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# Report of the International Law Commission on the work of its seventieth session (2018)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session, prepared by the Secretariat

Contents



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# I. Introduction

1. At its seventy-third session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, held on 21 September 2018, to include in its agenda the item entitled "Report of the International Law Commission on the work of its seventieth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 20th to 30th and 35th meetings, held from 22 to 26 October, on 30 and 31 October and on 13 November 2018. The Committee considered the item in three parts. The Chairperson of the International Law Commission at its seventieth session introduced the report of the Commission on the work of that session (A/72/10) as follows: chapters I to V, XII and XIII at the 20th meeting on 22 October, chapters VI and VIII at the 24th meeting on 25 October, and chapters IX to XI at the 28th meeting on 30 October 2018.

3. At its 35th meeting, on 13 November 2018, the Sixth Committee adopted draft resolution A/C.6/73/L.22 entitled "Report of the International Law Commission on the work of its seventieth session" without a vote. The Committee also had before it a statement submitted by the Secretary-General in accordance with rule 153 of the rules of procedure of the General Assembly concerning the programme budget implications of draft resolution A/C.6/73/L.22 (A/C.6/73/L.29). On the same day, the Committee also adopted with a vote a draft resolution entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (A/C.6/73/L.23) and a draft resolution entitled "Identification of customary international law" (A/C.6/73/L.24). After the General Assembly had considered the relevant report of the Sixth Committee (A/73/556), it adopted the draft resolutions, respectively, as resolutions 73/265, at its 65th plenary meeting, on 22 December 2018, and 73/202 and 73/203, at its 62nd plenary meeting, on 20 December 2018.

4. The present topical summary has been prepared pursuant to paragraph 39 of resolution 73/265, in 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 seventy-third session of the Assembly.

5. The present topical summary consists of two parts. The first part contains seven sections, reflecting the current programme of work of the Commission: A. Peremptory norms of general international law (*jus cogens*) (A/73/10, chap. VIII); B. Protection of the environment in relation to armed conflicts (*ibid*., chap. IX); C. Succession of States in respect of State responsibility (*ibid*., chap. X); D. Immunity of State officials from foreign criminal jurisdiction (*ibid*., chap. XI); and E. Other decisions and conclusions of the Commission (*ibid*., chap. XIII). The second part contains summaries on the topics: A. Provisional application of treaties (A/72/10, chap. V); and B. Protection of the atmosphere (*ibid*., chap. VI), on which the Commission completed work at its seventieth session on first reading (A/73/10, chaps. VI and VII). The Commission will resume its consideration of these topics at its seventy-second session, in 2020. The second part also contains summaries on the following topics, on which the Commission has completed work on second reading during its seventieth session: A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties; and B. Identification of customary international law.

# II. Topics and items on the current programme of work of the Commission

## A. Peremptory norms of general international law (*jus cogens*)

### 1. General comments

6. General support was expressed for the Commission's work on the topic "Peremptory norms of general international law (*jus cogens*)" with some delegations emphasizing its importance and others commending the Special Rapporteur's attempts to address the possible consequences of *jus cogens* norms beyond the law of treaties and the law of State responsibility. Some delegations nonetheless called for a cautious approach given the need to secure wide support from States, while others expressed concerns about the topic as a whole in light of uncertainties surrounding the concept of peremptory norms of general international law (*jus cogens*).

7. Some delegations commended the Commission and the Special Rapporteur for the balanced approach taken between theory and practice. While some delegations supported relying on a thorough analysis of existing law and established practice as well as judicial precedents, it was stated that the practice of international organizations and legal bodies could only help identify State practice, and that the work of international human rights bodies and the decisions of national courts were not appropriate for identifying peremptory norms of general international law (*jus cogens*). A number of delegations further pointed to the paucity of relevant practice and called on the Commission not to draw conclusions where no State practice existed.

8. Some delegations emphasized the need to pay greater attention to existing relevant international law and not to depart from the existing normative framework. Others considered that the topic would be best dealt with by the Commission through a conceptual and analytical approach rather than with a view to developing a new normative framework for States. It was also underlined that work on the topic should be confined to stating and clarifying international law as it existed.

9. Some delegations welcomed that draft conclusions were based on or consistent with existing legal instruments, including the 1969 Vienna Convention on the Law of Treaties (the "1969 Vienna Convention"),[1] the 2001 articles on responsibility of States for internationally wrongful acts[2] or the 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[3] The view was expressed that the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the 1969 Vienna Convention. It was also stated that, where conclusions were based on the provisions of the Convention, they should follow the language of such provisions.

10. Whereas some delegations further underlined the need to ensure a coherent and consistent approach with all related topics previously considered or currently under consideration by the Commission, it was emphasized that a solution ought to be found to address the fact that some of the draft conclusions overlapped with the Commission's work on other topics.

11. Some delegations expressed concern about the organization of work for the topic, regretting the fact that draft conclusions were not planned to be presented to

[1] Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[2] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., para. 76.

[3] *Ibid.*, *2006*, vol. II (Part Two), p. 161, para. 176.

the plenary session of the Commission until a full set of conclusions and commentaries had been adopted. In their view, this made it difficult for States to consider the Commission's annual work on the topic in a meaningful manner. Some delegations underlined that their comments were necessarily provisional and subject to the commentaries. Others considered the methodology acceptable, but nonetheless encouraged the Commission to prepare commentaries. Concern was also expressed about the fact that a large quantity of draft conclusions had been suggested in a short period of time. The Commission was invited to group and simplify them into more succinct provisions. It was further proposed that more time was required for States to comment on the draft conclusions.

### 2. Specific comments

12. Some delegations welcomed draft conclusion 10 (Invalidity and termination of treaties in conflict with a peremptory norm of general international law (*jus cogens*)) and considered that it largely reflected the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law – a comment also made for draft conclusions 11, 12 and 13. Nonetheless, a number of drafting suggestions were made, including merging draft conclusions 10 to 14.

13. Divergent views were expressed with regard to paragraph 1 of draft conclusion 11 (Separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)), for which support was voiced while its content was questioned and led to drafting suggestions. For example, the view was expressed that the it could follow a more nuanced position than the one taken in the 1969 Vienna Convention, by allowing for severability. Several delegations called for further clarification of paragraph 2. It was also suggested that a more detailed explanation of the different legal consequences arising from the situations provided for in the draft conclusion be given. Support was further conveyed for widening the scope of the draft conclusions in order to also cover acts of international organizations that create obligations for States.

14. Draft conclusion 12 (Consequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (*jus cogens*)) was welcomed by several delegations. It also led to various drafting suggestions, including introducing a new paragraph tracking either article 70 of the 1969 Vienna Convention stating that, in case of invalidity of a treaty, participants should be released from their obligations to perform their obligations under the treaty, or article 71, paragraph 1 (*b*), of the 1969 Vienna Convention requesting States to bring their mutual relations into conformity with peremptory norms of general international law (*jus cogens*).

15. Draft conclusion 13 (Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)), in the version proposed by the Special Rapporteur, was supported by some delegations. Other delegations expressed either the need to specify that reservations to the provisions of a treaty reflecting a peremptory norm were not permitted, or a preference for the wording reflected in paragraph 76 (*b*) of the third report of the Special Rapporteur (A/CN.4/714 and Corr.1).

16. Divergent views were expressed with regard to draft conclusion 14 (Procedural requirements) – some delegations supporting it – sometimes with qualifications – while others did not support it for various reasons, for example, that it should be modelled more closely on article 65 of the 1969 Vienna Convention or that it may clearly be identified as a proposal for progressive development. It was further suggested that a procedural paragraph with respect to the invocation of the invalidity of a treaty reflecting the general rules contained in articles 65 and 67

of the Convention could be added – a remark which also applied to draft conclusions 15 to 17. It was also observed that the draft conclusion might only apply in the context of inter-State disputes.

