68th Session of the United Nations General Assembly
Sixth Committee

Report of the International Law Commission
on the work of its sixty-third and sixty-fifth sessions (Agenda item 81)

On the subject of the "Most-favoured-nation clause", my delegation takes note of the new working documents produced and shares the concerns raised over the risk of an excessively prescriptive outcome. Although identifying and analysing examples of clauses is a long and useful business, it is not certain that an excessively prescriptive document or a document proposing model clauses is desirable.

The "Obligation to extradite or prosecute" was the subject of a presentation in the Working Group's report. I should like merely to recall that the concept of a peremptory norm should be treated with great caution, that in our opinion the obligation to extradite or prosecute is distinct from that of universal jurisdiction, the latter being widely debated or disputed among the States, and that the link between such an obligation and the mechanisms put in place by international jurisdictions does indeed deserve particular attention.

Concerning "Protection of the environment in relation to armed conflict", I congratulate Mrs Jacobsson on her appointment as Special Rapporteur. Nevertheless, I confirm the doubts already expressed by my delegation on the feasibility of work on such an issue. Leaving aside the time segmentation of the field of study, determining its objective seems less than self-evident. In all events, it seems neither desirable nor achievable to draw up guidelines or reach conclusions on the subject at this stage.

Concerning the Commission's inclusion of new projects in its programme of work, we can only repeat the concerns already expressed that the Commission should not overburden its programme of work. We query the inclusion of "Crimes against humanity" in the long-term programme of work. It is not clear that all the Commission's criteria on the choice of subjects are met. In this regard, France wonders whether the States really need to draw up a convention on the subject. At this point it seems preferable to encourage universal ratification of the Rome Statute and the effectiveness of existing norms, which might well not favour the drafting of new sectoral norms. Furthermore, the call for a universal jurisdiction to try the perpetrators of crimes against humanity is far from being shared by a majority of States and further consideration. Lastly, the question could well arise of the compatibility of the obligations that would derive from any such convention with those imposed by existing conventions, which is why the urgency of work on the subject may be queried. As for the new subject concerning "Protection of the atmosphere", the limits imposed on the scope of the Commission's work, especially with regard

DJ/DIP/MG ²18.X.2013²

precious in determining how States interpret or apply a treaty, we should not lose sight of the fact that it is the text itself which makes it possible to identify the parties' intention in the first place. The whole interest of a study on this subject lies in the fact that, in international law, the State is both the author and the subject of the norm. That may be stating the obvious, but the special status of the State in the international order makes analysis of the attitude it adopts all the more relevant. And it is of course on the practice of the States parties to a treaty that we should focus, as the report emphasises.

I turn now to the provisionally adopted draft conclusions. Draft conclusion 1 suggests that the rules set out at articles 31 and 32 of the Vienna Convention on the Law of Treaties have customary value, whereas such an assertion is perhaps not quite so self-evident, at least as far as article 31, paragraph 3 is concerned. In addition, the wording of paragraph 4 of the draft conclusion differs from that of article 32 of the Vienna Convention, since that article does not expressly refer to subsequent practice.

Concerning draft conclusion 2, I do not think that subsequent agreements and subsequent practice can be

should clearly state that it is only concordant and consistent conduct which establishes the parties' interpretation. That idea is contained in the commentaries, even more so in those relating to draft conclusion 5 than to draft conclusion 4. It should be stipulated as soon as what constitutes "subsequent practice" is defined.

Concerning draft conclusion 5, I would simply recall that, although non-State actors have a useful part to play in identifying practices, it would be wrong to draw hasty conclusions from that, insofar as their presentation may be influenced by the purpose of the organisation or institution which prepares it. That is emphasised in the report, especially with regard to international humanitarian law, States having often reaffirmed that they are primarily responsible for the development of such law.

I shall finish on this point by expressing my support for the avenues for thought already announced, such as the question of the frequency of subsequent practice or of omission as an attitude which reveals an interpretation.

I shall end with a few words on the subject of "Provisional application of treaties". I thank the Special Rapporteur for his first report, which identifies the avenues to be explored. Study of the legal regime should indeed focus on the form of consent given to provisional application; in my opinion, the hypothesis of implicit intention should be approached with care. I believe that the primary aim of this work should be to examine legal effects of provisional application given the extent to which that question remains unclear. While I agree that there is not much to be gained from examining States' responsibility, the question of the legal consequences arising from a State's failure to comply with the provisions of a treaty which it has agreed to provisionally apply deserves further consideration. That situation appears to be different *a priori* in the case of failure to comply with an obligation in force. The question that arises is whether such acceptance entails only duties or also rights. Another question concerns the provisional establishment of bodies created by a treaty. I believe that the subject could be usefully extended to include provisional accession. It also seems possible to utterly rule out any consideration of domestic law obligations, mainly of a constitutional nature. Although these requirements do not allow a State to escape its international obligations, the situation is perhaps not quite so clear-cut when it comes uleeew47 23(.42 Tm [ET BT 1 0 0 J ET BT170(s) 0