position to do so. Some delegations noted that, even in the absence of such an obligation, such responsibility could exist pursuant to the constituent instrument or rules of the international organization, draft article 19 or justice and equity. Moreover, some delegations noted that States could provide compensation ex gratia; pointed to a general obligation to cooperate in good faith in order to ensure that the acts of the organization were compatible with applicable law; and suggested that it was incumbent on the international organization to find alternative means of providing compensation. Although member States had a binding legal obligation to pay their contributions to an international organization so as to enable it to provide compensation to injured parties, a scheme of subsidiary responsibility for compensation could also be included in the draft articles as a special rule. It was also suggested that the provisions on exhaustion of local remedies and the jurisdictional immunity of international organizations be included.

(ii) Question (b)

44. As for the Commission's second question, in paragraph 28 (b), some delegations replied that States and international organizations did have an obligation to cooperate to bring to an end a serious breach of a peremptory norm of general international law by an international organization. In that regard, article 41 of the articles on State responsibility could be reproduced mutatis mutandis and reference could be made to its commentary. While some delegations viewed that duty as progressive development, other delegations noted that *jus cogens* rules applied equally to international organizations and the obligation to cooperate applied regardless of the source of the violation. It was noted, however, that the obligation was to achieve effective cooperation, rather than the cessation of the serious breach, and that it would be applied without prejudice to the pertinent provisions of the Charter of the United Nations. Accordingly, a saving clause, modelled on article 59 of the articles on State responsibility, would be needed. The work of the Commission on fragmentation of international law was also pertinent to that question, in particular as regards hierarchy in international law.

C. Reservations to treaties

1. General comments

45. The view was expressed that further elucidation of the question of compatibility of reservations with the object and purpose of treaties and the invalidity of reservations contrary to peremptory norms, or *jus cogens*, would add clarity to the topic. It was also felt that competence to determine the validity of reservations rested with the States parties concerned. Caution was urged as regards proposing a role for the depositary of a treaty in reviewing manifestly invalid

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10).

reservations. Because of the difficulty in determining the true object and purpose of a treaty, such a role could cause further uncertainty.

46. It was observed that the terms "validity/invalidity" offered a qualification that was premature and might be too far-reaching. Practice appeared to indicate that the regime of the Vienna Convention on the Law of Treaties was sufficient in that respect and that emphasis should be placed on the scope of the effect of the reservations and of objections to reservations rather than on the qualification issue. Moreover, it was stated that using the same terms for the formulation of reservations and their validity was confusing. The question of whether or not a reservation could be formulated did not automatically raise the question of the validity of the reservation itself.

47. According to another view, the terms "validity/invalidity" were satisfactory.

48. The comment was also made that the fact that a State did not object to a reservation did not necessarily mean that it considered the reservation to be valid. On the other hand, it was not obvious how the supposed intrinsic invalidity of a reservation could prevent States from accepting it or what the practical effect of preventing such acceptance from changing the nullity of the reservation was. The view was expressed that the approach taken by the Special Rapporteur seemed to transform the subjective, contractual system provided for in the Vienna Conventions into an objective system. It was stated that the most important criterion for evaluating the permissibility of a reservation was the intention of States when the treaty was concluded. If the treaty was silent on the matter of reservations, their permissibility should be judged in the light of the object and purpose of the treaty.

49. It was stated that as some draft guidelines became increasingly complex, the usefulness of the Guide to Practice would seem to depend on the Commission's ability to provide an easily understandable text to which States could refer in their practice.

2. Definition of object and purpose

50. It was observed that, in judging the validity of a reservation, its compatibility with the object and purpose of the treaty was a fundamental criterion. It was important to have a rather broad definition of the object and purpose in the Guide to Practice rather broad to permit the application of that criterion on a case-by-case basis and in conformity with the rules of treaty interpretation.

51. It was stated that a definition of the object and purpose of a treaty, however laudable its intentions, might result in the replacement of one elusive concept by another or in the introduction of cumbersome criteria that might disturb established terminology used in the Vienna Convention on the Law of Treaties.