17. With respect to draft conclusion 15 (Consequences of peremptory norms of general international law (*jus cogens*) for customary international law), while support was conveyed for the Special Rapporteur's approach of not applying the persistent objector rule to peremptory norms of general international law (*jus cogens*), reservations were made with regard to viewing such norms as superior to rules of customary international law. The view was further expressed that State practice in conflict with a peremptory norm did not establish a rule of customary international law.

18. As regards draft conclusion 16 (Consequences of peremptory norms of general international law (*jus cogens*) on unilateral acts), support was expressed for the view that a unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) would be invalid. It was suggested that the term "unilateral act" be clarified. It was also proposed that, rather than "unilateral acts", the phrase "unilateral declarations" be used in the draft conclusion to avoid confusion. Furthermore, it was suggested that it be made clear that unilateral acts would be null and void *ab initio*.

19. Regarding draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations), divergent views were expressed concerning the Special Rapporteur's proposal that binding resolutions of international organizations do not establish binding obligations if they conflict with peremptory norms of general international law (*jus cogens*). Some delegations supported this approach, including, for example, by inviting the Special Rapporteur to provide for invalidity in such cases. Others did not support the proposal. Similarly, some delegations were in favour of retaining an explicit reference to Security Council decisions in the text of the draft conclusion, considering, for instance, that the Commission should not shy away from recognizing that the Security Council is also bound by peremptory norms of general international law (*jus cogens*), while other delegations did not share that view, as it could undermine the legality and effectiveness of binding resolutions adopted by the Security Council. The introduction of procedural safeguards was also requested.

20. In relation to draft conclusion 18 (The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*), the Commission was asked to provide clarification and more in-depth analysis on the relationship between peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations.

21. Support was expressed for the Special Rapporteur's decision not to require a "serious" breach of an obligation arising under a peremptory norm of general international law (*jus cogens*). Further clarification was sought on paragraph 2 of draft conclusion 19 (Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness). Concern was also expressed regarding the reliance by the Special Rapporteur on the articles on responsibility of States for internationally wrongful acts, which were non-binding.

22. Draft conclusion 20 (Duty to cooperate) was welcomed by several delegations, because it drew upon articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts, and because it was considered that a duty to cooperate reflected existing customary international law. Doubt was nonetheless also expressed about the existence of such a duty. It was further suggested that draft conclusions 20 to 22 could be merged.

23. While being both the subject of support, because it drew upon the articles on responsibility of States for internationally wrongful acts, and concern, because it relied upon them, draft conclusion 21 (Duty not to recognize or render assistance) was considered by some delegations as not reflecting customary international law. It was also stated that the draft conclusion was closely connected to draft conclusion 18 and should follow it.

24. A number of delegations did not support draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law (*jus cogens*), and considered that it deviated from the scope of the topic and that it did not reflect any trend in State practice or existing customary international law. Some delegations called for its deletion.

25. A similar absence of support was expressed in relation to draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae)*, either for the same reasons and in light of the controversy in the Commission concerning exceptions to immunities *ratione materiae* which arose in the context of the topic "Immunity of State officials from foreign criminal jurisdiction". It was also considered that the content and scope of the concept of peremptory norms of general international law (*jus cogens*) itself was not clear enough. It was thus also suggested to delete the draft conclusion.

### 3. Future work

26. It was emphasized that the Commission should not unduly rush to conclude its work on the topic and should ensure that it spends enough time on the matter.

27. Whereas a number of delegations continued to voice their support for the development of an illustrative list of peremptory norms of general international law (*jus cogens*), some did so without qualifications, considering, for example, that it was one of the crucial benefits of the work on the topic. Others supported a non-exhaustive list that should not prejudice the legal status of norms which would not be included therein. It was reiterated that the Commission should include the grounds and evidence on which the Commission considered that the listed norms had acquired the status of *jus cogens*.

28. Some delegations nonetheless continued to advise against preparing an illustrative list, either because, for instance, it was considered a difficult task or it would prevent the emergence of State practice in support of other norms, or it could hinder the development of the concept of peremptory norms of general international law (*jus cogens*) itself. It was also stated that it would generate significant disagreement among States and dilute the concept of peremptory norms of general international law (*jus cogens*). It was further suggested that, if such a list were nonetheless included, reference should be made to the commentaries on articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts,[4] which included a tentative and non-exhaustive list of peremptory norms of general international law (*jus cogens*).

29. A number of delegations did not support the the concept of regional peremptory norms, with some considering, for example, that it would undermine the integrity of universally applicable peremptory norms of general international law (*jus cogens*). It was also suggested that the debate on the issue should be held in a cautious manner so as not to jeopardize norms that were universally recognizable and applicable.

[4] *Ibid., 2001*, vol. II (Part Two) and corrigendum, pp. 84–85 and 112–113.

## B. Protection of the environment in relation to armed conflicts

### 1. General comments

30. Delegations generally commended the continuity of approach taken by the Special Rapporteur on the topic. Several delegations expressed support for the Commission's consideration of the interplay between the law of occupation, international human rights law and international environmental law as it related to the topic. A number of delegations emphasized that the Commission should not seek to change international humanitarian law or create new norms. Some delegations expressed scepticism as to the outcome of the Commission's consideration of the topic.

31. Delegations raised the question of the applicability of the draft principles to both international and non-international armed conflicts. Some delegations emphasized the difference between the two with it being held that such differences precluded applicability of the rules governing international armed conflicts to non-international armed conflicts. A number of delegations encouraged further consideration of the issue by the Commission.

### 2. Specific comments

32. With regard to draft principle 4 (Measures to enhance the protection of the environment), the inclusion of a reference to "other measures" in paragraph 1 was questioned given that legislative, administrative and judicial measures would appear to constitute an exhaustive list. It was suggested that the commentaries refer to more recent relevant texts.

33. Concerning draft principle 5 [I-(x)] (Designation of protected zones), it was noted that the term "protected zone" went beyond the concept of "safety zones" used in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). It was suggested to add a reference to the 1972 Convention for the protection of the world cultural and natural heritage and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict in the commentary to the draft principle while the view was also expressed, with respect to draft principle 5 as well as draft principle 13 [II-5] (Protected zones), that application by analogy of the legal regime for protection of cultural heritage to the present topic was inappropriate.

34. Support was expressed for the recognition in the commentary to draft principle 6 (Protection of the environment of indigenous peoples) of the special relationship between indigenous peoples and their environment. A distinction between indigenous peoples and local communities was also noted including a call for clarification of whether draft principle 6 would also apply to local communities. The view was also expressed that draft principle 6 was not directly related to the topic.

35. The view was expressed that the obligations contained in draft principle 8 (Peace operations) went significantly beyond current legal requirements. It was noted that the term "peace operations" could lead to confusion and that a delimitation of the applicability of the draft principle was advisable.

36. With regard to draft principle 10 [II-2] (Application of the law of armed conflict to the natural environment), the necessity of taking into account, in assessing the illegality of an attack on the environment, international practice concerning the relationship between the concept of military advantage and damage to the environment was raised.

37. A need for clarification of the meaning of the term "environmental considerations" as used in draft principle 11 [II-3] (Environmental considerations) was noted.

38. Concerning draft principle 16 (Remnants of war), it was suggested that clarification of not only the rights and obligations of the former parties to a conflict but also those of other relevant actors would be useful. The absence of a definition of "toxic remnants of war" under existing international humanitarian law was noted.

39. With regard to draft principle 17 (Remnants of war at sea), the importance of the cooperation of coastal States in clearing remnants of war was underscored.

40. Concerning draft principle 18 (Sharing and granting access to information), some delegations questioned whether the regulation of access to information was necessary to facilitate remedial measures after an armed conflict. The obligations of an international organization to protect the interests of their member States was also raised.

