

## Chapter XII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Programme, procedures and working methods of the Commission and its documentation

165. At its 3160th meeting, on 7 May 2013, the Commission established a Planning Group for the current session.

166. The Planning Group held three meetings. It had before it section I of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657), entitled “Other decisions and conclusions of the Commission”; General Assembly resolution 67/92 of 14 December 2012 on the report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions, in particular paragraphs 23 to 28; General Assembly resolution 67/1 of 24 September 2012 containing the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels; and General Assembly resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels.

#### 1. INCLUSION OF NEW TOPICS ON THE PROGRAMME OF WORK OF THE COMMISSION

167. At its 3171st meeting, on 28 May 2013, the Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work and to appoint Ms. Marie Jacobsson as Special Rapporteur for the topic.

168. At its 3197th meeting, on 9 August 2013, the Commission decided to include the topic “Protection of the atmosphere” in its programme of work and to appoint Mr. Shinya Murase as Special Rapporteur for the topic. The Commission included the topic in its programme on the understanding that:

(a) work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries, including intellectual property rights;

(b) the topic will also not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to “fill” gaps in the treaty regimes;

(c) questions relating to outer space, including its delimitation, are not part of the topic;

(d) the outcome of work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Special Rapporteur’s reports would be based on such an understanding.

#### 2. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

169. At its first meeting, on 7 May 2013, the Planning Group decided to reconstitute for the current session the Working Group on the long-term programme of work. In the absence of its Chairperson, Mr. Donald McRae, the Working Group was chaired by Mr. Mahmoud Hmoud. Mr. Mahmoud Hmoud submitted an oral interim report to the Planning Group at its second meeting, on 6 June 2013, and another report at its third meeting, on 25 July 2013. The Working Group recommended the inclusion of the topic “Crimes against humanity” in the long-term programme of work of the Commission on the basis of a proposal prepared by Mr. Sean Murphy. The Working Group was guided by the recommendation made by the Commission at its fiftieth session (1998) regarding the criteria for the selection of topics, namely that:

(a) the topic should reflect the needs of States in respect of the progressive development and codification of international law;

(b) the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(c) the topic is concrete and feasible for progressive development and codification.

The Commission also agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.<sup>405</sup>

170. The Commission endorsed the recommendation to include the topic “Crimes against humanity” in its long-term programme of work. The view was expressed that consideration of the topic in the syllabus should have taken a broader perspective, including the coverage of all core crimes. The syllabus for the topic included by the

<sup>405</sup> *Yearbook ... 1998*, vol. II (Part Two), para. 553.

Commission in its long-term programme of work at the present session appears in annex II to the present report.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 67/97 OF 14 DECEMBER 2012 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

171. The General Assembly, in resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission has commented annually on its role in promoting the rule of law since its sixtieth session (2008). The Commission notes that the substance of the comprehensive comments contained in paragraphs 341 to 346 of its 2008 report<sup>406</sup> remains relevant and reiterates the comments in paragraph 231 of its 2009 report,<sup>407</sup> paragraphs 389 to 393 of its 2010 report,<sup>408</sup> paragraphs 392 to 398 of its 2011 report<sup>409</sup> and paragraphs 274 to 279 of its 2012 report.<sup>410</sup>

172. The Commission welcomes the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels contained in General Assembly resolution 67/1 and shares the commitment shown in the Declaration to an international order based on the rule of law, and the recognition that the rule of law applies to all States equally and to international organizations. The Commission also notes the appreciation expressed for the work of the International Law Commission in advancing the rule of law at the international level through the progressive development of international law and its codification.

173. The Commission recalls that the rule of law constitutes the essence of the Commission, for its basic mission is to work for the progressive development of international law and its codification, bearing in mind its implementation at the national level.

174. The Commission wishes to reiterate that its work has led to the adoption by States of a significant number of conventions. For such conventions to serve their full purpose they need to be ratified and implemented. In addition to formulating draft articles, the Commission's output takes other forms, which also contribute to the progressive development of international law and its codification. Keeping in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level and aims to promote the rule of law as a principle of governance at the international level.

175. The Commission welcomes the positive contribution of the General Assembly, as the chief deliberative and representative organ of the United Nations, to the rule of law in all its aspects through policymaking and standard

setting, and through the progressive development of international law and its codification.