52. Some delegations remained sceptical as to whether it was possible, or even desirable, to clarify the concept of the object and purpose of a treaty in the abstract. Caution was urged in dealing with the idea that the notion of "object and purpose" could be defined at all, since the words already referred to the core obligation or raison d'être of a particular legal instrument. The notion of the "general architecture of the treaty" seemed to refer to the structure or framework of a treaty; introducing an element alien to the law of treaties proper and shifting the focus away from the substantive issues indicated by "object and purpose". Moreover, the phrase "object and purpose" was not unique to the subject of reservations and appeared many times

in the Vienna Conventions; it was also used in case law and in dispute settlement procedure. A definition of "object and purpose" should not take place in a vacuum, because it could have an impact in other situations and produce unexpected legal effects. Consequently, the Commission should not be encouraged to undertake such a definition.

53. It was observed that further clarification was needed of the relationship between reservations, the raison d'être and essential provisions of the treaty and its object and purpose.

54. With regard to the consequences of a reservation incompatible with the object and purpose of a treaty, it was observed that a growing number of States were developing the practice of severing such a reservation from treaty relations between the countries concerned. A State that nullified key provisions of a treaty by means of a reservation should not be permitted to accede to it. An invalid reservation should be considered null and void. Since an objection to an invalid reservation served to draw attention to its nullity, several countries supported the intermediate solution suggested by the Special Rapporteur in draft guideline 2.1.8.

55. It was also suggested that the practice of severing reservations incompatible with the object and purpose of a treaty was fully in conformity with article 19 of the Vienna Convention. The option of separating out such reservations would preserve the treaty relationship and the possibility of dialogue among the treaty parties. Account should also be taken of the intention of the reserving State regarding the relationship between the ratification of a treaty and the reservation.

3. Human rights treaty bodies

56. Many delegations welcomed the proposal for a meeting between the Commission and human rights experts, including representatives of treaty-monitoring bodies to discuss issues relating to reservations to human rights treaties, including possible adjustments to the 1997 preliminary conclusions. It would be useful to bring to the meeting experts with wide experience from regional human rights bodies.

57. The view was expressed that great care should be exercised when deciding whether to allow the development of a separate regime for dealing with the specific effects of invalid reservations to human rights treaties. The preliminary conclusions adopted by the Commission in 1997 should not be allowed to result in unwarranted effects in that regard. Reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. Human rights treaty bodies were competent to rule on the status or consequences of a particular reservation solely when that power was provided by the treaty. As for paragraph 10 of the conclusions, if the option of severability was available, there might not be a need for the reserving State to modify or withdraw its reservation or to forgo becoming a party to the treaty.

58. Support was expressed for paragraph 5 of the preliminary conclusions on the competence of a treaty-monitoring body to comment upon and express recommendations with regard to the admissibility of reservations. Such a comment would be interpreted on the understanding that it had to be taken in conjunction with the other paragraphs of the text and without prejudice to acceptance or rejection of reservations by States parties to a treaty. It was observed that European Court of

Human Rights case law had helped the severability doctrine achieve acceptance within the Council of Europe. Pursuant to that doctrine a State that had made an invalid reservation would be considered to be fully bound by the treaty. The Commission should consider an adjustment on the preliminary conclusions and the draft guidelines to the effect that when treaty-monitoring bodies had actually been given competence to determine whether reservations to treaties were valid, such competence should prevail over any other mechanism with the same purpose.

59. It was also observed that everyday treaty practice did not always achieve a satisfactory balance between the objective of preservation of the integrity of the text of the treaty and the universality of participation in the treaty. The role of monitoring bodies was distinct from that of States parties, which could react to reservations by submitting objections and by deciding, if necessary, that no treaty relationship would be established with the reserving State. It would also be desirable to review the preliminary conclusions to include a clearer statement of the intended meaning of the "legal force" of the findings of the monitoring bodies (para. 8 of the preliminary conclusions). It was stated that the views expressed by monitoring bodies in a consistent manner or the interpretation of a certain category of reservations could become an authoritative interpretation. Confirmation that the ability of a human rights treaty body to assess the validity of a reservation did not exceed the competence of that body beyond the scope provided in its constituent instrument was welcomed.

60. According to another point of view, the function attributed by the draft guidelines to the treaty-monitoring bodies exceeded their normal function of assessment and went beyond the relevant provisions of the Convention on the Law of Treaties and State practice. Treaty-monitoring bodies should not have competence to rule on the validity of reservations.

61. The view was expressed that a distinction should be drawn between the power to decide that a reservation was manifestly invalid and the power to assess its validity in the light of the treaty's object and purpose. The two kinds of assessment could have different legal consequences and it would be better to state simply that monitoring bodies could make recommendations as to the validity of a reservation. The preliminary conclusions were silent on whether and how monitoring bodies should take account of the earlier views of States concerning reservations; however, it was not clear what should be done if the monitoring body and the States parties to the treaty took a different view on the validity of a reservation.