41. Delegations also commented on draft principles 19 (General obligations of an Occupying Power), 20 (Sustainable use of natural resources) and 21 (Due diligence) as provisionally adopted by the Drafting Committee during the seventieth session. A number of delegations expressed agreement with the placement of the draft principles 19, 20, 21 in a new Part Four dealing with situations of occupation. Support was also expressed for the inclusion of a separate draft principle stating that Parts One, Two and Three applied *mutatis mutandis* to situations of occupation while other delegations made reference to the specific draft principles that would apply in such situations. An interest in considering the extent to which the draft principles might be relevant to the administration of a territory by an international organization was put forth with the view being expressed that the commentaries should recognize that the draft principles relevant to Occupying Powers could apply in the context of the administration of a territory under the mandate of the Security Council. Other delegations held that a United Nations mission could not be equated with an Occupying Power.

42. While support to proceed without a definition of occupation was expressed, other delegations stressed the importance of clarity as to whether the reference to "occupation" was intended to be in accordance with either article 42 of the "Hague Regulations" (see the Hague Conventions respecting the Laws and Customs of War on Land) or with the relevant provisions of the 1949 Geneva Conventions for the protection of war victims.

43. With respect to paragraph 1 of draft principle 19 (General obligations of an Occupying Power) as provisionally adopted by the Drafting Committee, views were expressed both in support of, and in opposition to, the omission of the reference to "adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights". Some delegations sought further clarity in the commentaries on the applicability of the draft principles to pertinent maritime areas. The assumption was expressed that rules incumbent upon an Occupying Power in the ordinary course would remain applicable to its conduct in the occupied territory unless such rules provided otherwise.

44. Regarding paragraph 2 of draft principle 19, which, as reflected in the version provisionally adopted by the Drafting Committee, would require an Occupying Power to take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory, it was noted that the conditionality in such formulation appeared to limit the scope of the draft principles. Separately, several delegations highlighted the relevancy of other human rights in addition to the right to

health. A suggestion was made to expand the category of persons entitled to the benefit of environmental protection to include also "future generations" while the replacement of the phrase "population of the occupied territory" with the phrase "protected population [or "protected persons"] of the occupied territory" in both draft principle 19 and draft principle 20 was also proposed. It was suggested that "significantly" be added before "prejudice the health". The view was also expressed that paragraph 2 should be deleted as it is merely an example of the principle put forth in paragraph 1.

45. Several delegations emphasized the importance of ensuring sustainable use of natural resources. While the view was expressed that draft principle 20 (Sustainable use of natural resources) did not hew closely enough to the text of the Regulations annexed to the 1907 fourth Hague Convention respecting the Laws and Customs of War on Land (Hague Convention IV) and in particular article 55, other delegations contended that in addition to article 55 of that Convention, article 47 of that Convention as well as article 33 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) should be taken into account. In that regard, the suggestion was made that the commentary should specify the situations in which the conduct of the Occupying Power, as it relates to its exploitation of the natural resources of the occupied territory, might violate of laws of armed conflict either because such conduct amounted to pillage or because it violated the usufructuary rule. There was a request for clarification as to the use of the natural resources of the occupied territory for not only the benefit of the population but also "other lawful purposes". The view was expressed that the obligation to minimize environmental harm was insufficient and that prevention was the appropriate standard. Several delegations emphasized the continued applicability of the principle of permanent sovereignty in situations of occupation. The importance of clarifying the role of the population of the occupied territories in determining how their natural resources would be used was noted. Support was expressed for a mechanism to consider complaints of environmental damage caused during an armed conflict.

46. With respect to draft principle 21 (Due diligence), the use of the phrase "exercise due diligence" was questioned by some delegations. It was noted that the phrase "take appropriate measures" was used in a similar context in paragraph 2 of draft principle 19 and that precedent for using such term could be found in the Commission's articles on the law of transboundary aquifers[5] whereas "exercise due diligence" could not. The Commission was advised to carefully consider its choice of terminology. The relative weakness of an obligation of due diligence was also raised. Other delegations expressed support for the concept of "due diligence".

### 3. Future work

47. Suggestions were made that the Commission address the applicability of the draft principles to the protection of the environment in non-international armed conflicts and responsibility and liability for environmental harm including the responsibility of non-State actors and compensation mechanisms.

[5] *Ibid., 2008*, vol. II (Part Two), pp. 19–22, para. 53, especially article 11.

## C. Succession of States in respect of State responsibility

### 1. General comments

48. A number of delegations underlined the importance of the topic, while other delegations observed that the topic may be of limited practical relevance and that its outcome may not enjoy broad acceptance by States.

49. It was generally remarked that the scarcity or absence of available State practice presented particular challenges for the topic; in that regard, several delegations agreed with the Special Rapporteur that the limited State practice that was available was "diverse, context-specific and sensitive" (A/CN.4/719, para. 16), as well as susceptible to divergent interpretations. A cautious approach was thus called for. Several delegations underlined the importance of collecting a wide range of State practice from the principal legal systems of the world.

50. A number of delegations highlighted the importance of maintaining consistency with the 1978 Vienna Convention on succession of States in respect of treaties,[6] with the 1983 Vienna Convention on succession of States in respect of State property, archives and debts,[7] and with the 2001 articles on responsibility of States for internationally wrongful acts. Support was expressed for the suggestion by some members of the Commission to change the name of the topic to "State responsibility problems in cases of succession of States",[8] although the view was expressed that the words "aspects" or "dimensions" may be more appropriate than "problems".

51. Concerning a possible underlying general rule applicable to the succession of States in respect of State responsibility, several delegations agreed with the Special Rapporteur that a general theory of non-succession should not be replaced by a similar theory in favour of succession in respect of State responsibility, and that a more flexible and realistic approach was required. A number of delegations expressed support for a general rule of non-succession, with some exceptions thereto. The relevance of the principle of unjust enrichment was highlighted as a possible foundation for such exceptions. The view was also advanced that available State practice did not support the emergence of any new rule deviating from the general rule of non-succession.

### 2. Specific comments

52. A number of delegations expressed views in relation to the draft articles as proposed by the Special Rapporteur in his second report. In particular, several delegations voiced support for draft article 5 (Cases of succession of States covered by the present draft articles). The political sensitivity of the issue of legality of succession was underlined, and a number of delegations indicated that the commentaries should ensure that no advantage is inadvertently afforded to unlawful successors by draft article 5. It was also remarked that a situation of unlawful succession may not constitute a succession of States at all.

53. It was noted that a thorough debate was necessary in relation to draft article 6 (General rule) in light of its crucial importance. It was suggested that the draft article be revised to reflect the continued application of the rule of non-succession to State responsibility. The view was also expressed that draft article 6 was redundant because, if the predecessor State still existed, the general rules of responsibility would apply.

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[6] United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[7] *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts, Vienna, 1 March–8 April 1983*, vol. II, *Documents of the Conference* (A/CONF.117/16 (Vol. II)), p. 141 (document A/CONF.117/14).

[8] A/73/10, para. 239.

It was suggested that the use of the term “reparation” in draft article 6, paragraph 2, may be interpreted as limiting the scope of the draft articles to only certain aspects of State responsibility. Support was expressed for draft article 6, paragraph 4.

54. In relation to draft articles 7 to 11, the view was expressed that they would constitute progressive development rather than codification of international law. Furthermore, it was suggested that any language possibly implying an automatic transfer of responsibility in case of succession should be avoided.

55. In particular, in relation to draft articles 7 (Separation of parts of a State (secession)), 8 (Newly independent States) and 9 (Transfer of part of the territory of a State), which dealt with cases of succession where the predecessor State continued to exist, a number of delegations affirmed that certain terms (including “particular circumstances”, “direct link”, “organ of a territorial unit”) would need clarification. Concern was also expressed in relation to the general approach taken in these draft articles. Support was voiced for the rationale underlying draft article 7, paragraph 4, on insurrectional or other movements and draft article 8, paragraph 3, on national liberation or other movements. In relation to draft article 8, it was observed that the category of “newly independent States” may be obsolete.

