

THE WORK OF THE SIXTH COMMITTEE OF THE UNITED NATIONS GENERAL ASSEMBLY IN 2016 AND 2017

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1 Introduction

The following is a further instalment in a series reviewing the activities of the Sixth (Legal) Committee of the General Assembly of the United Nations, focusing on the seventy-first (2016) and seventy-second (2017) sessions.¹ The review retains the three-tier structure of its predecessors, whereby the work of the Sixth Committee is broadly organised into three main types of activities: the substantive consideration of certain legal issues; the review of the annual work of expert legal bodies; and the discharge of certain oversight functions. A fourth category, namely the review of requests for observer status in the General Assembly, has also become a standard feature of the annual work of the Committee.²

2 Substantive Topics on the Agenda of the Sixth Committee

During the period under review, the Sixth Committee had 11 substantive topics on its agenda, all of which had been considered at its prior sessions. A distinction may be drawn in the type of substantive discussion undertaken. Of the 11 topics, four entailed a substantive consideration of the legal issues at hand. The focus of the debate on the remaining seven topics was on taking a decision on the respective recommendations of the International Law Commission for the further negotiation and adoption of

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¹ For a description of the functions and work of the Sixth Committee at the 66th session of the General Assembly, in 2011, as well as the history of a number of items on the agenda of the Committee, see A Pronto 'The work of the Sixth Committee of the United Nations General Assembly in 2011' 2011 *South African Yearbook of International Law* 237. See also A Pronto 'The work of the Sixth Committee of the United Nations General Assembly in 2012 and 2013' 2013 *South African Yearbook of International Law* 144, and A Pronto 'The work of the Sixth Committee of the United Nations General Assembly in 2014 and 2015' 2015 *South African Yearbook of International Law* 223.

² The information reflected herein is drawn in part from the website of the Sixth Committee at <http://www.un.org/en/ga/sixth/>. Additional information is available on the PaperSmart Portal of the Sixth Committee at <https://papersmart.unmeetings.org/en/ga/sixth/>. All official United Nations documents cited herein are available on either the website or the portal, or can be retrieved at <http://documents.un.org/>.

legal instruments. All 11 topics were formally before the Committee itself for its consideration and decision, and are herein further distinguished on those grounds from the Committee's substantive consideration of the annual reports of several subsidiary bodies (covering topics formally before those bodies), which is the subject-matter of the next section.

2.1 Measures to Eliminate International Terrorism

The consideration of legal measures to contribute to the elimination of the scourge of international terrorism continued to be a key focus of consideration in the Sixth Committee during both sessions under review.³ All delegations reaffirmed their unequivocal condemnation of terrorism in all its forms and manifestations. Terrorism continued to be characterised as a flagrant breach of international law and a threat to international peace and security, regardless of the justifications invoked by the perpetrators. At the same time, several delegations highlighted the need, in the fight against terrorism, for strict observance of the Charter of the United Nations and international law, including sovereignty, territorial integrity, human rights, humanitarian and refugee law, as well as for due process and respect for the rule of law.

The human suffering caused by terrorism was highlighted by several delegations. In particular, the severe economic consequences of terrorism, as well as other potential consequences such as destruction or looting of cultural heritage and the worsening of the refugee crisis, were pointed to. Some delegations highlighted the high number of children recruited for, involved in, or victims of terrorism-related activities. It was also observed that violence against women and curtailment of their rights, as well as their recruitment for extremist purposes, had become intentional strategies of terrorist groups.

A number of delegations expressed the view that terrorism may be committed by individuals as well as states, including by the use of military force. Some delegations further stressed that terrorism should not be equated with the legitimate struggle of peoples under colonial or alien domination and foreign occupation. It was also maintained that terrorism should not be associated with any religion, culture, ethnicity, race, nationality or civilisation. Some delegations expressed their firm opposition to the unilateral establishment of lists of countries involved with terrorism, a practice which was viewed by them as unacceptable and contrary to international law. Furthermore, some delegations noted

³ For the summary records of the debates in 2016, see A/C.6/71/SR 1-4, 31 and 33; and for 2017, see A/C.6/72/SR 1-5, 28 and 30. The Sixth Committee had before it the respective reports of the Secretary-General. See A/71/182 and Add 1-2 and A/72/111 and Add 1.

an increase in the invocation of Article 51 of the Charter of the United Nations seeking to justify the resort to military action in the context of counter-terrorism, and reaffirmed the need for such action to be in compliance with the Charter. Delegations also expressed concern about the threat posed by the phenomenon of ‘foreign terrorist fighters’ and the use of social media and the Internet by terrorist organisations to recruit new adherents and spread propaganda. Delegations further highlighted the need to consider the underlying economic and political conditions from which terrorism arises. It was noted that international and internal conflict, foreign occupation, state failure, as well as the lack of development, were important root causes of terrorism. Concern was also expressed about the nexus between transnational organised crime and terrorism. It was also suggested that the question of the paying of ransom money, needed to be addressed.

Delegations further reported on their ratification of and/or accession to the universal and regional instruments to counter terrorism, as well as measures taken to implement existing agreements, with a view to countering terrorism. They also welcomed the fifth biennial review of the United Nations Global Counter-Terrorism Strategy, conducted in 2016. The importance of capacity building activities for counter-terrorism in developing countries was also emphasised. Delegations further welcomed the report of the Secretary-General on the agenda item (A/71/182, Add.1 and Add.2) and the Plan of Action to Prevent Violent Extremism, presented by the Secretary-General in 2016 (A/70/674). In 2017, delegations welcomed the reform of the United Nations’ counter-terrorism architecture and specifically the creation of the Office of Counter-Terrorism headed by an Under-Secretary-General.

Delegations reiterated the importance of reaching agreement on the draft comprehensive convention on international terrorism and concluding work without further delay. To this end, several delegations called on all states to show flexibility and overcome their differences concerning the remaining challenges. Several delegations emphasised that the draft convention would enhance and fill the lacunae in the existing legal framework and stressed that it would provide a harmonised definition of terrorism. It was also reiterated by some delegations that any definition of terrorism should distinguish terrorism from the legitimate struggle of peoples in the exercise of their right to self-determination from foreign occupation or colonial domination. It was also observed that such a definition should be in conformity with the Charter of the United Nations and international law. The view was also expressed that any definition would need to include all forms and manifestations of terror, including state terrorism, while the opposing viewpoint that no reference to ‘state terrorism’ should be included was also expressed.

Furthermore, the need to address, in the draft convention, issues that fell within the ambit of international humanitarian law in international humanitarian law language was emphasised. The need to regulate the relationship of the convention with international humanitarian law in order to preserve the integrity and rationale of this latter legal framework was also mentioned. While some delegations continued to express their support for the proposal made by the coordinator at the 2007 session of the ad hoc committee, other delegations reiterated their preference for earlier proposals relating to the scope of the draft convention. Several delegations reconfirmed their support for the proposal to convene a high-level conference under the auspices of the United Nations.

In both years, the Sixth Committee adopted draft resolutions, by consensus, which were subsequently adopted by the Plenary of the General Assembly as resolutions 71/151, of 13 December 2016, and 72/123, of 7 December 2017, respectively. The Sixth Committee was scheduled to continue its consideration of the topic in 2018.

2.2 Criminal Accountability of United Nations Officials and Experts on Mission

The Sixth Committee considered the agenda item⁴ at both sessions during the period under review, on the basis of successive reports of the Secretary-General.⁵ In both years, the work proceeded in the Sixth Committee directly (the working group which had been convened most recently at the 71st session (2015), was not reconvened in either year during the period under review).