62. It was also remarked that any assessment made by a treaty-monitoring body could, in most cases, be an expression of a view on the matter rather than a binding determination.

63. It was suggested that the preliminary conclusions be reviewed in the light of comments made by States and the outcome of the Commission's meeting with United Nations experts in the field of human rights to be held in 2007.

4. Comments on draft guidelines

(a) 1.1.6 (Statements purporting to discharge an obligation by equivalent means)

64. It was observed that draft guideline 1.1.6 needed clarification since there was no explanation of what the "rules applicable to them" were or where they could be found.

(b) 2.1.8 (Procedure in case of manifestly invalid reservations)

65. Several delegations expressed their concern about the fact that the depositary, rather than the States parties, was in a position to determine whether a particular reservation was incompatible with the object and purpose of the treaty. The role of the depositary was to transmit the text of reservations to the treaty parties and it should remain neutral and impartial.

(c) 3.1.1 (Reservations expressly prohibited by the treaty)

66. It was observed that draft guideline 3.1.1 referred to reservations "expressly prohibited" by a treaty, which left open the question of those implicitly prohibited. The comment was also made that when all, some or a certain category of reservations were prohibited, States identified those reservations as being contrary to the purpose of the treaty. Moreover, what constituted a "certain category" of reservations should be determined under the rules, including articles 31 et seq. of the Vienna Conventions, on the interpretation of treaties.

(d) 3.1.2 (Definition of specified reservations)

67. The view was expressed that a thorough analysis should be conducted of what constituted a "specified reservation" and that what fell outside the scope of specified reservations should meet the criteria of the "object and purpose of a treaty". Concern was also expressed that the definition might not capture all circumstances in which a reservation might be "specified".

(e) 3.1.3 (Permissibility of reservations not prohibited by the treaty)

68. It was pointed out that it was not clear whether the term "certain reservations" also covered "specified reservations".

(f) 3.1.4 (Permissibility of specified reservations)

69. The question was raised as to why reservations made under specific conditions still had to pass the object and purpose test.

(g) 3.2/3.2.4 (Plurality of bodies competent to assess the validity of reservations)

70. It was suggested that the relationship between draft guidelines 3.2 and 3.2.4 be further developed, especially as regards what to do in the event of contradictory findings by different bodies on the validity of the same reservation. The conclusion contained in guideline 3.2.4 did not help to resolve practical problems.

(h) 3.2.1/3.2.2 (Competence of the monitoring bodies established by the treaty)

71. It was stated that the relationship between draft guidelines 3.2.1 and 3.2.2 should be clarified. While guideline 3.2.1 stipulated that the competence of existing monitoring bodies to monitor the application of the treaty encompassed the competence to assess the validity of reservations, draft guideline 3.2.2 called on States to provide such bodies with that competence.

(i) 3.2/3.2.1 (Plurality of bodies competent to assess the validity of reservations)

72. It was stated that certain amendments should be made to the draft guideline, the purpose of which would be to avoid implied authorization for any monitoring body to pass judgement on the validity of reservations.

(j) 3.2.3 (Cooperation of States and international organizations with monitoring bodies)

73. A query was made regarding whether in cases in which a treaty provided for specified reservations, a State making such a reservation should also be obliged to consult with the monitoring body.

(k) 3.3 (Consequences of the invalidity of a reservation)

74. The comment was made that the title did not reflect the content of the guideline which related to the causes of invalidity.

(l) 3.3.2 (Nullity of invalid reservations)

75. The view was expressed that guideline 3.3.2 did not exclude the possibility of inter se agreements with regard to reservations provided that they were compatible with the basic treaty. It was also stated that the pertinent question was whether or not a reservation could be made. If some contracting parties chose to accept and others to object to a reservation, it was difficult to conclude that the reservation was invalid from the outset.

(m) 3.3.3 (Effect of unilateral acceptance of an invalid reservation)

76. It was suggested that guideline 3.3.3 be deleted because it was ambiguous and contradicted draft guideline 3.2.4.

(n) 3.3.4 (Effect of collective acceptance of an invalid reservation)

77. The view was expressed that guideline 3.3.4 was problematic because it seemed to allow States to make reservations prohibited by a treaty. Furthermore, no deadline was set for the entering of objections, and it said nothing about the effect of silence. It was doubtful whether anything like a collective position of the States parties to general multilateral treaties could be said to exist, especially as the draft guideline did not establish the time by which such a position had to be established.