176. The Commission, as an organ established by the General Assembly and in keeping with the mandate set out in Article 13, paragraph (1) (a), of the Charter of the United Nations, and in its statute, and in line with views expressed by States in the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, will continue to advance the rule of law through the progressive development of international law and its codification.

177. The Commission welcomes the decision of the General Assembly to select "The rule of law and the peaceful settlement of international disputes" as the thematic subject for debate in the Sixth Committee this year.

178. Bearing in mind the close interrelation between the rule of law at the national level and that at the international level, the Commission, in fulfilling its mandate concerning the progressive development of international law and its codification, considers that its work should take into account, where appropriate, the principles of human rights that are fundamental to the rule of law as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.

179. Accordingly, the Commission has promoted awareness of the rule of law at the national and international levels, including, in particular, through its work on such topics as expulsion of aliens, protection of persons in the event of disasters, the obligation to extradite or prosecute (*aut dedere aut judicare*) and immunity of State officials from foreign criminal jurisdiction.

180. The Commission reiterates its commitment to the rule of law in all of its activities.

#### 4. HONORARIA

181. The Commission reiterates once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of resolution 56/272 of 27 March 2002, which have been expressed in previous reports of the Commission.<sup>411</sup> The Commission emphasizes that the above resolution particularly affects special rapporteurs, as it compromises support for their research work.

#### 5. DOCUMENTATION AND PUBLICATIONS

182. The Commission reiterated its recognition of the particular relevance and significant value to its work of the legal publications prepared by the Secretariat.<sup>412</sup> It noted with appreciation that the Codification Division

<sup>406</sup> *Yearbook ... 2008*, vol. II (Part Two), pp. 146–147.

<sup>407</sup> *Yearbook ... 2009*, vol. II (Part Two), p. 150.

<sup>408</sup> *Yearbook ... 2010*, vol. II (Part Two), pp. 202–203.

<sup>409</sup> *Yearbook ... 2011*, vol. II (Part Two), p. 178.

<sup>410</sup> *Yearbook ... 2012*, vol. II (Part Two), p. 87.

<sup>411</sup> See *Yearbook ... 2002*, vol. II (Part Two), paras. 525–531; *Yearbook ... 2003*, vol. II (Part Two), para. 447; *Yearbook ... 2004*, vol. II (Part Two), para. 369; *Yearbook ... 2005*, vol. II (Part Two), para. 501; *Yearbook ... 2006*, vol. II (Part Two), para. 269; *Yearbook ... 2007*, vol. II (Part Two), para. 379; *Yearbook ... 2008*, vol. II (Part Two), para. 358; *Yearbook ... 2009*, vol. II (Part Two), para. 240; *Yearbook ... 2010*, vol. II (Part Two), para. 396; *Yearbook ... 2011*, vol. II (Part Two), para. 399; and *Yearbook ... 2012*, vol. II (Part Two), para. 280.

<sup>412</sup> See *Yearbook ... 2007*, vol. II (Part Two), paras. 387–395.

was able to expedite the issuance of its publications significantly through the continuation and expansion of its desktop publishing initiative, which has greatly enhanced the timeliness and relevance of those publications to the Commission's work.

183. The Commission noted with satisfaction that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, would not be subject to arbitrary length restrictions. Given, however, that a shortage of staff in the units responsible for drafting summary records might have an impact on the integrity and quality of the records, a number of experimental measures to streamline the processing of the Commission's summary records were introduced following exchanges between the secretariat of the Commission and the drafting units. The new arrangements entail more expeditious transmission of the provisional records to members of the Commission for timely correction and prompt release of the final texts. It is hoped that this will result in a more rational use of resources and facilitate the preparation of the definitive records in all languages, without compromising their integrity.

184. The Commission is aware that, in the present financial situation, the continuation of several of the Codification Division's publications may be in jeopardy.

185. In view of the extreme usefulness of the following publications to its work, the Commission decided to recommend that the General Assembly request the Secretary-General to continue these publications:

(a) *The Work of the International Law Commission* in all six official languages at the beginning of each quinquennium;

(b) *Reports of International Arbitral Awards* in English or French; and

(c) *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice* in all six official languages every five years.