56. In relation to draft articles 10 (Uniting of States) and 11 (Dissolution of State), which dealt with situations where the predecessor State had ceased to exist, a number of delegations considered that the State practice relied upon was not relevant, nor did it support the position expressed. Understanding was nevertheless expressed for the intended rationale of the two draft articles. It was underlined that it would be difficult to articulate a unified rule concerning all cases where the predecessor State had ceased to exist. In relation to draft article 11, in particular, a cautious approach was advocated and support was expressed for the principle that no transfer of the obligations arising from an internationally wrongful act could occur in the absence of agreement.

57. Several delegations also expressed views in relation to the interim oral report by the Drafting Committee on draft article 1, paragraph 2, and draft articles 5 and 6, as provisionally adopted by the Drafting Committee.[9] In particular, delegations generally welcomed the provisional adoption by the Drafting Committee of draft article 1 (Scope), paragraph 2, concerning the subsidiary nature of the draft articles, which would apply in the absence of any different solution agreed upon by the States concerned. The view was also expressed that such paragraph was redundant in view of the *lex specialis* principle. In relation to draft article 6 (No effect upon attribution), support was voiced by some delegations, while a number of delegations suggested that the text be further clarified.

### 3. Future work

58. Support was expressed for the proposals by the Special Rapporteur concerning the future programme of work on this topic. The point was made that the focus of the topic should be on categories of State succession. It was proposed that the scope of the topic be limited to non-resolved consequences of internationally wrongful acts predating a succession of States, rather than on the possible devolution of rights and obligations. Furthermore, it was affirmed that the consequences of responsibility for an internationally wrongful act, including the obligation to make reparation, should be analysed separately. It was also remarked that the international responsibility of successor States towards other successor States of the same predecessor State should be addressed. The view was voiced that the work of the Commission on this topic should not address subjects of international law other than States, nor should it

[9] The interim report of the Chairperson of the Drafting Committee is available in the Analytical Guide to the Work of the International Law Commission: http://legal.un.org/ilc/guide/gfra/shtml.

address the issue of continuation, rather than succession, of States. It was suggested that the pace of work be slowed down considering the complexity of the topic.

### 4. Final form

59. Several delegations considered that, in light of the limited support by States for treaties in this field of international law, a set of draft conclusions or guidelines, or an analytical report, might be a more appropriate final form for this topic. A number of delegations expressed the view that the final form should be determined at a later stage.

## D. Immunity of State officials from foreign criminal jurisdiction

### 1. General comments

60. Delegations generally emphasized the importance of the topic while noting its complexity and sensitivity for States. A number of delegations highlighted the need to strike a balance between the fight against impunity for serious international crimes and sovereign equality and stability in inter-State relations. Several delegations stressed that perpetrators of serious international crimes must be held to account, while others recalled that immunity of State officials stemmed from the sovereign equality of States. It was pointed out that immunity should not be equated with impunity. Some delegations underlined the procedural nature of immunity of State officials.

61. A concern was also expressed regarding the progress of the topic within the Commission. A number of delegations highlighted the distinction between immunity *ratione materiae* and immunity *ratione personae*. While support was expressed for the Commission's general approach to immunity *ratione personae*, a view was reiterated that the scope of immunity *ratione personae* extends beyond the *troika* of Heads of State, Heads of Government and Ministers for Foreign Affairs. It was also suggested that immunity should not prevent the prosecution of any persons who committed atrocities such as genocide, crimes against humanity, war crimes or the crime of aggression, even if they were Heads of State, Heads of Government and Ministers for Foreign Affairs.

62. A number of delegations expressed the hope that the work of the Commission would contribute to providing legal clarity and certainty on the subject. The Commission was urged to indicate to what extent it considered the provisions being elaborated to be a codification of existing law (*lex lata*) or progressive development of the law (*lex ferenda*).

63. Delegations generally emphasized the importance of the procedural aspects of immunity, in particular so as to prevent abuse and politicization. A view was nevertheless expressed that the development of procedural safeguards should not result in an undesirable strengthening of the immunity of high-level officials.

64. Some delegations suggested that the analysis of the procedural aspects should be comprehensive, both with respect to general procedural considerations and procedural safeguards related to exceptions to immunity. While a number of delegations welcomed the analysis of the procedural aspects of the topic in the sixth report of the Special Rapporteur (A/CN.4/722), a view was expressed that the sixth report did not address procedural aspects of immunity comprehensively enough. A number of delegations expressed regret that no new draft articles had been proposed, while others noted the preliminary nature of the discussion of the report in the Commission.

### 2. Specific comments

65. The debate on draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) during the seventy-second session of the Sixth Committee was recalled and the summary of that debate in the sixth report of the Special Rapporteur was welcomed. A number of delegations expressed support for draft article 7. While some delegations considered the inapplicability of immunity *ratione materiae* in cases of serious crimes under international law *lex lata*, other delegations considered draft article 7 to be progressive development of the law or reflective of a trend towards exceptions and limitations to immunity for serious crimes in current international law. A number of delegations maintained that draft article 7 did not reflect customary international law and disputed the existence of a trend to that effect. The view that draft article 7 was rather a proposal for "new law" beyond codification or progressive development was expressed. The Commission was asked to provide stronger evidence if it wished to assert that draft article 7 represented customary international law or clearly indicate to what extent it fell within the area of progressive development. A disappointment was also expressed with regard to the manner in which draft article 7 had been adopted and at the repercussions for the working methods of the Commission in the future. Several delegations recalled that draft article 7 was provisionally adopted by a recorded vote and a number of delegations urged the Commission to seek to achieve a consensual outcome.

66. Some delegations considered the current approach in draft article 7 of identifying certain international crimes to which immunity *ratione materiae* shall not apply inadvisable, as such a list would cause unnecessary controversy or because there were no criteria to identify which crimes should be included. It was also noted that substantial questions concerning the respective crimes could not be adequately addressed within the scope of the topic. The Commission was asked to consider adding the crime of aggression to the crimes currently listed in draft article 7.

67. With respect to procedural aspects, some delegations emphasized that the Commission should base its outcome on a comprehensive analysis of State practice. Some delegations noted the diversity of legal systems and paucity of practice regarding procedural aspects of immunity. In this connection, the Commission was asked to exercise caution before attempting to formulate any general rules.

68. Differing views were expressed on the need to define the concept of "criminal jurisdiction" for the purposes of the topic. The Commission was asked to distinguish more clearly between the question of what constitutes an exercise of criminal jurisdiction and the timing of considering immunity.

69. With respect to when immunity must be considered, a number of delegations asserted that immunity must be considered at an early stage of the proceedings. It was also acknowledged that an "early stage" of criminal proceedings may be difficult to define. A view was expressed that immunity should be taken into account during all stages of the proceedings. Some delegations underlined that a criminal investigation as such does not violate immunity, while others maintained that any initiation of criminal proceedings may violate immunity. It was highlighted that immunity must be considered before adopting binding measures of constraint against the official.

70. As to the three categories of acts addressed in the sixth report (namely detention, appearance as a witness, and precautionary measures), support was expressed for the Special Rapporteur's approach that such categories may entail exercises of jurisdiction. With respect to confiscation of objects as a precautionary measure, it was observed that there were special rules in relevant international conventions concerning immunity of State-owned property.

71. Regarding which authority of the forum State was appropriate in determining immunity, some delegations acknowledged the important role of courts, but maintained that authority of other organs should not be ruled out. A concern was raised that wide prosecutorial discretion in deciding on the applicability of immunities may lead to abuse and selective application.

72. Several delegations emphasized the importance of communication and cooperation between the State of nationality and the forum State, with some delegations underlining the need to develop mechanisms for communication for such purposes. It was stated that such cooperation must be based on the principles of complementarity and subsidiarity.

73. With respect to the relationship between invocation of immunity and State responsibility, a view was expressed that immunity should not lead to impunity and that the State of the official should cooperate in the administration of justice and assume responsibility for the internationally wrongful acts of its organs. It was also noted that such responsibility was the consequence of acknowledging that a State official acted in the exercise of official functions.