Delegations once again reiterated the importance they attached to the issue of criminal accountability of United Nations officials and experts on mission. They further acknowledged the commitment and dedication of United Nations personnel in the field, while underlining the negative consequences that criminal acts committed by some officials and experts on mission have on the image, credibility, impartiality and integrity of the organisation, as well as on its relationship with local communities. Several delegations voiced serious concerns regarding recent allegations of sexual exploitation and abuse by United Nations peacekeeping missions. Delegations strongly reaffirmed their support for the zero-tolerance policy of the United Nations with regard to criminal conduct, in particular with regard to such serious crimes as sexual exploitation and abuse committed by United Nations officials and experts on mission. Several delegations welcomed the steps taken by the Secretary-General

⁴ For the summary records of the debates in 2016, see A/C.6/71/SR 8, 9 and 33; and for 2017, see A/C.6/72/SR 8, 9 and 30.

⁵ See A/71/167 and A/72/121, A/72/126 and A/72/205.

in addressing the recent allegations of sexual exploitation and abuse. Delegations also commended the establishment of the Office of the Special Coordinator on improving the United Nations' response to sexual exploitation and abuse. In 2017, delegations further welcomed the adoption of General Assembly resolution 71/278 of 10 March 2017, the convening of the High-Level Meeting on the Prevention of Sexual Exploitation and Abuse, on 19 September 2017, as well as the Voluntary Compact on Preventing, and Addressing Sexual Exploitation and Abuse, proposed by the Secretary-General.⁶ A number of delegations highlighted initiatives protecting the rights of victims, such as the appointment of a Victims' Rights Advocate or the establishment of a trust fund for victims. Others further emphasised the need to protect the due process rights of those against whom allegations were raised.

While it was also recognised that the primary responsibility for bringing perpetrators to justice rests with member states of the United Nations, delegations emphasised that it was the shared responsibility of the United Nations and of member states to ensure the criminal accountability of United Nations officials and experts on mission. Delegations also stressed the need to ensure that all personnel were properly vetted by contributing states and the United Nations for any prior cases of misconduct while serving on previous missions.

Delegations also recalled that criminal misconduct caused harm to victims and emphasised the need to ensure the protection of victims and witnesses. Several delegations recalled the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by the United Nations Staff and Related Personnel, adopted by General Assembly resolution 62/214.

States were also encouraged to cooperate with each other in criminal investigations and/or extradition proceedings in respect of crimes of a serious nature committed by United Nations officials and experts on mission, and to take measures to close existing jurisdictional gaps.

Delegations reiterated the importance of prompt referrals by the United Nations of cases of alleged criminal conduct, for investigation and possible prosecution, and states were encouraged to report back to the organisation with full details of the measures undertaken in a timely manner. Some delegations indicated a preference for referral to the state of nationality over the host state. Several delegations expressed their regret that in 73 of 89 cases which had been referred since 2007, no information on action taken had been provided to the Secretariat.

Regarding future action, several delegations called for continued

⁶ See <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/voluntary-compact>.

consideration of the report of the Group of Legal Experts (A/60/980), and called once again for the implementation of the revised draft model Memorandum of Understanding contained in chapter 9 of the 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)' (A/C.5/60/26, annex) (resolution 61/291, as read with A/61/19, annex). Different views continued to be expressed concerning the potential negotiation of an international convention, as was proposed by the Group of Legal Experts.

In both years, the Sixth Committee adopted draft resolutions, by consensus, which were subsequently adopted by the Plenary of the General Assembly as resolutions 71/134, of 13 December 2016, and 72/112, of 7 December 2017, respectively. An innovation, introduced in 2016, was the request addressed to the Secretary-General for the preparation of two additional annual reports: the first reviewing existing policies and procedures throughout the United Nations system relating to credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission;⁷ and the second summarising information received from member states since 2007 regarding the establishment of jurisdiction over their nationals whenever they serve as United Nations officials or experts on mission.⁸ The Sixth Committee was scheduled to continue its consideration of the topic in 2018.

2.3 The Scope and Application of the Principle of Universal Jurisdiction

The Sixth Committee considered the item at both sessions during the period under review,⁹ on the basis of successive reports of the Secretary-General.¹⁰ The work was undertaken both in the plenary of the Committee, and in the framework of a working group, chaired by Ms Georgina Guillén-Grillo, of Costa Rica, in 2016, and by Ms Shara Duncan Villalobos, of Costa Rica, in 2017.

⁷ See A/72/121.

⁸ See A/71/126.

⁹ For the summary records of the debates in 2016, see A/C.6/71/SR 13, 14, 15, 31 and 32; and for 2017, see A/C.6/72/SR 13, 14, 28 and 30.

¹⁰ See A/71/111 and A/72/112.

Overall, delegations acknowledged that universal jurisdiction was a well-established principle of international law aimed at combating impunity and bringing justice to victims. A number of delegations also pointed to the exceptional character of universal jurisdiction, as it departed from common rules on the exercise of criminal jurisdiction. As such, some delegations deemed the principle to be a measure of last resort. Several delegations provided their understandings of the jurisdictional basis of the principle, focusing on the serious nature of the crimes involved. The principle of universal jurisdiction was further discussed in light of other principles in international law, such as the principle of *aut dedere aut judicare*.

Nonetheless, consensus on the scope *ratione materiae* of the crimes subject to the principle of universal jurisdiction has yet to emerge. Several delegations considered that universal jurisdiction applied to the most serious international crimes. While some preferred to focus on the applicability to serious crimes under international treaties, other delegations noted that also customary international law permitted the exercise of the principle over certain crimes. Some delegations emphasised that the scope of universal jurisdiction, strictly speaking, was established only for a small number of crimes, and that this did not preclude jurisdiction for a broader range of crimes being founded on other principles. There was also disagreement on the advisability of seeking to establish an exhaustive list of crimes for which universal jurisdiction applied. Caution was also voiced against an unwarranted expansion of the list of crimes beyond the most heinous crimes.

Delegations reaffirmed their concerns with respect to the potential abuse or manipulation of the principle in practice. Several delegations stressed that the principle must be applied in accordance with the Charter of the United Nations and international legal norms, including the sovereign equality of states, territorial integrity and the non-interference in the internal affairs of states. The need to avoid arbitrary or selective application of the principle, in order to avoid its political manipulation or exploitation, was also emphasised. Several delegations again referred to the various decisions of the African Union addressing this issue, in particular decision 420 (2012). The link between universal jurisdiction and the question of immunity of state officials, in particular heads of state and other high-ranking officials was stressed.

Several delegations affirmed that the primary responsibility for investigating and prosecuting serious international crimes should always lie with the state of territoriality. It was suggested that criteria be developed to address situations where states possess overlapping jurisdiction. A number of delegations emphasised the importance of cooperation and mutual legal assistance in any application of the principle of universal

jurisdiction. In that context, the initiative to open negotiations for a treaty focused on mutual legal assistance and extradition between states for the investigation of certain serious crimes was recalled.

Several delegations continued to support the possibility of requesting a study from the International Law Commission on the topic. Others maintained that it was still too premature to refer the matter to the Commission.

In both years, the Sixth Committee adopted draft resolutions, by consensus, which were subsequently adopted by the Plenary of the General Assembly as resolutions 71/149, of 13 December 2016, and 72/120, of 7 December 2017, respectively. The Sixth Committee was scheduled to continue its consideration of the topic in 2018.

2.4 Administration of Justice at the United Nations

The agenda item was referred to both the Fifth and Sixth Committees of the General Assembly at both sessions during the period under review.¹¹ Delegations welcomed the reports of the Secretary-General,¹² the Office of the United Nations Ombudsman and Mediation Services,¹³ and the Internal Justice Council¹⁴ and reiterated their satisfaction with the progress achieved by and the positive impact of the administration of justice system since 2009. Delegations referred to the key principles that the administration of justice should be based on, including professionalism, independence, transparency, decentralisation, and the principles of legality and due process. Some delegations also expressed their support for the protection of human rights of United Nations staff members. In 2017, delegations took note of the report of the Secretary-General on the findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations.¹⁵

¹¹ For the summary records of the debates in the Sixth Committee in 2016, see A/C.6/71/SR 16 and 22; and for 2015, see A/C.6/70/SR 16 and 18.