186. The Commission expressed its gratitude to all services involved in document processing, both in Geneva and in New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints, which contributes to the smooth conduct of the Commission's work.

187. The Commission expressed its appreciation to the United Nations Office at Geneva Library, which assists its members very efficiently and competently.

#### 6. TRUST FUND ON THE BACKLOG RELATING TO THE YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

188. The Commission reiterated that the *Yearbook* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, and in strengthening the rule of law in international relations. The Commission took note that the General Assembly, in resolution 67/92, had expressed

its appreciation to Governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook of the International Law Commission* and had encouraged further contributions to the fund.

#### 7. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

189. The Commission decided to recommend that the General Assembly *express its satisfaction* with the remarkable progress achieved in the last few years in catching up with the backlog of the *Yearbook of the International Law Commission* in all six languages and welcome the efforts made by the Division of Conference Management, especially its Editing Section in the United Nations Office at Geneva, in effectively implementing relevant resolutions of the General Assembly calling for the backlog to be reduced; *encourage* the Division of Conference Management to provide continuous necessary support to the Editing Section in advancing the *Yearbook*; and *request* that updates on progress in this respect be provided to the Commission on a regular basis.

#### 8. ASSISTANCE OF THE CODIFICATION DIVISION

190. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the Commission's work. In particular, the Commission expressed its appreciation to the Secretariat for preparing two memorandums on the topics "Provisional application of treaties" (A/CN.4/658) and "Formation and evidence of customary international law" (A/CN.4/659). The Commission reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work and reiterated its request that the Codification Division continue to provide it with those publications.

#### 9. WEBSITES

191. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in continuously updating and managing its website on the International Law Commission.<sup>413</sup> The Commission reiterated that this and other websites maintained by the Codification Division<sup>414</sup> constitute an invaluable resource for the Commission and for those in the wider community researching the work of the Commission, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the Commission's work includes information on the current status of the topics on its agenda, as well as advance edited versions of the summary records of its meetings.

#### B. Date and place of the sixty-sixth session of the Commission

192. The Commission decided that its sixty-sixth session would be held in Geneva from 5 May to 6 June and from 7 July to 8 August 2014.

<sup>413</sup> <http://legal.un.org/ilc/>.

<sup>414</sup> Generally accessible from <http://legal.un.org/cod/>.

### C. Cooperation with other bodies

193. At the 3182nd meeting, on 18 July 2013, Judge Peter Tomka, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court,<sup>415</sup> while also drawing attention to recent efforts to encourage acceptance of the compulsory jurisdiction of the Court in accordance with its Statute. An exchange of views followed.

194. The Asian–African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Rahmat Mohamad, who addressed the Commission at the 3176th meeting, on 9 July 2013.<sup>416</sup> He focused on the views of member States of the Organization, on the basis of their statements in other international forums, on three topics on the programme of work of the Commission: “Immunity of State officials from foreign criminal jurisdiction”; “Protection of persons in the event of disasters”; and “Formation and evidence of customary international law”. An exchange of views followed.

195. The European Committee on Legal Co-operation and the Committee of Legal Advisers on Public International Law of the Council of Europe were represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public International Law, Ms. Liesbeth Lijnzaad, and the Head *ad interim* of the Public International Law Division of the Council of Europe, Ms. Christina Olsen, both of whom addressed the Commission at the 3177th meeting, on 10 July 2013.<sup>417</sup> They focused on the current activities of the Committee on a variety of legal matters, and on the activities of the Council of Europe. An exchange of views followed.

196. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Miguel Pichardo Olivier, who addressed the Commission at the 3180th meeting, on 16 July 2013.<sup>418</sup> He gave an overview of the activities of the Committee as contained in its annual report and those planned for 2013. An exchange of views followed.

197. The African Union Commission on International Law was represented at the present session of the Commission by its Chairperson, Mr. Adelardus Kilangi, who addressed the Commission at the 3189th meeting, on 31 July 2013.<sup>419</sup> He gave an overview of the activities of the African Union Commission on International Law. An exchange of views followed.