D. Effects of armed conflicts on treaties

1. General remarks

78. Support was expressed for the general approach proposed by the Special Rapporteur, particularly as regards the basic approach (in draft article 3) that treaties should continue during an armed conflict unless there was a genuine need for suspension or termination. Support was also expressed for the premise that the topic, although closely related to other domains of international law such as humanitarian law, self-defence and State responsibility, formed part of the law of treaties.

79. It was further observed that the Vienna Convention on the Law of Treaties of 1969 constituted the legal benchmark for any work relating to the law of treaties. It

was therefore essential to avoid any reinterpretation or development of its provisions which might alter their spirit and content. It was likewise observed that the Vienna Convention itself was a prime example of a multilateral law-making treaty whose object and purpose necessarily implied that it should continue to be in operation during an armed conflict. According to a further suggestion, it was necessary to ascertain the effects of the outbreak of armed conflict on particular provisions of treaties, taking into account the rules on separability of treaty provisions, contained in article 44 of the Vienna Convention, together with more specific provisions applicable in times of armed conflict.

2. Draft article 1 — Scope

80. Support was expressed for extending the scope of the draft articles to cover agreements concluded between international organizations and between States and international organizations, as well as regional agreements. It was recalled that international organizations had been directly involved in several armed conflicts which may have had direct effects on treaties concluded between the organizations in question and States parties to those treaties. Others preferred to exclude treaties concluded by international organizations, since there existed a wide variety of international organizations, and it was doubtful that their specificity and treaty arrangements could be successfully dealt with. Moreover, the issues arising from armed conflict for international organizations might be very different from those arising for States.

81. Support was also expressed for extending the scope of the draft articles to treaties being applied provisionally, as provided for in article 25 of the Vienna Convention, since such treaties were in fact operative and hence could be affected by an armed conflict in the same manner as treaties that had already entered into force. Others pointed out that, by discussing the aspect of provisional application as an issue of whether or not the draft articles should cover treaties that had not yet entered into force, the Commission was not properly considering the reality of treaty practice, since there were treaties that had not yet entered into force but that were provisionally applied by some States, and there could be treaties that had entered into force for some States and that were provisionally applied by others. As regards the possibility of differentiating between bilateral and multilateral international treaties, it was suggested that the pattern of the Vienna Convention be followed.

3. Draft article 2 — Use of terms

(a) Paragraph (a)

82. As regards the definition of “treaty” in paragraph (a), it was suggested that it be made consistent with the definition in the 1969 Vienna Convention. In addition, it was observed that if the scope of the draft articles, in draft article 1, were extended to treaties involving international organizations, the definition in article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations would have to be incorporated, which could present problems for countries not parties to that Convention.

(b) Paragraph (b)

83. Concerning the scope of the term “armed conflict” in paragraph (b), it was noted that internal armed conflicts had significantly outnumbered international armed conflicts in recent decades, and that the distinction between the two was often blurred. While a narrow definition would tend to strengthen the treaty regime (and, conversely, a broad definition might jeopardize it), a narrow definition would limit the relevance of the draft articles. It was also noted that since the effects on treaties of armed conflict involving non-State actors would not be precisely the same as the effects of armed conflict involving State actors alone, it would be appropriate to examine those differences. Support was, accordingly, expressed for the definition employed in the Tadic case, considered by the International Tribunal for the former Yugoslavia. It was suggested that any concerns about employing such a definition could be avoided by stressing the fact that the definition was merely “for the purposes of the present draft articles”.

84. Others expressed a preference for dealing only with international armed conflicts in the draft articles, because internal conflicts did not directly affect the treaty relationships between States parties to a treaty, which instead should be dealt with in the framework of the Vienna Convention. It was also recalled that the 2001 articles on the responsibility of States for internationally wrongful acts already made provision, in chapter V (Part one), for circumstances precluding wrongfulness. It was further observed that while the distinction between international and non-international armed conflicts could be difficult to draw, such a distinction was justified for several reasons: (a) international humanitarian law was still based on such a distinction; (b) the other State party to a treaty might not be aware of the existence of a non-international armed conflict in a State; and (c) since no other State was involved in a non-international armed conflict, it was unclear to which other States parties the effects of the draft articles would then apply.