¹² See A/71/62/Rev 1 (Note by the Secretary-General on the system of administration of justice at the United Nations), A/71/164 and A/72/204 (Report of the Secretary-General on administration of justice at the United Nations).

¹³ See A/71/157 and A/72/138. In 2016, the Sixth Committee also had before it the Report of the Advisory Committee on Administrative and Budgetary Questions, on the Administration of justice at the United Nations and activities of the Office of the Ombudsman and Mediation Services, A/71/436.

¹⁴ See A/71/158 and A/72/210.

¹⁵ See A/71/163.

Delegations also noted the stabilisation in the number of cases before the United Nations Disputes Tribunal (UNDT) and the progress made in the disposal of old cases. Nonetheless, it was observed that while the overall number of requests for management evaluation had decreased in 2015, the number of cases submitted from staff in the field had increased, along with the number of applications received by the UNDT. Furthermore, some delegations pointed to the increase in the number of appeals received by the Appeals Tribunal.

Delegations commended the Management Evaluation Unit for its role in identifying cases that could be settled, and emphasised that the informal resolution of conflict was a crucial element of the internal system of administration of justice. Delegations also called for better incentives to resort to informal conflict resolution, and in this regard, commended the activities of the Office of the United Nations Ombudsman and Mediation Services. Delegations further emphasised the key role played by the Office of Staff Legal Assistance. Delegations further took note of the proposal for a single code of conduct for all legal representatives.

As regards the legal protection of non-staff personnel, some delegations favoured a differentiated system that would provide an adequate remedy, while emphasising that cost-efficient modalities in line with the broad preference for non-judicial mechanisms should be envisaged whenever possible. Nonetheless, different preferences on how non-staff members could be given access to an effective remedy were expressed.

Delegations continued to emphasise the need to protect whistle-blowers who reported misconduct or cooperated with investigations. Some delegations considered existing protections to be insufficient to protect individuals from retaliation. The Sixth Committee was also called upon to consider a specific mechanism in this regard, and the Secretary-General was invited to present a possible framework for improvement. In 2017, delegations welcomed the recommendation of the Internal Justice Council to establish an explicit system-wide policy for the protection of parties and witnesses.

As regards the power of the Tribunals, interest was expressed in the Assessment Panel's recommendation that there was a need for the early resolution of receivability issues before the United Nations Dispute Tribunal and that the United Nations Appeals Tribunal should be empowered to address urgent motions *in limine*.

As in the past, no draft resolution was adopted in the Sixth Committee at either session under review. Instead, on both occasions the Sixth Committee again opted for sending a letter, addressed from its Chairperson to the President of the General Assembly, drawing attention to the views of the Sixth Committee on certain specific issues relating

to the legal aspects of the reports submitted under the agenda item as discussed in the Committee, and requesting that such information be brought to the attention of the Fifth Committee.

2.5 Effects of Armed Conflicts on Treaties

In 2017,¹⁶ the Sixth Committee reverted to the consideration of the recommendation of the International Law Commission that a convention be negotiated on the basis of the articles on the effects of armed conflicts on treaties,¹⁷ adopted by the Commission in 2011.¹⁸

Delegations were generally of the view that the articles offered useful guidance to states. In particular, no opposition was expressed to the general principle contained in article 3, namely that armed conflicts do not *ipso facto* terminate or suspend the operation of treaties. Delegations considered the general principle to reflect customary international law. Nonetheless, some delegations maintained that the definition of armed conflicts in article 2(b) deviated from the customary definition in international humanitarian law. Delegations also disagreed on whether the articles should apply to non-international armed conflicts. Differing views were also expressed with regard to the indicative list of treaties in the annex to the articles, with some delegations supporting the inclusion of the list, while others preferring general criteria of types of treaties to which the articles would apply.

Different preferences were expressed as to the possible future form of the articles, with some delegations suggesting the convening of a working group to address outstanding issues, with a view to a possible convention, while others considered that the articles were most useful in their current form. The matter was resolved during the negotiation of the draft resolution, subsequently adopted by the General Assembly as resolution 72/121 of 7 December 2017. Different from the outcome of the negotiations on the draft resolutions relating to other International Law Commission texts (discussed elsewhere herein), the Assembly refrained from deciding to revert to the matter at a specific future session. Instead, the Assembly (drawing inspiration from the formula adopted for the articles on nationality in relation to the succession of states, in 2011)¹⁹ emphasised the value of the articles in providing guidance to states,

¹⁶ For the summary records of the debate on the topic held in 2017, see A/C.6/72/SR 17, 28 and 29.

¹⁷ The Committee had before it a report of the Secretary-General summarising comments submitted by States in writing. See A/72/96.

¹⁸ For the text of the articles on the effects of armed conflicts, as taken note of by the General Assembly, see GA res 66/99 of 9 December 2011.

¹⁹ GA res 66/92 of 9 December 2011.

invited states to use the articles as a reference whenever appropriate, and decided to 'revert to the question of the effects of armed conflicts on treaties at an appropriate time'. In doing so, the Assembly effectively ended its consideration of the possibility of negotiating a legal instrument on the effects of armed conflicts on treaties, thereby leaving the articles developed by the Commission as the last word on the matter, at least for the foreseeable future.

2.6 Diplomatic Protection

In 2016,²⁰ the Sixth Committee returned to its consideration of the recommendation of the International Law Commission that an international convention be negotiated on the basis of the articles on diplomatic protection,²¹ which the Commission adopted in 2006.²² The Sixth Committee considered the matter both in plenary and in the context of a working group. Divergent views on the advisability of negotiating a treaty continued to be held. Of those who spoke in favour of a treaty, some stressed that a convention would contribute to the protection of human rights, including the protection of refugees and stateless persons. The view was also expressed that the articles clarified and developed key norms of customary international law relating to diplomatic protection. It was also indicated that a treaty negotiation would create the opportunity to improve the articles. Several other delegations expressed their preference not to negotiate a convention on the basis of the draft articles at that stage and to allow more time for consideration of their content. Some were of the view that several provisions did not adequately reflect customary international law, and that their codification would create uncertainty and ambiguity. It was also noted that any decision to begin negotiating a convention in respect of diplomatic protection would be premature in the absence of a consensus on the negotiation of a convention on the basis of the articles on the responsibility of states for internationally wrongful acts, given the close connection between the two sets of articles.

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 71/142, of 13 December 2016, in which the Assembly decided, *inter alia*, to revert to the topic at its 74th session (2019).

²⁰ For the summary records of the debate on the topic held in 2016, see A/C.6/71/SR 9, 10, 31 and 32.

²¹ The Committee also had before it a report of the Secretary-General summarising comments submitted by states in writing. See A/71/93 and Corr1.

²² For the text of the articles on diplomatic protection, as commended by the General Assembly, see GA res 62/67, annex, of 6 December 2007.

2.7 *Expulsion of Aliens*

In 2017,²³ the Sixth Committee continued its consideration of the recommendation of the International Law Commission that a convention be negotiated on the basis of the draft articles on the expulsion of aliens, adopted by the Commission in 2014.²⁴

Significant differences of opinion on the draft articles continued to exist in the Sixth Committee. A number of delegations reiterated the critical importance of the topic, while also acknowledging its complexity. Delegations stressed the importance of striking a balance between state sovereignty and the human rights of the person expelled or in the process of expulsion. Some expressed the view that aliens should only be expelled in exceptional circumstances. A number of delegations affirmed that the draft articles constituted an important contribution as guidelines to states. Others were of the view that the topic intruded directly into the domestic sphere of states and thus impaired the discretion enjoyed in this area. The view was also expressed that the draft articles did not reflect customary international law.