### 3. Future work

74. A number of delegations urged the Commission to continue its consideration of draft article 7, in particular in conjunction with procedural safeguards and taking into account the views of all members of the Commission and of delegations. The view was expressed that the substantive flaws of draft article 7 were such that they could not be remedied through procedural safeguards.

75. A number of delegations invited the Commission to further clarify and analyse the procedural aspects addressed in the sixth report of the Special Rapporteur. The Commission was also encouraged to examine invocation and waiver of immunity, consequences for State responsibility and civil liability. The difference between criminal investigations in general and the investigation of a particular case, and whether a lower or a higher domestic court is competent to determine immunity, were also mentioned as matters to be further analysed by the Commission.

76. Diverging views were expressed on the advisability of analysing issues related to the cooperation between States and international courts and tribunals and their relationship to the topic. Some delegations opposed such an analysis, pointing to the scope of the draft articles and the special nature of regimes for international criminal courts and tribunals. Other delegations welcomed efforts by the Commission in that regard. The Commission was discouraged from examining further the practice of red notices issued by INTERPOL (the International Criminal Police Organization), as national authorities remained competent and responsible to ensure compliance with rules of immunity in their application.

77. While the Commission was cautioned not to rush the completion of the topic, a number of delegations stated that they looked forward to examining a full set of draft articles at the next session. The Commission was asked to engage more with States and ensure consistency across its work on related topics.

### 4. Final form

78. Some delegations noted that if the Commission went beyond codification of existing law, the outcome of its work should be a draft treaty subject to express consent by States. A view was expressed that the acceptable way of regulating immunity of State officials from foreign criminal jurisdiction was through the conclusion of an international treaty.

## E. Other decisions and conclusions of the Commission

### 1. Future work of the Commission

79. The view was reiterated that there were too many topics on the programme of work of the Commission for Member States to realistically analyse within their existing capacities. According to another view, the Commission should slow down the pace of its work in order to provide States with an opportunity to more carefully analyse its output.

80. Delegations generally welcomed the inclusion of the topic "General principles of law" in the programme of work of the Commission. The view was expressed, however, that the topic did not appear to cater to the practical needs or interests of States. The importance of clarifying the nature, scope and methods of identification of such principles was stressed by several delegations. More specifically, it was suggested that drawing up an illustrative list of such principles would be useful for courts and practitioners of international law. It was also noted that the Commission should ensure that the identification of general principles of law was based on all legal systems of the world, on practice in the application of the law and that the topic should be analysed in the context of international law, although the view was expressed that there might not be enough material on State practice for the Commission to reach any useful conclusions. The suggestion was made that the outcome of the topic be an analytical report.

81. Support was expressed for the Commission including the topic "The settlement of international disputes to which international organizations are parties" in its programme of work.

82. A number of delegations supported the inclusion of the topic "Universal criminal jurisdiction" in the Commission's long-term programme of work. It was noted by some delegations that universal criminal jurisdiction constituted a subsidiary basis for promoting accountability and bridging the impunity gap, and some other delegations indicated that the Commission was well positioned to assist States in defining universal jurisdiction, identifying its nature and scope, and considering State practice in its application. Several delegations, however, objected to the inclusion of the topic in the long-term programme of work of the Commission, stressing that it was not ripe for discussion by the Commission under the current conditions. In particular, some delegations noted that the Commission should not address the topic while dealing with other closely linked topics. Some other delegations noted that the Sixth Committee should remain seized of the item "The scope and application of the principle of universal jurisdiction" and related issues. It was noted that, in any event, the topic should be approached with caution. According to some other delegations, the Commission's work should complement future discussions on the issue in the Sixth Committee.

83. Delegations generally welcomed the inclusion in the Commission's long-term programme of work of the topic "Sea-level rise in relation to international law". The Commission was called upon to move the topic to its programme of work so that it might be examined as a matter of urgency. Some other delegations, however, expressed doubts concerning the inclusion of the topic in the long-term programme of work. In particular, the point was stressed that practice was limited, and that the topic should be addressed within the framework of the United Nations Convention on the Law of the Sea,[10] which should not be modified or undermined. Given the

[10] United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

complexity and the evolving nature of State practice, some delegations advised that the Commission adopt a prudent approach to the topic.

84. Several delegations supported the scope of the topic as proposed in annex II of the Commission's report. The consideration of the topic within the framework of a study group was welcomed by some delegations.

85. The inclusion of further topics on the long-term programme of work of the Commission was proposed, including "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law" and "Jurisdiction of States in cyberspace".

86. It was suggested by some delegations that the General Assembly do more to identify new topics or mandate their consideration by the Commission.

#### 2. Programme and working methods of the Commission

87. A number of delegations welcomed the celebration of the seventieth anniversary of the Commission with events organized in New York and Geneva, which had been the occasion for important interactions with the Sixth Committee, as well as the holding of part of the session in New York. Several delegations also expressed support for holding sessions in New York, or in other parts of the world, on a regular basis. The point was made, however, that holding a session in New York was exceptional and linked to the commemoration of the seventieth anniversary.

88. Several delegations regretted the underrepresentation of women in the Commission and called for a better gender balance in its composition.

89. The Commission was encouraged by some delegations to continue to improve its relations with the Sixth Committee so that the General Assembly might benefit from the invaluable outcome of the discussions between them. Some delegations stressed that the Commission should bear in mind the goal of serving Member States by focusing on questions to which they needed urgent answers and base its work on well-established State practice, seeking to strike a balance between codification and progressive development. The importance of taking into account the opinions of States was highlighted by some delegations.

90. The suggestion was made that the Commission simplify the report and provide further information in the chapter containing the summary of its work. A number of delegations indicated the need for assistance in capacity-building, particularly for developing countries, with regard to the work of the Commission.

# III. Topics on which the Commission completed work at its seventieth session

## *On first reading*

## A. Provisional application of treaties

#### 1. General comments

91. Delegations in general welcomed the adoption, on first reading, of a set of draft guidelines on the provisional application of treaties, with commentaries. Some delegations stated that the draft guidelines would provide a valuable and practical tool for States and international organizations in their treaty-making practice, and allow for the development of a consistent practice. Other delegations reiterated the importance of the voluntary and flexible nature of provisional application.

92. The Commission was commended for embarking on an extensive study of the practice of States and international organizations, which could provide guidance on questions left unanswered by article 25 of the 1969 Vienna Convention. It was cautioned that mixing proposals for progressive development of the law with statements otherwise intended to reflect the state of the law risked creating confusion. Several delegations described their practice with regard to the provisional application of treaties.

### 2. Specific comments

93. In relation to draft guideline 1 (Scope), the broadening of the scope of the draft guidelines to include international organizations was welcomed once again. It was underscored that the scope of obligations arising from a provisionally applied treaty had to be defined cautiously, with due respect for the intention of the parties. It was also suggested that draft guideline 2 (Purpose) be merged with draft guideline 1.

94. In relation to draft guideline 3 (General rule), some delegations welcomed the text of the draft guideline and commentaries thereto as they clearly reflected the voluntary nature of provisional application. It was pointed out that the normative connection between draft guidelines 3 and 4 should be strengthened, including by merging the two. In relation to draft guideline 4 (Form of agreement), some delegations stated that the Commission should clarify whether a decision of an international organization or intergovernmental conference allowing for the provisional application of a treaty would be binding on all parties, even if that decision had not been unanimous. Some delegations favoured the Commission explicitly requiring the express consent in all forms, means or arrangements for provisional application, including resolutions of international organizations, while others invited the Commission to further explain the need for express acceptance in the commentaries. Concern was expressed that the broad nature of the phrase “any other means or arrangements”, including resolutions and declarations, which did not always reflect State consent. It was also suggested that the Commission address, in the commentary to draft guideline 4, the role of the depositary of a treaty in relation to an instrument containing an agreement on provisional application arrived at through “other means or arrangements”.