85. According to a further suggestion, the term “armed conflict” could be used and not defined, leaving it to be determined on a case-by-case basis, taking into account the nature and extent of the conflict. Other suggestions included simply making a reference to the Geneva Conventions of 1949, or taking account of more up-to-date concepts, such as those found in the report of the High-level Panel on Threats, Challenges and Change. Disapproval was expressed of the term “hostilities”, which itself required a definition. Similarly, it was noted that the phrase “the outbreak of hostilities” had a temporal dimension and referred mainly to the beginning of the conflict. Opposition was also expressed to the inclusion of other references to phenomena such as the “war on terrorism” in the draft articles.

86. Some speakers expressed support for extending the draft articles to cover military occupations, as addressed by the 1949 Geneva Conventions and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. Others opposed including military occupations.

4. Draft article 3 — Ipso facto termination or suspension

87. Support was expressed for draft article 3, which was considered a departure from the traditional view that the outbreak of an armed conflict meant the termination of the operation of a treaty. Instead, it clarified and justified the practice, followed since the Second World War, of safeguarding the viability of the treaty. Others expressed doubts as to the advisability of establishing the general rule

of continuity, since neither State practice nor treaty practice offered sufficient guidance. It was, accordingly, preferable not to formulate any general rule at all.

88. The proposal to replace the words “ipso facto” with the word “necessarily” was welcomed, since that wording made allowance for the abrogating effect of war on some treaties, such as treaties of friendship and cooperation. Others preferred to retain “ipso facto”, arguing that the two terms were not synonymous and represented a policy choice with substantive impact.

89. It was also suggested that draft article 3 distinguish between the effects of armed conflict for treaty parties both of which were parties to the conflict, and the effects for parties to the conflict and third parties. According to a further drafting suggestion, the title of the draft article could be changed to “Validity of treaties”.

5. Draft article 4 — The indicia of susceptibility to termination or suspension of treaties in the case of an armed conflict

90. It was noted that draft article 4 rested on the premise that when States entered into treaties, they generally took into consideration the possibility of the outbreak of armed conflicts after the entry into force of those instruments despite the fact that in reality, treaties were concluded in order to strengthen relations between States, promote cooperation and avoid disputes or conflicts. Others were open to considering the intention of the parties to the treaties, but not as the main factor. Still others maintained that the intention of the parties was a crucial factor in determining the susceptibility of a treaty to termination or suspension when the treaty itself contained no provisions on the matter and when the travaux préparatoires, the context in which the treaty had been concluded and the nature of the treaty shed no light on the subject. It was also noted that the practical difficulties faced in ascertaining the intention of States parties were not insurmountable and were often of a type encountered by domestic courts.

91. It was proposed that the criterion for the survival of treaties during an armed conflict should instead be sought primarily in their character, and that the indicative list put forward in draft article 7, paragraph 2, was indispensable in that regard. Other suggestions included considering the viability of the treaty itself and taking a contextual approach encompassing an examination of the object and purpose of the treaty and the nature and extent of the armed conflict or the legality of the actions of each party to the conflict. Another approach suggested was to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict.

6. Draft article 5 — Express provisions on the operation of treaties

92. The view was expressed that draft article 5 was unnecessary and could lead to misunderstandings. If treaties in general were not suspended or terminated by armed conflicts, that was all the more true of treaties expressly covering such situations. Moreover, the outbreak of an armed conflict clearly did not prevent the parties from concluding legal agreements on the suspension or waiver of a treaty concerned with such situations. Nor did paragraph 2 serve a useful purpose: legally speaking, armed conflicts never weaken or abolish the sovereign right of a State to conclude treaties.

93. Others found draft article 5 to be generally acceptable but agreed with the proposal to include a reference to the applicable *lex specialis* and to divide the two

paragraphs into separate articles. Support was also expressed for replacing the term "competence" with the term "capacity".

7. Draft article 6 — Treaties relating to the occasion for resort to armed conflict

94. While support was expressed for the proposal to delete draft article 6, others preferred to retain it, either intact or incorporated into draft article 4, as it preserved the integrity and continuity of international treaties.

8. Draft article 7 — The operation of treaties on the basis of necessary implication from their object and purpose

95. Some delegations recalled the difficulties with the entire provision and welcomed the Special Rapporteur's readiness to revisit it.