Some delegations favoured the General Assembly taking note of the draft articles, and even the possibility of negotiating a convention based on the draft articles (subject to modification of some of the provisions). Other delegations expressed the firm view that no convention on the basis of the draft articles should be developed, in particular because of the divergences of opinion and still evolving character of many aspects of the draft articles. Instead, the importance of local, national and regional initiatives was emphasised. A further group of delegations questioned the advisability of a convention on rules, that already existed in other instruments applicable to human rights and refugees.

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 72/117, of 7 December 2017, in which the Assembly decided to revert to the topic at its 75th session (2020).

²³ For the summary records of the debate on the topic held in 2017, see A/C.6/72/SR 14, 15, 25 and 28.

²⁴ As of the time of writing, the General Assembly had not decided to annex the draft articles to a resolution, thereby transforming them into the 'articles' on expulsion of aliens. Accordingly, for the most recent text of the 'draft articles on expulsion of aliens', see the 2014 report of the International Law Commission, in A/69/10 para 44.

2.8 Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of such Harm

In 2016,²⁵ the Sixth Committee continued its consideration of possible future action to be taken on the articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001,²⁶ and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, finalised by the Commission in 2006.²⁷ As of that year, the Sixth Committee decided to join the consideration of the fate of both texts under a single agenda item.

For its consideration of the topic in 2016, the Sixth Committee had before it a report of the Secretary-General summarising comments and observations received from governments in writing,²⁸ as well as a further report of the Secretary-General containing a compilation of decisions of international courts, tribunals and other bodies referring to both texts.²⁹

A number of delegations were of the view that the work of the Commission in the area represented an important contribution to the progressive development of international law and its codification. Some emphasised that international law imposed certain obligations on states regarding prevention, cooperation, prior authorisation, notification, information and due diligence. The view was expressed that the articles and principles could not prevail over *lex specialis*. It was also suggested that the definition of 'state of origin' should be reconsidered in light of the many transnational corporations operating in developing countries.

With regard to the final form of the articles and the principles, some delegations reiterated that they would be most effective if they remained in their current form. A preference was expressed for addressing the relevant issues through sector-specific and regional instruments, rather than a general convention. On the other hand, it was noted that a unified convention incorporating both the articles and the principles could be useful.

²⁵ For the summary records of the debate on the topic held in 2016, see A/C.6/71/SR 18, 31 and 32.

²⁶ For the text of the articles on prevention of transboundary harm from hazardous activities, as commended by the General Assembly, see GA res 62/68, annex, of 6 December 2007.

²⁷ For the text of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, as taken note of by the General Assembly, see GA res 61/36, annex, of 64 December 2006.

²⁸ See A/71/136 and Add 1.

²⁹ See A/71/98.

Delegations also observed that any consideration regarding the future of the articles and principles should be based on a study of their application in the bilateral, regional and multilateral practice of states.

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 71/143, of 13 December 2016, in which the Assembly decided to revert to the topic at its 74th session (2019).

2.9 The Law of Transboundary Aquifers

In 2016,³⁰ the Sixth Committee returned to its consideration of the recommendation of the International Law Commission that an international convention be negotiated on the basis of the articles on the law of transboundary aquifers, which the Commission adopted in 2008.³¹

Several delegations stressed the need for further scientific and technical knowledge in the area, and acknowledged the important contribution to the topic by the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization. The social and economic factors linked to the exploitation of transboundary aquifers, and the importance of capacity-building, technical assistance and international cooperation, were also discussed.

According to a number of delegations, the draft articles had achieved a clear and fair balance between the rights and obligations of states. Some delegations expressed the view that sovereignty over aquifers must be exercised in conformity with rules of international law, which provide limits to the overuse or exploitation thereof. The view was also expressed by a number of delegations that the issue of a potential overuse of resources was especially prevalent, for different reasons, in areas with a dry climate and in areas under foreign occupation. According to some delegations, a more appropriate subject for the draft articles would have been common aquifers, not only those which are transboundary in nature, because questions of reasonable and equitable use may arise from the transboundary effects of the exploitation of aquifers which are not transboundary. The need to apply the concept of equitable use in relation to future generations was also emphasised.

As for the future form of the draft articles, a number of delegations envisaged the adoption of the draft articles in the form of a declaration of principles on the law of transboundary aquifers, which could serve as

³⁰ For a summary, records of the debate on the topic held in 2016, see A/C.6/71/SR 18, 19 and 33.

³¹ For the text of the articles on the law of transboundary aquifers, as commended by the General Assembly, see GA res 63/124 of 11 December 2008.

guidelines for states in their elaboration and conclusion of bilateral or regional agreements. Other delegations preferred that the draft articles evolve into an international framework convention. Other delegations reaffirmed their continued belief in context-specific arrangements and asserted that the draft articles should be taken into account by the states concerned in the negotiation of bilateral or regional agreements. Several delegations also noted that any international convention to be negotiated in the future would have to take account of existing international agreements, including the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses³² and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.³³

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 71/150, of 13 December 2016, in which the Assembly commended the articles to the attention of governments as guidance for bilateral or regional agreements and arrangements for the proper management of transboundary aquifers, and encouraged the International Hydrological Programme of UNESCO to continue its contribution by providing further scientific and technical assistance, and decided to revert to the topic at its 74th session (2019).

2.10 State Responsibility and Responsibility of International Organisations

The Sixth Committee reverted to its consideration of the topics 'Responsibility of states for internationally wrongful acts' and 'Responsibility of international organizations' at the 2016 and 2017 sessions, respectively. While the Committee considered them as separate agenda items, they are dealt with herein jointly owing to the significant link between them. In both cases, the Sixth Committee continued to grapple with the recommendation of the International Law Commission to consider the possibility of negotiating an international convention (or some other instrument) on the basis of the articles on the responsibility of states for internationally wrongful acts of 2001, in the case of the former, and on the basis of the articles on the responsibility of international organisations of 2011, in that of the latter. In fact, the fate of the 2011 articles is to a significant degree contingent on a decision on how to proceed with the 2001 articles. In neither case was

³² Not in force at time of writing. See GA res 51/229 of 21 May 1997, annex.

³³ 1936 UNTS 269.

the Committee able take to a definitive decision, and the consideration of the matter was again postponed into the future.

As regards the consideration of the 2001 articles, in 2016,³⁴ the Sixth Committee had before it a report by the Secretary-General reflecting a number of comments and observations received in writing from governments.³⁵ It also had before it a further installment of the compilation of decisions of international courts, tribunals and other bodies in which the 2001 articles have been cited, prepared by the Secretariat.³⁶ The debate was held in the plenary of the Sixth Committee, and in a working group, chaired by Mr Patrick Luna (Brazil).

Three options for future action were considered: (1) the negotiation of a convention on the basis of the articles; (2) the adoption of the articles by the General Assembly in the form of a declaration or resolution; or (3) the retention of the articles in their present form with no further action. The debate revealed a continuing trend towards the hardening of positions, even though some delegations (particularly those disinclined towards the negotiation of a treaty) called for more time for reflection. The key development during the session was the announcement by the African Group (led by South Africa), joined subsequently by the group of Arab states, that they favoured the negotiation of a treaty based on the 2001 articles. Together with the expressions of support by the Group of Latin American and Caribbean states, and a number of European states, made at previous sessions, the new position of the African and Arab states brought the total number of states on record as favouring a treaty negotiation to well over 100. Nonetheless, a group of approximately 20 states continued to express opposition to the negotiation of a treaty.

The General Assembly subsequently adopted, as resolution 71/133 of 13 December 2016, a compromise negotiated in the Sixth Committee whereby the Assembly, *inter alia*, decided to continue the discussion at the 74th session, in 2019, but also requested the Secretariat to prepare, in 2016, a technical report listing, in a tabular format, the references to the articles contained in the compilation of decisions of international courts, tribunals and other bodies referring to the articles prepared since 2001, as well as references to the articles made in submissions presented by member states before international courts, tribunals and other bodies since 2001 (to be used in inter-sessional informal discussions).³⁷ As part of the package compromise, the Assembly further envisaged the possibility of deciding at its 74th session (2019)

³⁴ For the summary records of the debate on the topic held in 2016, see A/C.6/71/SR 9, 31 and 33.