198. On 16 July 2013, an informal exchange of views was held between members of the Commission and the ICRC on topics of mutual interest. Presentations were given on the activities of the ICRC Legal Division and on the Arms Trade Treaty and its humanitarian objective, as well as on topics on the programme of work of the

Commission, including the topic “Formation and evidence of customary international law”.<sup>420</sup>

### D. Representation at the sixty-eighth session of the General Assembly

199. The Commission decided that it should be represented at the sixty-eighth session of the General Assembly by its Chairperson, Mr. Bernd Niehaus.

200. In view of the fact that the debate in the Sixth Committee on the topic “Reservations to treaties” was postponed to the sixty-eighth session of the General Assembly, the Commission reiterated the desire it had expressed at its previous session (2012) for the former Special Rapporteur on the topic, Mr. Alain Pellet, to be invited by the Sixth Committee in order to attend the debate in the Sixth Committee on the chapter of the 2011 report of the Commission that relates to this topic.<sup>421</sup>

### E. Gilberto Amado Memorial Lecture

201. On 17 July 2013, members of the Commission, participants in the International Law Seminar and other experts on international law attended the Gilberto Amado Memorial Lecture, entitled “Contemporary trends on *opinio juris* and the material evidence of customary international law”, which was delivered by Professor Paulo Borba Casella of the University of São Paulo. A discussion followed.

### F. International Law Seminar

202. Pursuant to General Assembly resolution 67/92, the forty-ninth session of the International Law Seminar was held at the Palais des Nations from 8 to 26 July 2013, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service of their country.

203. Twenty-one participants of different nationalities, from all the regions of the world, took part in the session.<sup>422</sup> The participants attended plenary meetings of

<sup>420</sup> Mr. Laurent Colassis, Deputy Head, Legal Division, ICRC, provided an overview of the work of the ICRC Legal Division, and Ms. Nathalie Weizmann, Legal Adviser, Arms Unit, ICRC, gave a presentation on the Arms Trade Treaty and its humanitarian objective. Mr. Sean Murphy provided an overview of the topics on the programme of work of the Commission, and Sir Michael Wood gave a presentation on “Formation and evidence of customary international law”.

<sup>421</sup> *Yearbook ... 2011*, vol. II (Part Two), chap. IV, and *ibid.*, vol. II (Part Three).

<sup>422</sup> The following persons participated in the Seminar: Mr. Hatem Alabd (Egypt), Ms. Makiko Asami (Japan), Mr. Jonas Attenhofer (Switzerland), Ms. Danai Azaria (Greece), Mr. Eduardo Cagnoni (Argentina), Mr. Jorge Luis Cepero Aguilar (Cuba), Mr. Rasmané Congo (Burkina Faso), Ms. Fiona Devlin (Ireland), Ms. Athikarn Dilogwathana (Thailand), Ms. Alicia Gauto Vázquez (Paraguay), Ms. Hyun Jung Kim (Republic of Korea), Ms. Pamela López-Ruiz Montes (Peru), Mr. Brian McGarry (United States of America), Ms. Ha Thi Ngoc Nguyen (Viet Nam), Ms. Siham Sebbar (Morocco), Mr. Edgardo Sobenes Obregón (Nicaragua), Ms. Sarala Subramaniam (Singapore), Mr. Alexey Nikolayevich Trofimenkov (Russian Federation), Mr. Zoilo Velasco (Philippines), Mr. Mawuse Vormawor (Ghana) and Ms. Olga Voronovich (Belarus). The Selection Committee, chaired by Mr. Marco Sassoli, Professor and Director of the Department of Public International Law of the University of Geneva, met on 22 April 2013 at the Palais des Nations and selected 24 candidates out of 86 applications to participate in the Seminar. At the last minute, three of the candidates selected were unable to attend.

<sup>415</sup> This statement is recorded in the summary record of that meeting.

<sup>416</sup> *Idem.*

<sup>417</sup> *Idem.*

<sup>418</sup> *Idem.*

<sup>419</sup> *Idem.*

the Commission and specially arranged lectures and participated in working groups on specific topics.

204. The Seminar was opened by Mr. Bernd Niehaus, Chairperson of the Commission. Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar. The substantive coordination of the Seminar was ensured by the University of Geneva. Mr. Vittorio Mainetti, international law expert from the University of Geneva, acted as coordinator, assisted by Mr. Martin Denis, legal assistant.