95. Several delegations welcomed the revised wording of draft guideline 6 (Legal effect of provisional application), replacing the phrase “the same legal effect” with “a legally binding obligation to apply the treaty or a part thereof”. More generally, it was noted with appreciation that the Commission had made substantial progress in distinguishing between provisional application and entry into force. Some delegations reiterated that the Commission should clarify the source of the binding legal effect of provisional application, which was left undetermined by article 25 of the 1969 Vienna Convention. While some found the additional explanations provided in the commentaries useful, others expressed confusion with regard to paragraph (5) of the commentary to draft guideline 6. It was suggested that the Commission provide a more detailed explanation, along with examples illustrating the ways in which a provisionally applied treaty was not subject to all the rules of the law of treaties.

96. In relation to draft guideline 7 (Reservations), several delegations welcomed the decision to add the draft guideline, including the incorporation of the relevant rules of 1969 Vienna Convention, applied *mutatis mutandis*. Others questioned its practical value, and pointed to the divergent views on the matter among the members of the Commission. Several delegations invited the Commission to consider the issue of reservations more carefully, taking into account relevant State practice. Several delegations also requested the Commission to clarify in the commentaries the practical impact and scope of reservations to provisionally applied treaties, particularly the relationship with draft guideline 6 and whether the legal effects of a

reservation would end with the termination of the provisional application or could continue even after the treaty entered into force. Some delegations expressed concerns that the draft guideline might create legal uncertainty about the integrity of the legal regime of reservations, reflected in the 2011 Guide to Practice on Reservations to Treaties,[11] which acknowledged that there were no reservations, strictly speaking, to bilateral treaties.

97. Some delegations emphasized that the breach of a provisionally applied obligation, would, in accordance with draft guideline 8 (Responsibility for breach), result in international responsibility. The view was expressed that the draft guideline should reflect, as far as possible, the concepts set out in the articles on responsibility of States for internationally wrongful acts, particularly articles 1 and 2.

98. Draft guideline 9 (Termination and suspension of provisional application) was welcomed. While some States pointed to the limited reference to the practice of States and international organizations, the Commission's approach was nonetheless commended for its pragmatism and flexibility. Some delegations further observed that a number of scenarios of termination or suspension might not covered by article 25, paragraph 2, of the 1969 Vienna Convention, and might require additional guidance. It was suggested that the Commission introduce other provisions regarding the additional grounds of termination and suspension provided for in the 1969 Vienna Convention, also taking into account the internal decision-making procedures of States. Several delegations proposed that the draft guideline address the temporal and procedural aspects of notification, as to when the termination of provisional application would take effect and whether States could unilaterally terminate provisional application. The Commission was invited to conduct further analysis of the difference between the termination of multilateral and bilateral treaties subject to provisional application.

99. Draft guidelines 10 (Internal law of States and rules of international organizations, and the observance of provisionally applied treaties) and 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties) were considered appropriate, since their content reflected the provisions of articles 27 and 46 of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, respectively. In relation to draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations), it was stated that the Commission should provide guidance on whether reservations could play a role in limiting the scope of provisional application of a treaty due to the application of internal laws of States. It was proposed to relocate the draft guideline as new draft guideline 10 in order to give it more prominence.

### 3. Final form

100. Several delegations commended the form of the proposed outcome as draft guidelines for its inherent flexibility, while others reserved their right to comment on the form later. It was pointed out that the title "Guide to Provisional Application of Treaties" properly reflected the intended nature and purpose of the work on the topic. Many delegations welcomed the Special Rapporteur's proposal to include model

[11] General Assembly resolution 68/111 of 16 December 2013, annex. The text of the guidelines with commentaries thereto is available from the Commission's website: legal.un.org (Analytical guide, Reservations to treaties, Final outcome). The Guide to Practice on Reservations to Treaties will be published in *Yearbook of the International Law Commission, 2011*, vol. II (Part Three) (forthcoming).

clauses in an annex to the Guide, while others doubted the appropriateness of model clauses. Some delegations were open to considering them once the Commission had finalized its work on their possible content. Others noted that the decision to send model clauses directly to the second-reading stage deprived States of the opportunity to comment and would prevent a satisfactory outcome on second reading. Several delegations observed that draft model clauses would provide practical assistance and guidance to States when drafting provisions of treaties. Delegations stated that model clauses should be formulated for a wide range of situations, represent the full diversity of practice and indicate their suitability for use in bilateral or multilateral treaties. It was noted that the Commission should conduct a closer review of the relationship between the draft model clauses and the draft guidelines taking into account their partly overlapping nature.

## B. Protection of the atmosphere

### 1. General comments

101. Delegations welcomed the adoption of the draft guidelines on protection of the atmosphere, with commentaries, on first reading, and commended the Commission. Several delegations expressed their support for the work of the Commission on the topic and stressed its importance to the international community. The need for international cooperation was emphasized. Attention was also drawn to the relevance of developments in relation to the Paris Agreement[12] and the Global Pact for the Environment.[13] Other delegations expressed doubts regarding the usefulness of the work of the Commission on the topic. The flexibility of existing agreements in addressing new challenges was noted.

102. Some delegations noted that the draft guidelines as adopted on first reading were in line with the 2013 understanding.[14] While the need for compliance with that understanding was stressed, concerns were expressed regarding the stringent limits on the scope of the topic. Several delegations requested the Commission to reconsider or delete references to the 2013 understanding in the draft guidelines, in particular, in the eighth preambular paragraph and in draft guideline 2, paragraphs 2 and 3.

103. Some delegations pointed to the need to review the Spanish translation of the draft guidelines.

### 2. Specific comments

104. Some delegations expressed support for the reference in the third preambular paragraph to “the close interaction between the atmosphere and the oceans”. Several delegations favoured replacing the reference in the fourth preambular paragraph to the protection of the atmosphere as a “pressing concern of the international community as a whole” with a “common concern of mankind”, in line with the wording of the Paris Agreement. The Commission was encouraged to elaborate on the implications of the legal concept of “common concern of humankind” in the context of environmental law on the protection of the atmosphere. In relation to the fifth and sixth preambular paragraphs, several delegations welcomed the reflection of considerations of equity and the special situations and needs of developing countries, as well as the special vulnerability of small island developing States and low-lying coastal areas. It was proposed that the wording in the sixth preambular paragraph be strengthened to reflect scientific warnings about atmospheric degradation. The

[12] FCCC/CP/2015/10/Add.1, annex.

[13] See the preliminary draft Global Pact for the Environment, available from www.iucn.org.

[14] See *Yearbook of the International Law Commission, 2013*, vol. II (Part Two), p. 78, para. 168.

importance of the principle of intergenerational equity in the seventh preambular paragraph was stressed. However, the absence of references to specific agreements in the preamble was criticized.

105. In relation to draft guideline 1 (Use of terms), it was proposed that the definition of "[a]tmospheric pollution" in paragraph (*b*) include "substances or energy", and to reflect natural sources of atmospheric pollution in addition to anthropogenic sources.

106. With regard to draft guideline 2 (Scope of the guidelines), the Commission was requested to reconsider the double negative formulation "does not deal with, but are without prejudice to" in paragraph 2, while it was suggested that paragraph 3 should either list the names of all dual-impact substances or include none.

107. It was proposed that draft guideline 3 (Obligation to protect the atmosphere) be worded in such a way as to encourage States to join, ratify or implement multilateral environmental agreements. While it was reiterated that the obligation to protect the atmosphere was of an *erga omnes* nature, the view was expressed that explicit legal obligations on States to protect the atmosphere had yet to materialize, and the relevant practice and rules were still being developed. It was also suggested that the Commission should leave it up to States to apply national laws containing higher standards than those set by international law.

108. In relation to draft guideline 4 (Environmental impact assessment), it was observed that the obligation of States to ensure that an environmental impact assessment was undertaken was derived from treaties, including the United Nations Convention on the Law of the Sea and customary international law. However, the view was expressed that such a rule had not become a universally agreed principle of international law for the protection of the atmosphere. Further, the inconsistency of draft guideline 4 with the purported general nature of the draft guidelines was not considered to be satisfactorily addressed in the commentary.