³⁵ See A/71/79.

³⁶ See A/71/80 (covering the period 1 February 2013 to 31 January 2016).

³⁷ The report was subsequently issued as A/71/80/Add1.

to request the Secretary-General to provide the General Assembly with information on all procedural options regarding possible action on the basis of the articles, without prejudice to the question of whether such possible action is appropriate.

Much less progress was made, in 2017, with regard to the consideration of the future of the responsibility of international organisations articles.³⁸ There the Sixth Committee proceeded on the basis of a report of the Secretary-General reproducing several comments and observations received from states and interested intergovernmental organisations,³⁹ as well as a compilation of decisions of international courts and tribunals in which the articles have been cited, prepared by the Secretariat.⁴⁰ A strong vein of scepticism as to the viability of converting the draft articles into an international convention continued to exist. The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 72/122, of 7 December 2017, in which the Assembly decided to revert to the topic at its 75th session (2020).

In sum, the consideration of the two topics during the period under review revealed a number of countervailing trends. On the one hand, as support for the negotiation of an international convention on international responsibility, at least for states, for the commission of internationally wrongful acts approached two-thirds of the membership of the United Nations, the options available to those opposing such an outcome seemed increasingly limited. Nonetheless, despite such a trend (or perhaps because of it) opposition to such an outcome was also increasingly expressed in virulent terms, including on the part of some (but not all) permanent five states. Only hindsight will reveal whether 2016 saw an inflection point beyond which the momentum towards a treaty became unsurmountable.

However, the debate on both agenda items continued to provide evidence of shifting understandings of the notions of codification and progressive development of international law, and in particular of the continuing retreat of the perceived value of the 'progressive' development of international law. The two concepts form the conceptual framework for contemporary international law-making, as laid out in article 13, paragraph 1(a), of the Charter of the United Nations, adopted in 1945.⁴¹ The Charter should be read together with the Statute of the International

³⁸ For a summary of the debate on the topic held in 2017, see A/C.6/72/SR 15 and 30.

³⁹ See A/72/80.

⁴⁰ See A/72/81 (covering the period 1 January 2004 to 31 December 2016).

⁴¹ 'The General Assembly shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.'

Law Commission, adopted two years later in 1947, which spelled out the understanding of the drafters of the Charter as to the implications of the two concepts.

Simply put, when coming to the codification of existing rules of international law (typically those enjoying a customary-law status), transformation into a treaty is strictly speaking not necessary (even if not excluded). The Statute of the Commission⁴² envisages other outcomes, such as the presentation of the rules in the form of a report.⁴³ The logic being that the added step of encapsulation into a treaty does not change the legal nature of the rules. However, when coming to 'progressive development', proposals for new rules (or changes to existing rules) are strictly speaking not 'law' until they have undergone transformation into law. This could happen through the process of sustained practice and acceptance as rules of customary international law (following which one would presumably no longer be in the realm of 'progressive development'), or through transformation by means of adoption in an international treaty permitting those states who support the new rule(s) to join (and those who oppose, the opportunity not to). The Statute of the Commission opts for the latter option, by indicating that the desired outcome of progressive development texts should be the 'preparation of draft conventions'.⁴⁴

Nonetheless, over the years the debate in the Sixth Committee, on the two texts proposed by the Commission, has revealed contrary understandings. For example, in 2010 Germany expressed itself as being amenable to the negotiation of a treaty on state responsibility only when there was general agreement that every provision in the 2001 articles reflected customary international law.⁴⁵ Leaving aside the likelihood of nearly 200 very different states attaining such level of agreement in advance of any negotiation, that such conditions would be considered a *sine qua non* for a treaty negotiation is seemingly much narrower than the position taken in the Commission's Statute (as described above). In such circumstances, it is not clear what the added value of codifying the articles in a treaty would be, particularly in the light of the expense and effort that a treaty negotiation would entail. That different views exist is precisely the reason why treaties are negotiated with a view to finding common ground.

⁴² GA res 174 (II) of 21 November 1947, as subsequently amended.

⁴³ *Ibid* art 23.

⁴⁴ *Ibid* art 15.

⁴⁵ See A/65/96 ('attention should in particular be paid to whether State courts accord the articles in their entirety (rather than individual articles) the status of customary international law. In the view of Germany, as long as not all States and courts do so, a binding convention should not be drawn up ...').

Perhaps even more stark was the view on progressive development of international law taken by the United Kingdom during the 2017 debate on the 2011 articles. Since ‘several of the draft articles represent[ed] progressive development rather than codification of international law [w]e consider it, therefore, unlikely that an inevitably long and complex process of negotiation would lead to sufficient consensus for the adoption of a convention’.⁴⁶ Such view seems to favour a more pejorative understanding of ‘progressive development’, whereby such classification has become an argument against, not for, transformation into law through treaty negotiation. This seemingly inverts the position taken in the Commission’s Statute, described above. Furthermore, that a state with a deep tradition in efforts to progressively develop international law would openly express doubts as to the continued viability of such activity, whose origins stretch back before the Charter to the efforts of the League of Nations to ‘progressively codify’ international law, provides yet more evidence of the diminution of the perceived value of the notion of ‘progressive development of international law’.⁴⁷

3 Consideration of Reports of Expert Legal Bodies

3.1 Report of the International Law Commission

The reports of the International Law Commission on its 68th (2016)⁴⁸ and 69th (2017)⁴⁹ sessions were considered by the Sixth Committee during the period under review.⁵⁰

The main achievement of the 2016 session of the Commission⁵¹ was the adoption of the draft articles on the protection of persons in the event of disasters.⁵² In doing so, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles. In addition, the Commission concluded the first reading of the draft conclusions on identification of customary international law,⁵³

⁴⁶ Statement by the United Kingdom of Great Britain and Northern Ireland, on agenda item 87, Responsibility of international organisations, delivered on 13 October 2017 (on file with the author).

⁴⁷ That such phenomenon might be having a chilling effect on the work of the Commission is best left for a separate discussion.

⁴⁸ ILC Report 2016, A/71/10.

⁴⁹ Ibid 2017, A/72/10.

⁵⁰ For the summary records of the debates in 2016, see A/C.6/71/SR 20 to 30 and 33; and for 2017, see A/C.6/72/SR 18 to 26 and 30.

⁵¹ For a more detailed summary of the work of the Commission in 2016, see the statement of its Chairman, summarised in A/C.6/71/SR 20 paras 3–32; A/C.6/71/SR 24 paras 33–61; A/C.6/71/SR 27, paras 51–81. See also the website of the Commission <http://legal.un.org/ilc/>.

⁵² See A/71/10 para 48.

⁵³ Ibid para 62.

together with commentaries thereto, as well as of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties,⁵⁴ also accompanied by commentaries thereto. Both texts were transmitted, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

In 2017, the Commission's main achievement was the conclusion of the first reading of the draft articles on crimes against humanity, together with commentaries thereto.⁵⁵ The draft articles were transmitted, through the Secretary-General, to Governments, international organisations and others, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018, to allow for the necessary preparations for the second reading to be undertaken in 2019.

At both sessions, the Commission also continued to make progress on the topics 'crimes against humanity', 'protection of the atmosphere', 'peremptory norms of general international law (*jus cogens*)',⁵⁶ 'protection of the environment in relation to armed conflicts',⁵⁷ 'immunity of state officials from foreign criminal jurisdiction', and 'provisional application of treaties'.⁵⁸ Of particular note was a relatively rare recorded vote, held in 2017 during the work on the topic 'immunity of state officials from foreign criminal jurisdiction', whereby the Commission provisionally adopted (21 in favour, eight against and one abstention) a provision on crimes under international law in respect of which immunity *ratione materiae* does not apply. Furthermore, in 2017, the Commission decided to add a new topic to its work programme, namely the 'succession of States in respect of State responsibility', and appointed Mr Pavel Šturma as Special Rapporteur.