205. The following lectures were given by members of the Commission: Mr. Ernest Petrič, “The work of the International Law Commission”; Mr. Georg Nolte, “Subsequent agreements and subsequent practice in relation to treaty interpretation”; Ms. Concepción Escobar Hernández, “Immunity of State officials from foreign criminal jurisdiction”; Mr. Dire Tladi, “The United Nations Convention on the Law of the Sea and treaty interpretation: Use of subsequent practice and subsequent agreements to resolve controversies on the sustainable use of marine biodiversity”; Sir Michael Wood, “Formation and evidence of customary international law”; Mr. Sean Murphy, “Selecting new topics for the International Law Commission: Process and substance”; Mr. Mathias Forteau, “Fair and equitable treatment in international investment law”; and Mr. Shinya Murase, “International law-making for the protection of the global environment”.

206. A lecture was also given by Ms. Iris Müller, Legal Adviser to the ICRC, on “Customary international humanitarian law”.

207. Seminar participants attended a special external brainstorming session organized by the University of Geneva on the topic “The protection of the environment in relation to armed conflicts”. During this session, Ms. Marie Jacobsson, a member of the Commission and Special Rapporteur on this topic, introduced the topic. Her introduction was followed by presentations and comments by Professor Marco Sassoli, University of Geneva; Professor Robert Kolb, University of Geneva; Professor Makane Mbengue, University of Geneva; Dr. Mara Tignino, Senior Researcher, University of Geneva; Ms. Marie-Louise Tougas, ICRC; Ms. Karen Hulme, Senior Lecturer, University of Essex; Ms. Britta Sjostedt, Researcher, University of Lund; and Mr. David Jensen, Head of Environment Cooperation for Peacebuilding, United Nations Environment Programme.

208. Seminar participants also attended the Gilberto Amado Memorial Lecture, delivered on 17 July 2013, followed by a reception offered by Brazil.

209. Seminar participants had the opportunity to familiarize themselves with the work of other international organizations based in Geneva. A visit to the International Telecommunication Union was organized, and a presentation was given by Mr. Alexander Beck, Senior Legal Adviser at UNHCR.

210. Three seminar working groups, on “Subsequent agreements and subsequent practice in relation to treaty interpretation”, “Protection of persons in the event of disasters” and “Immunity of State officials from foreign criminal jurisdiction”, were organized. Each participant of the Seminar was assigned to one of them. Three members of the Commission, Ms. Concepción Escobar Hernández, Mr. Georg Nolte and Mr. Eduardo Valencia-Ospina, supervised and provided expert guidance to the working groups. Each group prepared a report and presented its findings to the Seminar in a special session. The reports were compiled and distributed to all participants, as well as to members of the Commission.

211. The Republic and Canton of Geneva offered the participants a guided tour of the Geneva Town Hall and the Alabama Room.

212. Mr. Bernd Niehaus, Chairperson of the Commission, Mr. Markus Schmidt, Director of the Seminar, and Ms. Pamela López-Ruiz Montes (Peru), on behalf of the participants of the Seminar, addressed the Commission and the participants during the closing ceremony of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-ninth session of the Seminar.

213. The Commission noted with particular appreciation that, since 2010, the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed a sufficient number of fellowships to be awarded to deserving candidates, especially from developing countries, in order to achieve adequate geographical distribution of participants. This year, 15 fellowships for travel and subsistence allowance were awarded.

214. Since 1965, 1,115 participants, representing 170 nationalities, have taken part in the Seminar. Of them, 684 have received a fellowship.

215. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2014 with the broadest participation possible, especially in the light of the forthcoming 50th anniversary of the Seminar.

#### **G. Commemoration of the 50th anniversary of the International Law Seminar**

216. The Commission expressed its satisfaction that in 2014 the International Law Seminar would hold its 50th session and recognized the valuable contribution that the Seminar has made in allowing successive generations of young international lawyers to follow the debates and better understand the functioning of the Commission.

217. It was decided that the Commission, in cooperation with the Legal Liaison Office of the United Nations Office at Geneva, would organize an appropriate commemoration of the 50th anniversary, if possible inviting former participants of the Seminar, including those who

later became members of the Commission and of the International Court of Justice.

218. This commemoration could coincide with the visit to the Commission by the President of the International Court of Justice.