96. As regards the list of treaties in paragraph 2, agreement was expressed with the view that some of the categories of treaties could be classified under the heading of "law-making treaties", in the sense of treaties that created rules for regulating the future conduct of the parties without creating an international regime, status or system. It was suggested that if a list was retained, it should include treaties establishing borders. According to another suggestion, only those categories of treaties which were well known to have the effect of suspension or termination in the event of armed conflict should be included in the draft article. Other proposals included developing an annex, either to replace paragraph 2 or to complement it, and dealing with categories of treaties in the commentary. It was also proposed that the Commission study the elements which were common to those treaties in order to provide better guidance for the future.

97. Others cautioned against providing an arbitrary list of treaties which might create an *a contrario* presumption that treaties not included would automatically lapse in an armed conflict. Instead, draft article 7 ought to set forth the guiding principles for determining exactly which treaties, by virtue of their nature or purpose, would never be affected by an armed conflict. One such guiding principle would be the inviolability of certain treaties on account of their subject matter. It was also pointed out that such a generic approach would allow for greater flexibility, since some treaties might be multi-purpose and might not fall neatly into demarcated categories.

9. Draft article 8 — Mode of suspension or termination

98. The view was expressed that draft article 8 was generally acceptable, although the suggestion (made at the fifty-seventh session of the Commission) that the concepts of suspension and termination be dealt with in different articles required clarification.

10. Draft article 10 — Legality of the conduct of parties

99. It was reiterated that the different status of States, with respect to adherence to Article 2, paragraph 4, of the Charter of the United Nations, was critical and that the aggressor State and the victim of aggression were not to be treated on an equal footing. Doing so would be tantamount to recognizing an unlawful act. It was recalled that the Institute of International Law, in its resolution on the effects of armed conflicts on treaties, had decided that States should be entitled to suspend, in

whole or in part, the operation of a treaty that was incompatible with their inherent right to self-defence. Such a distinction had to be taken into account in the draft articles.

E. Expulsion of aliens

100. Regret was expressed that the topic was not considered by the Commission at its fifty-eighth session. The view was expressed that the Commission should adopt a comprehensive approach to the expulsion of aliens, by considering all legal aspects of the question, including issues relating to human rights, repatriation and human trafficking or the smuggling of migrants. It was observed that the right to expel aliens whose presence is considered undesirable for national security reasons was uncontroversial. However, such a right was subject to the limits established by international law. The importance of respect for human rights, in particular the safety and human dignity of the alien expelled, was emphasized. Attention was also drawn to certain procedural guarantees such as due process. The view was expressed that migrants who are victims of trafficking or smuggling have the right to return to their countries and to be accepted there. Furthermore, the collective expulsion of aliens was considered to be prohibited by international law.

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

1. General comments

101. Delegations welcomed the first report of the Special Rapporteur and some of them endorsed the general approach taken in the report.

102. Some delegations were of the view that the Commission should first undertake an analysis of the relevant treaties, national legislation and practice, and it was suggested that the Secretariat could assist the Special Rapporteur in such a task.

2. Scope of the topic

103. Support was expressed for the cautious approach advanced in the Commission with regard to the scope of the topic. However, according to another view, the topic should have been part of a broader study on jurisdiction. While it was proposed that the Commission also examine extradition procedures, the opinion was expressed that it should not undertake a review of extradition law and deportation.

104. Some delegations invited the Commission to examine the related principle of universal jurisdiction, or at least the relationship between the topic and the principle. Other delegations, while recognizing the link between universal jurisdiction and the obligation to extradite or prosecute, were of the view that the Commission should focus on the latter. It was suggested that the question of universal jurisdiction and the definition of international crimes deserved to be considered as separate topics.

105. It was also proposed that the Commission examine the relationship between the obligation to extradite or prosecute and the principles of State sovereignty and human rights protection.

3. Customary law nature of the obligation

106. Some delegations suggested that the Commission determine whether the obligation to extradite or prosecute had become part of customary international law. Should that be the case, the Commission would need to specify the offences to which the obligation would apply.

107. It was also remarked that the customary nature of the obligation would not necessarily follow from the existence of multilateral treaties imposing such an obligation.

108. The view was expressed that the principle *aut dedere aut judicare* was not part of customary international law and that it certainly did not belong to *jus cogens*. In any event, it was observed that if the obligation had become part of customary international law, that would only be true in respect of a limited number of crimes.

109. According to another view, the principle *aut dedere aut judicare* had started to shape States' conduct beyond the obligations arising from international treaties with regard to the most heinous international crimes. It was also believed that in certain areas such as counter-terrorism, the obligation to extradite or prosecute was accepted by the whole international community.