In both years, the Sixth Committee took note of the progress in the work of the Commission, and held an extensive debate on the various legal issues raised in the Commission's respective annual reports.⁵⁹ In particular, the Committee, in 2016, welcomed the adoption of the draft articles on the protection of persons in the event of disasters.

⁵⁴ Ibid para 75.

⁵⁵ See A/72/10, para 45.

⁵⁶ In 2017, the Commission decided to change the title of the topic from *jus cogens* to the present title.

⁵⁷ A new Special Rapporteur for the topic, Ms Marja Lehto, was appointed in 2017.

⁵⁸ In light of the conclusion of its quinquennium at the end of 2016, a new Commission was elected in November 2017 to serve for the next quinquennium (2017–2021).

⁵⁹ For an extensive summary of the views of delegations expressed in the Sixth Committee on the International Law Commission's annual reports, see A/CN.4/703 (for 2016) and A/CN.4/713 (for 2017).

Delegations were generally of the view that the draft articles constituted a comprehensive framework for response to, and the reduction of risks associated with, disasters and protection of persons. Nonetheless, some delegations indicated that not all concerns had been addressed during the second reading. It was also noted, in particular, that the draft articles largely reflected *lex ferenda*. Views were largely split on whether to accept the Commission's recommendation for the eventual form of the draft articles (a convention).

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/140 of 13 December 2016, and 72/116 of 7 December 2017. In 2016, the Assembly also adopted resolution 71/141 of 13 December 2016, in which it took note of the draft articles on the protection of persons in the event of disasters, presented by the Commission, and invited governments to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles, for consideration at its 73rd session (in 2018).⁶⁰

3.2 Report of the United Nations Commission on International Trade Law

The Sixth Committee considered the report of the United Nations Commission on International Trade Law (UNCITRAL)⁶¹ on the work of its 49th⁶² and 50th sessions,⁶³ held in 2016 and 2017, respectively.⁶⁴

The main achievements in 2016⁶⁵ were the adoption of three texts: the UNCITRAL Model Law on Secured Transactions (dealing with security interests in a broad range of tangible and intangible movable property), the second edition of the UNCITRAL Notes on Organising Arbitral Proceedings (covering typical matters for consideration in the organisation of arbitral proceedings) and the Technical Notes on Online Dispute Resolution (seeking to promote the development of online dispute resolution mechanisms).

The highlight of the 2017 session⁶⁶ of UNCITRAL was the

⁶⁰ It should be noted that the Sixth Committee did not, at the time, decide to annex the draft articles.

⁶¹ Information on the work of UNCITRAL is available at its website <http://www.uncitral.org>.

⁶² UNCITRAL Report, 2016, A/71/17.

⁶³ *Ibid* 2017, A/72/17.

⁶⁴ For the summary records of the debates in 2016, see A/C.6/71/SR 11, 12, 19 and 24; and for 2017, see A/C.6/72/SR 10, 17 and 21.

⁶⁵ For a detailed summary of the work of UNCITRAL in 2016, see the statement of its Chairman, summarised in A/C.6/71/SR 11 paras 52–77.

⁶⁶ For a detailed summary of the work of UNCITRAL in 2017, see the statement of its Chairman, summarised in A/C.6/72/SR 10 paras 1–30.

commemoration of its 50th anniversary, as well as the finalisation and adoption of the UNCITRAL Model Law on Electronic Transferable Records (aimed at legally enabling the dematerialisation of transferable documents and instruments), as well as of the Guide to Enactment of the Secured Transactions Model Law (providing a general introduction to, and a brief explanation of, each provision of the Model Law).

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/135 of 13 December 2016, and 72/113 of 7 December 2017. In 2016, the Assembly also adopted resolutions 71/136, by which it recommended that all states give favourable consideration to the UNCITRAL Model Law on Secured Transactions; 71/137, by which it recommended the use of the 2016 UNCITRAL Notes on Organising Arbitral Proceedings; and 71/138 by which it recommended that all states and other stakeholders use the Technical Notes on Online Dispute Resolution in designing and implementing online dispute-resolution systems for cross-border commercial transactions. In 2017, the Assembly, on the recommendation of the Sixth Committee, also adopted resolution 72/114, on 7 December 2017, by which it recommended, *inter alia*, that all states consider favourably the UNCITRAL Model Law on Electronic Transferable Records when revising or adopting legislation relevant to electronic commerce.

3.3 Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization

At its 2016 and 2017 sessions,⁶⁷ the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization⁶⁸ focused once again on the themes of the maintenance of international peace and security and the peaceful settlement of disputes.⁶⁹ Under the maintenance of international peace and security, the Special Committee considered the question of the ‘implementation of the provisions of the Charter of the United Nations related to assistance to third states affected by the application of sanctions’, on the basis of

⁶⁷ See Report of the Special Committee on the Charter, A/71/33, 2016, and Report of the Special Committee on the Charter, A/72/33, 2017.

⁶⁸ For more information, see the website of the Special Committee, <http://legal.un.org/committees/charter/>.

⁶⁹ The Special Committee also reviewed the work of the United Nations Secretariat in updating the *Repertory of Practice of United Nations Organs* and the *Repertoire of Practice of the Security Council*, as reported in the respective reports of the Secretary-General, A/71/202 and A/72/184. For more information on each publication, see <http://legal.un.org/repertory/> and <http://www.un.org/en/sc/repertoire>.

a report prepared by the Secretary-General.⁷⁰ A key development was agreement, in 2016, on a package set of recommendations by which the consideration of the subtopic would be undertaken biennially (with the next consideration to take place in 2018). A further component of the package was the discussion, in 2017, on the question of the introduction and implementation of sanctions imposed by the United Nations, and in particular the implementation by the sanctions committees of the Security Council of the set of recommendations adopted by the General Assembly in 2009, based on the work of the Special Committee.⁷¹

The Special Committee also had before it a revised proposal submitted, in 1998, by the Libyan Arab Jamahiriya (now Libya) on strengthening the role of the United Nations in the maintenance of international peace and security; a working paper submitted by the Bolivarian Republic of Venezuela, in 2011, entitled 'open-ended working group to study the proper implementation of the Charter of the United Nations with respect to the functional relationship of its organs'; a proposal by Belarus and the Russian Federation, submitted in 2005, that the General Assembly request an Advisory Opinion from the International Court of Justice as to the legal consequences of the resort to the use of force by states without prior authorisation by the Security Council, except in the exercise of the right to self-defence; and a working paper submitted by Cuba on 'the strengthening of the role of the Organization and enhancing its effectiveness: adoption of recommendations', which had been submitted at the 2012 session. At the 2016 annual session, the Special Committee also commenced its consideration of a working paper submitted by Ghana on strengthening the relationship and cooperation between the United Nations and regional arrangements or agencies in the peaceful settlement of disputes.

Under the rubric of the peaceful settlement of disputes, the Special Committee considered a proposal, submitted by the Russian Federation, that the Secretariat be requested to establish a website on the peaceful settlement of disputes and update the *Handbook on the Peaceful Settlement of Disputes between States*; as well as a proposal submitted on behalf of the Non-Aligned Movement entitled 'Pacific settlement of disputes and its impact on the maintenance of peace'. It was on the basis of the latter proposal that, in 2017, the Special Committee further recommended that, as of its 2018 session, it would undertake an annual thematic debate, under the agenda item entitled 'Peaceful settlement of disputes', to discuss the means for the settlement of disputes, in accordance with Chapter VI of the Charter of the United Nations,

⁷⁰ See A/71/166.