109. As to draft guideline 7 (Intentional large-scale modification of the atmosphere), it was stressed that the precautionary principle also contained the obligation to refrain from an activity if the consequences and effects on the environment were unclear or could not be assessed. To address concerns about the possible environmental impact of geo-engineering, it was proposed that the Commission reformulate the draft guideline with reference to the precautionary principle or by recourse to any other means of taking into account environmental concerns.

110. The Commission was asked to clarify the origin of the obligation to cooperate in draft guideline 8 (International cooperation). Regarding the scope of the draft guideline, it was reiterated that the commentary should address other actors relevant to and other forms of international cooperation.

111. While some delegations voiced support for draft guideline 9 (Interrelationship among relevant rules), others reiterated their concerns regarding the approach taken in the draft guideline and its lack of support in practice. It was suggested that the draft guideline be developed to introduce an innovative solution to the problems posed by the diversity of legal regimes referring to the protection of the atmosphere. In relation to paragraph 1, it was pointed out that the focus should not be on the avoidance of conflicts but on the development of norms of international law. Paragraph 2 was considered to be a workable element of the draft guideline in addressing the problem of harmonization of legal instruments in a realistic manner. As to paragraph 3, it was reiterated that poorer parts of the national population should be included under particularly vulnerable groups. However, caution was expressed against introducing the concept of countries in special situations, as defined in the context of climate change, into the discourse on the protection of the atmosphere.

112. Several delegations welcomed the addition of draft guideline 10 (Implementation). It was highlighted that the draft guideline was in line with the mechanisms generally used by States to discharge their obligations under international law. The view was expressed that the draft guideline essentially completed draft guideline 3. Other delegations questioned the usefulness of paragraph 1. It was considered that a more direct link with specific international obligations regarding protection of the atmosphere was needed. Concern was expressed that the broad discretion of States to take measures to meet their international obligations was not sufficiently articulated. The Commission was asked to clarify the reference in the commentary to the role of regional organizations, and to clarify in relation to all the draft guidelines that the term "obligations" referred to the existing obligations of States. In addition, it was proposed that the commentary to paragraph 1 address the facilitative procedures referred to in draft guideline 11.

113. The distinction drawn between obligations and recommendations, addressed separately in draft guideline 10, paragraphs 1 and 2, was considered appropriate by some delegations. The Commission was invited to clarify the term "recommendations". While paragraph 2 was acknowledged to be useful in light of the non-binding nature of the draft guidelines, it was suggested that the wording of paragraph 2 encourage States to express their political commitment to giving effect to the recommendations. Regret was expressed by some delegations that the draft guideline did not refer to State responsibility, but the decision not to address the issue of extraterritorial application of national law received support.

114. In relation to draft guideline 11 (Compliance), while some delegations doubted the value of restating the principle of *pacta sunt servanda*, others agreed with the approach taken. It was proposed that paragraph 1 stipulate that States must "effectively" comply with their international obligations. Criticism was expressed at the perceived inconsistency between the text of the draft guideline and its title, and at the use of the term "abide" rather than "fulfil" in paragraph 1.

115. A number of delegations agreed with the reference to compliance mechanisms, particularly the use of facilitative or enforcement procedures in paragraph 2. It was suggested that both procedures could be used in combination, with facilitative procedures first and enforcement procedures subsequently. Concerning the phrase "as appropriate" in paragraph 2, it was proposed that the commentary refer to the criterion of proportionality, as used in relation to countermeasures to internationally wrongful acts, in determining whether facilitative or enforcement procedures were most appropriate in a given case. Further, several delegations welcomed the recognition of specific challenges faced by developing and least developed States and stressed the importance of providing assistance to States in case of non-compliance. Access to financial mechanisms or other means of financial support was highlighted as one of these challenges. However, concern was expressed that the wording used in paragraph 2, subparagraph (*a*), could be interpreted as suggesting that assistance was a kind of mechanism for monitoring States in cases of non-compliance. Some delegations called for further consideration of paragraph 2, subparagraph (*b*). The distinction in the commentary between the enforcement procedures referred to in subparagraph (*b*) and any invocation of international responsibility of States was welcomed.

116. While several delegations welcomed the inclusion of draft guideline 12 (Dispute settlement), others questioned whether it was necessary or appropriate. Support was expressed for the emphasis in paragraph 1 on the principle of peaceful settlement of disputes, although some considered that it stated the obvious. The Commission was invited to include express references in the draft guideline to Article 33 of the Charter of the United Nations and to the principle of good faith. The view was expressed that the reference to disputes in the draft guideline should be understood as being those

that might arise under the international instrument to which the States concerned were parties. It was suggested that paragraph 1 include language excluding interference with existing dispute settlement provisions in treaty regimes.

117. In relation to paragraph 2, several delegations agreed with the recognition of the "fact-intensive and science-dependent character" of disputes relating to the atmosphere. The Commission was urged to consider incorporating a science-based policy as a general principle in the draft guidelines. A number of delegations also supported the reference to the use of technical and scientific experts. It was observed that the use of experts should be considered on a case-by-case basis. It was further suggested that the involvement of technical and scientific expertise might be necessitated by the special and complex nature of the facts of a case, rather than its fact-intensive character. However, the view was expressed that it was usually up to the relevant jurisdiction deciding the dispute to request or use such expertise, and so the relevance of paragraph 2 was unclear. Further, it was proposed that paragraph 2 refer to the use of the relevant expertise, not experts. The Commission was also encouraged to consider acknowledging the relevance of the traditional knowledge of indigenous peoples and local communities, either in the draft guideline or its commentary. In addition, it was suggested that the Commission was correct not to address the principles of *jura novit curia* and *non ultra petita* in the draft guideline, which could be further developed in the commentary.

#### 3. Final form

118. Some delegations emphasized the importance of developing the draft guidelines on the topic, which could provide useful guidance to States and lead to the adoption of common norms, standards and recommended practices that promote the protection of the atmosphere. It was underlined that the draft guidelines built on and did not duplicate existing international law, and, overall, reflected a balanced and positive approach to the topic. It was further stressed that the work on the topic should take the form of guidelines and remain within the limits on its scope. However, the draft guidelines were criticized for lacking in substantive provisions. It was suggested that the draft guidelines had potential value as generic model clauses or model provisions for future agreements pertaining to the topic, rather than standalone guidelines with normative content.

### *On second reading*

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

#### 1. General comments

119. Delegations welcomed the adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as well as the commentaries thereto. Delegations emphasized the practical utility of the draft conclusions, particularly in light of the State practice and the authorities identified in the commentaries. The question was raised whether the draft conclusions and other work by the International Law Commission on the law of treaties could constitute subsequent agreement or subsequent practice in relation to the 1969 Vienna Convention.

120. Several delegations expressed their support for the recommendation by the Commission to the General Assembly, as contained in paragraph 49 of the report of the Commission's seventieth session (A/73/10). A number of delegations proposed that the draft conclusions be issued as a publication of the United Nations, along with summaries of the views expressed by Member States in connection with those texts,

in order to ensure that their legal authority could be determined in an informed and transparent manner.

121. Several delegations underscored the primacy of articles 31 and 32 of the 1969 Vienna Convention in relation to treaty interpretation, indicating that the ordinary meaning to be given to the terms of a treaty, in their context and in light of its object and purpose, would always prevail over other means of interpretation. A number of delegations concurred with the Commission that the articles reflected customary international law, although disagreement was also expressed. While it was noted that the draft conclusions only applied to the interpretation of treaties between States, the view was expressed that the draft conclusions could also be relevant to the interpretation of treaties involving international organizations.