110. It was further suggested that the Commission concentrate on the progressive development of the relevant rules.

4. Scope and content of the obligation

111. Some delegations expressed support for the approach taken by the Special Rapporteur, according to which the obligation to extradite or prosecute gave States the choice to decide which part of the obligation they were willing to fulfil. However, the point was also made that the obligation to extradite or prosecute presupposed a choice that did not always exist in practice. In that respect, it was suggested that the Commission consider situations in which a State could not or did not extradite an offender. It was observed that the obligation to extradite or prosecute presupposed the presence of the suspect in the territory of the State. It was also considered that the Commission should offer guidance to States as to whether they should extradite or prosecute.

112. The view was expressed that the Commission should determine which States should have priority in exercising jurisdiction. In that regard, it was suggested that preference be given to the State on whose territory the crime had been committed and that priority jurisdiction entailed an obligation to exercise such jurisdiction and to request extradition for that purpose.

5. Crimes covered by the obligation

113. It was suggested that the obligation to extradite or prosecute be limited to crimes that affect the international community as a whole. In particular, it was considered that the principle would apply to crimes recognized under customary international law as well as serious offences covered by multilateral treaties such as those relating to hijacking aircraft, narcotic drugs and terrorism. It was further noted that the obligation should apply to serious international and transnational crimes, including war crimes, crimes against humanity, genocide, torture and terrorist acts.

114. Doubts were raised by other delegations as to the appropriateness of distinguishing, in that context, between crimes recognized under customary international law and crimes defined under treaty law.

115. Different views were expressed as to whether the obligation to extradite or prosecute was applicable only to crimes that were covered by the principle of universal jurisdiction, with some delegations favouring this narrower view and others questioning such a limitation. In that context, it was considered that the obligation to extradite or prosecute should first and foremost relate to crimes for which universal jurisdiction already existed.

116. The view was expressed that the obligation to extradite or prosecute should also apply to serious crimes under domestic law which caused significant harm to the State and the public interest of the people. According to another view, crimes that were defined only in domestic legislation should be excluded from the topic.

(a) Link with universal jurisdiction

117. It was noted that the principle of universal jurisdiction was instrumental to the full operation of the obligation to extradite or prosecute. It was also observed that a State might not be in a position to extradite if there was no treaty between the requested and the requesting State or if the requirement of double criminality was not met, there being at the same time an inability to prosecute because of the lack of jurisdiction.

(b) Surrender of suspects to international criminal tribunals

118. Some delegations referred to the surrender of suspects to an international criminal tribunal as a possible additional option to the alternative offered by the principle *aut dedere aut judicare*. While some delegations emphasized the role of international criminal tribunals in that context, other delegations were of the view that the Commission should not examine the surrender of suspects to such tribunals, which was governed by distinct legal rules.

(c) National legislation and practice

119. In providing details on national legislation, some delegations indicated that laws were being or had been passed in order to implement the obligation to extradite or prosecute, in particular with respect to international crimes such as genocide, war crimes, crimes against humanity and torture.

120. However, it was pointed out that some domestic laws on extradition did not provide for the obligation to extradite or prosecute. Other national laws might not allow extradition in the absence of a bilateral extradition treaty, or imposed restrictions upon the extradition of nationals or persons who had been granted political asylum. The extradition of nationals was subject to several limitations relating to the type of crime and the existence of reciprocity established by treaty, as well as the condition that a fair trial be guaranteed by the law of the requesting State.

121. Attention was also drawn to the existence of bilateral extradition agreements which did not provide for the obligation to extradite or prosecute, and to sectoral conventions on terrorism containing limitations on extradition that could be incompatible with the obligation to extradite or prosecute.

122. It was further observed that reservations to multilateral treaties containing the obligation to extradite or prosecute had been made in line with national legislation prohibiting extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State, with the exclusion, however, of crimes recognized under customary international law such as genocide, crimes against humanity and war crimes.

(d) Final outcome of the work of the Commission

123. Some delegations observed that the final outcome of the work of the Commission on the topic should be determined at a later stage. Without prejudice to a final decision on the matter, other delegations supported the idea of a set of draft rules.