⁷¹ See GA res 64/115, annex.

including in particular those contained in article 33, and consistent with the Manila Declaration on the Peaceful Settlement of International Disputes. It further recommended that the subtopic for the debate at the 2018 session would be 'Exchange of information on State practices regarding the use of negotiation and enquiry'.

In 2016, the Special Committee further recommended the text of a draft resolution recalling the commemoration of the 70th anniversary of the International Court of Justice, and commending the important role that it has played as the principal judicial organ of the United Nations in adjudicating disputes among states, and recognising the value of its work.

The debate in both the Special Committee and in the Sixth Committee,⁷² later in each year, continued to reveal a fundamental difference of opinion on almost all of the proposals, particularly those seeking a modification of the powers of the Security Council. Nonetheless, there was general support for the various recommendations of the Special Committee.

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/146 of 13 December 2016, and 72/118 of 7 December 2017, establishing, inter alia, the mandate for the respective subsequent sessions of the Special Committee. In 2016, the Assembly also adopted resolution 71/147, on 13 December 2016, recalling the commemoration of the 70th anniversary of the International Court of Justice.

3.4 Report of the Committee on Relations with the Host Country

The Sixth Committee considered the annual reports of the Committee on Relations with the Host Country⁷³ at each session during the period under review.⁷⁴ The reports reviewed annual activities concerning the fulfilment of the Host Country's obligations under the Convention on the Privileges and Immunities of the United Nations⁷⁵ and the Headquarters Agreement,⁷⁶ and the actions taken to accommodate the needs of the diplomatic community in New York in various areas. The main issues raised in the reports and debate in the Sixth Committee related to obtaining

⁷² For the summary records of the debates in 2016, see A/C.6/71/SR 15, 16, 30, 32 and 33; and for 2017, see A/C.6/72/SR 12, 13, 25 and 28.

⁷³ Report of the Committee on Relations with the Host Country, A/71/26, 2016, and Report of the Committee on Relations with the Host Country, A/72/26, 2017.

⁷⁴ For the summary records of the debates in 2016, see A/C.6/71/SR 30 and 33; and for 2017, see A/C.6/72/SR 27 and 30.

⁷⁵ 1 UNTS 15.

⁷⁶ 11 UNTS 147.

suitable banking services necessary for the effective functioning of the permanent missions; restrictions on movement of certain diplomats and international civil servants accredited to the United Nations; concerns over alleged irregularities in the issuance of visas to certain missions; restrictions arising from the bilateral relations of the host country in relation to the security of missions; the efforts of the host country to accelerate customs and immigration; and the importance of enhancing the training of police and security personnel.

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/152 of 13 December 2016, and 72/124 of 13 December 2017.

4 Oversight Activities

4.1 *The Rule of Law at the National and International Levels*

During the period under review, the Sixth Committee considered the item ‘the rule of law at the national and international levels’,⁷⁷ on the basis of several reports by the Secretary-General.⁷⁸ Delegations once again pointed to the central role of the rule of law at the national and international levels to support international peace and security, in achieving socio-economic development and in serving as an important foundation for the universal respect of the principle of justice in accordance with the Charter of the United Nations. Delegations also stressed the importance of fighting impunity and seeking accountability. At the same time, it was noted that there was no single definition of the rule of law.

In 2016, delegations focused their comments on the subtopics ‘sharing national practices of States in the implementation of multilateral treaties’ and ‘practical measures to facilitate access to justice for all, including for the poorest and most vulnerable’. Regarding the former, delegations generally noted the key role that multilateral treaties play in laying down common rules for all nations and strengthening a rules-based international system, contributing to predictability, transparency and equality in treaty relations. With regard to the latter, delegations noted that the provision of equal, easy access to justice for all, including for the poorest and most vulnerable, was essential for promoting the rule of law at the national level. A number of delegations also noted the importance of providing legal aid and assistance to individuals. Delegations further emphasised that the promotion of the rule of law was crucial for the

⁷⁷ For the debates in 2016, see A/C.6/71/SR 4 to 8 and 33; and for 2017, see A/C.6/72/SR 5 to 8 and 29.

⁷⁸ See A/71/169, A/72/268 and A/72/86. More information on the rule of law activities of the United Nations is available at <https://www.un.org/ruleoflaw/>.

achievement of the Sustainable Development Goals, in particular Goal 16, paragraph 3.

In 2017, the debate focused on the subtopic 'ways and means to further disseminate international law to strengthen the rule of law'. Delegations outlined their domestic activities in that regard. Delegations also commended the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, administered by the Office of Legal Affairs. Several delegations commented on the Report of the Secretary-General concerning a possible review of the regulations giving effect to article 102 of the Charter of the United Nations⁷⁹ and called for a dedicated debate on the issue.

Delegations stressed the need for the rule of law to be integrated in all aspects of the work of the United Nations, and noted that there was room for improvement to avoid duplication of efforts and to increase the efficiency of the activities within the organisation and towards strengthening the rule of law at the national and international levels. Delegations further welcomed United Nations activities in a wide range of rule of law areas and emphasised the importance of the provision of technical assistance and capacity building to member states.

Delegations further emphasised the important work of the International Court of Justice (ICJ) in the peaceful settlement of disputes and the important role of the International Criminal Court (ICC) in the fight against impunity. Some delegations also noted the role that ad hoc and mixed tribunals could play in enhancing the rule of law and further stressed the importance of alternative dispute-settlement mechanisms, such as negotiation, the use of good offices, mediation and conciliation. While some delegations welcomed the establishment of the International Impartial Independent Mechanism (IIIM) for Syria, others (including the Syrian Arab Republic) criticised its creation.

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/148 of 13 December 2016, and 72/119 of 7 December 2017.

4.2 Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts

The Sixth Committee considered the agenda item in 2016,⁸⁰ on the basis of a report by the Secretary-General.⁸¹ Delegations reiterated the necessity of ensuring access to humanitarian assistance for the relief of

⁷⁹ See A/72/68.

⁸⁰ For the debates in 2016, see A/C.6/71/SR 10, 11 and 33.

⁸¹ See A/71/183.

those in need, and the obligation to avoid attacks on medical personnel and facilities as well as humanitarian convoys. Specific reference was made to Security Council resolution 2286 (2016).⁸² Delegations also noted the importance of measures addressing missing persons, as well as that of combating sexual and gender-based violence in armed conflict.

Caution was expressed that measures employed in the fight against terrorism should not violate other fundamental international rules. Specific reference was made to the deleterious impact of such measures on humanitarian work. The necessity for the laws of armed conflict to regulate asymmetric warfare and sufficiently address the conduct of non-state parties to armed conflicts was also discussed.

Several delegations expressed support for the idea of convening a meeting of the High Contracting Parties to the Fourth Geneva Convention to examine measures for the enforcement of the Convention in the Occupied Palestinian Territory. States were also encouraged to accept the competence of the International Humanitarian Fact-Finding Commission (IHFFC) pursuant to article 90 of the First Additional Protocol⁸³ to the Geneva Conventions. Reference was also made to the extension of the jurisdiction of the International Criminal Court⁸⁴ over certain war crimes, decided at the review conference held in Kampala in 2010. The impact of the Arms Trade Treaty⁸⁵ on human rights and International Humanitarian Law (IHL) was also noted.

Delegations further commended the ICRC on its role in the promotion of IHL and in monitoring and enhancing its mechanisms of compliance.

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 71/144, of 13 December 2016, in which the Assembly decided, *inter alia*, to revert to the topic at its 73rd session (2018).

4.3 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives

The Sixth Committee considered the agenda item in 2016,⁸⁶ on the basis of a report by the Secretary-General.⁸⁷ Delegations again denounced continuing acts of violence against the security and safety of diplomatic and consular missions and their representatives and urged states to

⁸² Protection of civilians in armed conflict. Adopted on 3 May 2016.

⁸³ 1125 UNTS 3.