### 2. Specific comments

122. Delegations generally agreed with the content of Part One (Introduction) and Part Two (Basic rules and definitions). With regard to draft conclusion 2 (General rule and means of treaty interpretation), a number of delegations concurred that treaty interpretation consisted of a single combined operation, while the distinction between articles 31 and 32 of the 1969 Vienna Convention was also noted. It was also suggested that the nature of the relevant treaty could have a bearing on the role of subsequent agreements and subsequent practice. In connection with draft conclusion 4 (Definition of subsequent agreement and subsequent practice), some delegations highlighted the distinction between subsequent practice as an authentic means of interpretation, under the Convention's article 31, paragraph 3 (*b*), and as a supplementary means, under its article 32. The view was expressed that the term "conclusion", as contained in paragraphs 1, 2 and 3 of draft conclusion 4, should refer to a treaty's entry into force, rather than to its signing.

123. In relation to draft conclusion 5 (Conduct as subsequent practice), some delegations acknowledged that decisions of domestic courts could constitute subsequent practice, while others emphasized that conduct by lower authorities contradicting the official position of the State could not. While a number of delegations maintained that the conduct of non-State actors should never be taken into account in the interpretation of treaties, the Commission's balanced approach to that issue was welcomed.

124. With regard to Part Three (General aspects), some delegations noted that they understood draft conclusion 6 (Identification of subsequent agreements and subsequent practice) to require that the position taken by States regarding the interpretation of a treaty be explicit. Several delegations expressed support for draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), although some delegations highlighted the importance of maintaining a clear distinction between, on the one hand, the interpretation of a treaty, and, on the other, its amendment and modification. In relation to draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time), a number of delegations maintained reservations as to the propriety of the evolutive interpretation of treaty terms. It was noted, in the context of draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation), that the weight should also depend on the number of parties involved, as well as on the consistency and breadth of the subsequent agreements and subsequent practice.

125. Several delegations appreciated the clarification, in draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty), paragraph 1, that agreements under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention may, but need not, be legally binding. While the Commission's approach to silence in paragraph 2 was welcomed, a number of delegations emphasized that it could only

establish acceptance of subsequent practice in exceptional circumstances. The observation was made that subsequent practice under article 31, paragraph 3 (*b*), did not require explicit agreement, but could derive from independent, parallel practice of States together demonstrating a common understanding.

126. With respect to Part Four (Specific aspects), delegations agreed with the premise of draft conclusion 11 (Decisions adopted within the framework of a conference of States parties) that such decisions required the agreement of all parties in order to constitute subsequent agreement or subsequent practice. In this regard, it mattered whether the decision was taken by consensus or majority vote, and how States had reacted to the decision. In connection to draft conclusion 12 (Constituent instruments of international organizations), delegations drew a distinction between practice of the international organization and the practice of its Member States, noting that, since an international organization is not a party to its constituent instrument, only the latter could constitute subsequent agreement and subsequent practice. With regard to draft conclusion 13 (Pronouncements of expert treaty bodies), several delegations underscored that not the pronouncements themselves, but the reactions thereto by States parties, could give rise to subsequent agreements or subsequent practice.

## B. Identification of customary international law

### 1. General comments

127. Delegations welcomed the completion of work by the Commission on the draft conclusions on identification of customary international law and the commentaries thereto, together with the annexed bibliography. In the view of delegations, those important texts would be useful as practical guidance for States, practitioners, academics and judges. It was also underlined that the draft conclusions should not be construed as binding. Several delegations welcomed the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).

128. A number of delegations considered that the draft conclusions represented a balanced outcome, which had taken into account the views expressed by States over the years on many aspects of the topic. In the view of some delegations, an apt compromise had been achieved in relation to difficult issues such as the question of the practice of international organizations. According to other delegations, it was unclear whether some of the draft conclusions and the commentaries thereto purported to codify existing law or proposed its progressive development. The view was advanced that the draft conclusions should be viewed as representing the outcome of the Commission's own analysis, and not necessarily an expression of the views of Member States. A number of delegations proposed that the draft conclusions be issued as a publication of the United Nations, along with summaries of the views expressed by Member States in connection with those texts, in order to ensure that their legal authority could be determined in an informed and transparent manner.

129. Quite a number of delegations expressed support for the parts of the recommendation by the Commission, contained in paragraphs 63 (*a*), (*b*) and (*c*) of its report on the work of its seventieth session (A/73/10), concerning the draft conclusions, the commentaries thereto and the bibliography. Support was expressed by some delegations also in relation to the other parts of the recommendation by the Commission, contained in paragraphs 63 (*d*) and (*e*) of its report, concerning the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available. It was envisaged that the materials collected by the Secretariat in its memorandum could be updated in the future, also in light of the mandate in article 24 of the statute of the International Law Commission.

Nevertheless, further clarification was requested concerning such suggestions, and the view was expressed that the analysis of practice for the identification of customary international law should be conducted autonomously by courts and tribunals, rather than through secondary sources such as those included in the Secretariat memorandum.

### 2. Specific comments

130. In relation to Part One of the draft conclusions (Introduction), some delegations regretted that the Commission had not addressed certain additional issues, including the formation of rules of customary international law, questions relating to the burden of proof, and the relationship between customary international law and peremptory norms of general international law (*jus cogens*).

131. With regard to Part Two (Basic approach), delegations generally reiterated their agreement with the two-element approach adopted by the Commission and highlighted the importance of a separate assessment concerning the evidence of each of the two constituent elements of customary international law. According to a number of delegations, a rigorous methodology was essential because customary international law was not to be easily created or inferred. Other delegations considered that a flexible approach was nevertheless called for, given that certain forms of practice or acceptance as law may have particular significance in relation to particular potential rules, depending on the circumstances.

132. In relation to Part Three (A general practice), quite a number of delegations welcomed the emphasis of the draft conclusions on the primacy of State practice for the identification of customary international law. Several delegations expressed support for draft conclusion 4 (Requirement of practice), paragraph 2, as a balanced provision on the practice of international organizations. Other delegations expressed the view that draft conclusion 4, paragraph 2, was an exercise in progressive development. In the view of a number of delegations, it was only the practice of States that was susceptible to establishing customary international law. The only practice that could be relevant for the identification of customary international law in connection with international organizations was the practice of the member States of the international organization, the practice carried out on behalf of States by an international organization, or the reaction by States to the practice of an international organization. Several delegations expressed support for draft conclusion 6 (Forms of practice), paragraph 1, and underlined that only deliberate inaction could be deemed relevant.

133. With regard to Part Four (Accepted as law (*opinio juris*)), several delegations expressed caution in relation to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), paragraph 3, on the failure to react over time to a practice. In the view of a number of delegations, no automatic presumption of implied consent should arise in the absence of strict requirements, including knowledge of the practice by the State in question, as well as sufficient time and ability to react. It was observed that express evidence of a State's reasoning in refraining from reacting was necessary, otherwise a failure to react may simply reflect political, rather than legal, considerations.

134. In relation to Part Five (Significance of certain materials for the identification of customary international law), some delegations underlined that it was important for draft conclusion 11 (Treaties) not to be read as implying that every multilateral treaty with sufficiently wide participation created customary rules. While a number of delegations expressed support for draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), some delegations remarked that resolutions adopted by political organs may not always reflect the legal position of

States. Support was expressed by several delegations for the cautious approach adopted in draft conclusion 13 (Decisions of courts and tribunals) in relation to decisions of domestic courts. However, a number of delegations considered that any difference in the weight given to decisions of international or national courts should result only from their persuasiveness and quality.

135. Quite a number of delegations expressed support for Part Six (Persistent objector). Some delegations expressed the view that draft conclusion 15 (Persistent objector) required further clarification, especially in relation to the temporal aspects of persistent objection. It was observed that the notion of persistent objection remained controversial and did not encounter wide acceptance by States. Several delegations welcomed the "without prejudice" clause concerning peremptory norms of general international law (*jus cogens*).

136. A number of delegations expressed support in relation to Part Seven (Particular customary international law). Some delegations noted that the existence of particular customary international law that was neither regional nor local was debatable.