G. Other decisions and conclusions of the Commission

124. Appreciation was expressed for the central role and important contribution of the International Law Commission in the progressive development and codification of international law. It was also observed that the traditional role of the Commission was changing and would need to continue to be adapted to the challenges of the changing international environment. Accordingly, the Commission should not shy away from current issues of international law, innovative working methods and different products for its work, for which it might require increased use of external expertise. According to another view, it was considered to be appropriate that the Commission's efforts towards the codification and progressive development of international law be pursued in close consultation with States. A preference was expressed for reconsidering the question of honorariums for Special Rapporteurs.

125. As regards the long-term programme of work of the Commission, the Commission and its secretariat were commended for focusing on real-world problems. At the same time, it was suggested that care be taken in choosing the topics to ensure consistency with the selection criteria determined by the Commission, in particular the real needs of the international community for codification and progressive development in a given area of international law. It was also suggested that the focus be on topics for which there was abundant case law and established State practice, or on topics that reflected the consistency and continuity of the Commission's work, rather than on passing concerns.

126. With regard to the five new topics included in the Commission's long-term programme of work:

(a) General support was expressed for the topic "Immunity of State officials from foreign criminal jurisdiction", which had come before the International Court of Justice on a number of occasions. The view was expressed that the time seemed ripe to take stock of present practice and to attempt to elaborate general rules on the subject. It was also noted that due priority should be given to the need for State officials to enjoy such immunity, for the sake of stable relations among States;

(b) It was also suggested that the Commission take up the topic "Protection of persons in the event of disasters" expeditiously and that, rather than employ a rights-based approach, the Commission should focus on the development of concrete legal tools. It was observed further that, unlike international humanitarian law, international law applicable to natural disasters was relatively fragmented and

undeveloped and steps to codify it could save lives and alleviate human suffering. Specifically, it was suggested that the topic include specific treatment of all relevant actions and the omission of factors such as the obligations of transit countries with respect to the principle of access. Some speakers expressed doubts about the suitability of the topic for consideration by the Commission. It was further suggested that the Commission could carry out a further preliminary study of the topic;

(c) Support was expressed for the inclusion of the topic "Jurisdictional immunity of international organizations", as it was a topic where the practice of States required harmonization. National courts needed greater legal certainty when ruling on the immunity of international organizations. The inclusion of the topic would supplement the Commission's work with regard to both immunity and international organizations. Other speakers expressed doubts about the necessity of considering the topic;

(d) Support was also expressed for the topic "Protection of personal data in the transborder flow of information". It was noted that while there existed a high level of interest, in an increasingly globalized world, in codification and progressive development of the international rules in that area, the question remained as to whether State practice was sufficiently consolidated in relation to ongoing rapid technological development. Others were concerned that the topic did not meet the Commission's criteria for consideration and noted that it raised significant political and policy issues. According to another suggestion, the Commission could carry out a further preliminary study of the topic;

(e) Support was likewise expressed for the inclusion of the topic "Extraterritorial jurisdiction". It was recommended that its scope be properly delimited, because of its potential broadness. Others remarked that the topic would require coordination with that of the obligation to extradite or prosecute. According to another suggestion, the Commission could carry out a further preliminary study of the topic.

127. The view was expressed that reconsidering the topic "Most-favoured-nation clauses" was unnecessary, since the development of international economic and investment law was progressing in specific forums. It was also noted that the basic policy differences that had prevented the General Assembly from taking action on the Commission's earlier draft articles on the topic had not yet been resolved. According to another view, although policy differences preventing the adoption of earlier articles on the topic had still not been resolved, developments in the situation since 1978 had created an environment in which consideration of the topic might prove more fruitful. It was noted that while the concept of most-favoured nation had historically been related to the fields of trade and investment, it also resonated within the broader sphere of international law. Its similarities with and dissimilarities from the principle of non-discrimination in other branches of international law would benefit from the Commission's careful consideration. Accordingly, it was appropriate for the Commission to give serious consideration to the inclusion of the topic in its long-term programme of work.

128. Regarding suggestions for additional topics for possible inclusion in the long-term programme of work of the Commission, the representative of Germany referred to the suggestion, made during the informal discussion on the Commission's report, that the Commission consider the topic "Adapting

international treaties to changing circumstances", focusing on what constituted subsequent agreement and subsequent practice, and the way in which they affected the implementation and interpretation of treaties. The representative of Sierra Leone also proposed the following topics: the legal consequences of the use of private armies in internal conflicts; the legal consequences of the involvement of multilateral corporations in internal conflicts; and the legal consequences of the involvement of security agencies in internal conflicts.