⁸⁴ See the Rome Statute of the International Criminal Court, 1998, 2187 UNTS 3.

⁸⁵ GA res 67/234B, annex, of 2 April 2013. Not in force.

⁸⁶ For the debates in 2016, see A/C.6/71/SR 11, 30 and 32.

⁸⁷ See A/71/130 and Add 1.

respect their obligations under international law and to take all the necessary measures in order to protect diplomatic and consular missions and the representatives within their territories. They also stressed the need for those states that had not already done so to become parties to the relevant international conventions. Several delegations emphasised the particular threats posed by terrorist and other armed groups to diplomatic and consular missions, as well as to missions and representatives of international organisations.

Delegations also stressed the special obligations and responsibilities that host countries have in protecting diplomatic and consular missions. Several delegations were of the view that international cooperation was important to assist in the prevention of future attacks, in particular through the exchange of information. The need to hold perpetrators of attacks on diplomatic and consular missions and representatives accountable and to bring them to justice was also referenced. It was reaffirmed that the sending state should be entitled to obtain prompt compensation for loss or injury suffered as a result of the failure of receiving states to fulfil their obligations stipulated in the Vienna Convention on Diplomatic Relations.⁸⁸

Several delegations reiterated their concern about the effects that state surveillance and the interception of their communications had on their diplomatic functions. A number of delegations restated their view that the General Assembly should address new challenges in the digital era, and highlighted the need to ensure the respect for diplomatic and consular immunities – including those of archives, documents and communications.

The Sixth Committee adopted a draft resolution, by consensus, which was subsequently also adopted by the General Assembly as resolution 71/145, of 13 December 2016, in which the Assembly decided, *inter alia*, to revert to the topic at its 73rd session (2018).

4.4 United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law

During the period under review, the Sixth Committee considered⁸⁹ the consecutive reports of the Secretary-General⁹⁰ providing an overview of the various activities undertaken in the context of the Programme of

⁸⁸ 500 UNTS 95.

⁸⁹ For the debates in 2016, see A/C.6/71/SR 17, 18, 30 and 32; and for 2017, see A/C.6/72/SR 16 and 30.

⁹⁰ See A/71/432 and A/72/517. For more information on the activities of the Programme of Assistance see <http://legal.un.org/poa/>.

Assistance. Of particular note was the expansion, in 2016, of the regional courses in international law to three regions per year: Latin America and the Caribbean (Chile), Africa (Ethiopia) and Asia-Pacific (Thailand).

During the debate, delegations reiterated the benefits of the Programme of Assistance to enhance knowledge of international law across all regions. It was noted that knowledge and understanding of the substantive norms of international law was a necessary premise for their observance, which was at the heart of the purposes and principles of the United Nations. Delegations expressed their strong appreciation for and support of the Regional Courses in International Law and for the International Law Fellowship Programme. A number of delegations considered such activities under the Programme of Assistance to be a key capacity-building activity in improving the participation of developing countries in multilateral frameworks and instruments. Delegations also praised the Audiovisual Library of International Law⁹¹ as an essential research and teaching resource, offering easy and free access to a vast range of materials, and noted the large and increasing number of users of the resource. Delegations also emphasised the significance of the legal publications produced by the Office of Legal Affairs of the United Nations.

Based on the respective recommendations of the Sixth Committee, the General Assembly subsequently adopted resolutions 71/139 of 13 December 2016, and 72/115 of 13 December 2017.

5 Requests for Observer Status

In 2016 and 2017, the Sixth Committee considered proposals for the grant of observer status in the General Assembly to 15 entities. Five requests, namely those relating to the International Chamber of Commerce (in 2016),⁹² the International Conference of Asian Political Parties (in 2016),⁹³ the Cooperation Council of Turkic-speaking states,⁹⁴ the Eurasian Economic Union,⁹⁵ and the Community of Democracies⁹⁶ had been carried over from prior sessions. Of those, the Committee was only able to overcome previous difficulties in the case of the International Chamber of Commerce, which was granted observer status in the General Assembly on the recommendation of the Sixth Committee in

⁹¹ See <http://legal.un.org/avl/>.

⁹² See A/71/232.

⁹³ See A/70/194.

⁹⁴ See A/66/141.

⁹⁵ See A/70/141.

⁹⁶ See A/70/142.

2016.⁹⁷ There continued to be opposition in the Sixth Committee to the grant of observer status to the other four entities. In 2016, the respective sponsors decided to withdraw the request for the grant of observer status to the International Conference of Asian Political Parties. The consideration of the other three requests was deferred, in each year, to the next session, and is next scheduled to take place in 2018.

In 2017, opposition was also expressed to the grant of observer status in the General Assembly in the case of two new requests, namely to the Ramsar Convention on Wetlands Secretariat⁹⁸ and the Global Environment Facility.⁹⁹ Both were deferred to the 2018 session for further consideration.

Opposition to the grant of observer status was based principally on technical grounds, involving lack of clarity as to the intergovernmental nature of the entities in question, as in the case of the International Conference of Asian Political Parties. A further technical obstacle arose in 2017, in the context of the request for the grant of observer status to a treaty Secretariat (of the Ramsar Convention), and whether it satisfied the established requirement of being an intergovernmental organisation. Similar concerns were expressed in connection with the Global Environment Facility.

However, the opposition to the grant of observer status to the other entities mentioned above was primarily based on political considerations. In other words, in addition to fulfilling the technical requirements, established by the General Assembly in 1994,¹⁰⁰ namely that the entity is constituted as an intergovernmental organisation, as understood under international law, whose activities cover matters of interest to the Assembly, the political acceptability of the entity in question has increasingly played a role in the decision-making process. In effect, political acceptability continues to be a *de facto* third criterion for the grant of observer status. While such criterion has typically been dominant in preventing the grant of observer status to entities (most of which satisfy the technical requirements), the opposite is also true, on occasion. In 2016, the political acceptance criterion predominated in the decision to look beyond the technical objections and nonetheless grant observer status to the International Chamber of Commerce.¹⁰¹

⁹⁷ GA res 71/156 of 13 December 2016.

⁹⁸ See A/72/194.

⁹⁹ See A/72/195.

¹⁰⁰ GA decision 49/426 of 9 December 1994.

¹⁰¹ The compromise, negotiated by the delegation of France, involved the inclusion of new language in the preamble to the draft resolution, inter alia, confirming the 'unique importance of the International Chamber of Commerce, created in 1919, due to its historical specificities and its special role and authority as a representative of the

In 2016 and 2017, the General Assembly, on the recommendation of the Sixth Committee, decided to grant observer status to the following entities (in addition to the International Chamber of Commerce); the Conference of Ministers of Justice of the Ibero-American countries;¹⁰² the International Youth Organization for Ibero-America;¹⁰³ the Pacific Islands Development Forum;¹⁰⁴ the Central American Bank for Economic Integration;¹⁰⁵ the International Network for Bamboo and Rattan;¹⁰⁶ the ASEAN+3 Macroeconomic Research Office;¹⁰⁷ the Eurasian Group on Combating Money Laundering and Financing of Terrorism;¹⁰⁸ and the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean.¹⁰⁹

6 Conclusion

The Sixth Committee was scheduled to revert to its consideration of the above topics at the 2018 session (or future sessions) of the General Assembly.

business community in more than 120 countries' and '[e]mphasizing that the present resolution does not change the criteria established in decision 49/426'.

¹⁰² GA res 71/153 of 13 December 2016.

¹⁰³ GA res 71/154 of 13 December 2016.

¹⁰⁴ GA res 71/155 of 13 December 2016.

¹⁰⁵ GA res 71/157 of 13 December 2016.

¹⁰⁶ GA res 72/125 of 7 December 2017.

¹⁰⁷ GA res 72/126 of 7 December 2017.

¹⁰⁸ GA res 72/127 of 7 December 2017.

¹⁰⁹ GA res 27/128 of 7 December 2017.