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Chair: Mr. Salinas Burgos . . . . . (Chile)

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11-56285 (E)

The meeting was called to order at 10 a.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third session (*continued*) (A/66/10 and Add.1[1])

1. **Mr. Schusterschitz** (Austria) said that his delegation welcomed the Commission's recommendation to the General Assembly to initiate a reservations dialogue, particularly where the scope of a reservation raised doubts as to its compatibility with the object and purpose of the relevant treaty. While it also welcomed, in principle, the proposed establishment of a flexible mechanism to assist in the settlement of disputes between States formulating a reservation and those objecting to it, such a mechanism raised a series of practical and legal questions, such as the composition of the mechanism, the relationship between such a mechanism and a competent treaty body and whether a recommendation on the impermissibility of a reservation would have an effect only for the requesting States or for all States parties.

2. With regard to topic of the responsibility of international organizations, his delegation was happy to see some of its comments reflected in the text of the draft articles. It supported the Commission's recommendation to the General Assembly to take note of the draft articles in a resolution and annex them to the resolution, and to consider, at a later stage, the elaboration of a convention based on them. In view of the scarce practice in the field, it remained to be seen whether over time States and international organizations accepted the draft articles in their practice, and thus whether the elaboration of a convention would be worthwhile. However, the Commission might give further consideration to the situation where international organizations invoked the responsibility of States for breaches of international law by States, since that issue was not addressed either in the draft articles or in the articles on responsibility of States for internationally wrongful acts.

3. Regarding new topics to be considered by the Commission, his delegation welcomed the inclusion of the topic of formation and evidence of customary international law in the Commission's long-term programme of work. Although international law was increasingly based on international treaties, customary international law continued to play a significant role in international relations. Unlike treaty law, the formation and evidence of customary international law had never been codified in a fully satisfactory manner.

4. The topic of protection of the atmosphere addressed a growing global concern. An effort by the Commission to take stock of rules under existing conventions and to elaborate a new legal regime would be commendable. Study of the provisional application of treaties was also welcome: States and international organizations increasingly resorted to provisional application, and while the practice was explicitly recognized in article 25 of the Vienna Convention on the Law of Treaties and in some States' legislation, the interpretation of its scope and meaning varied.

5. The fair and equitable treatment standard in international investment law was too narrow a topic and thus did not lend itself to the development of general rules. Moreover, the matter was not ripe for codification. Although the fair and equitable treatment standard had undoubtedly become the core investment protection standard, it appeared difficult for the Commission to manage such a vast field of practice, especially where the resulting case law could not be considered established as yet. Lastly, it was not clear that there was a need for codification on protection of the environment in relation to armed conflicts. Relevant rules were already contained in article 35, paragraph 3, and article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

6. **Mr. Macleod** (United Kingdom) said that the improvements in the Commission's website, and in particular the inclusion of the provisional summary records of the Commission's plenary meetings, had facilitated engagement with the Commission's work. Regarding the new topics to be considered by the Commission, its study of the formation and evidence of customary international law should result in a short, practical guide, not overly prescriptive, for judges, both domestic and international, practitioners, government lawyers and legal advisers of non-governmental organizations.

7. The Commission's consideration of the provisional application of treaties, while valuable, should not result in a set of draft articles, but rather in a study of the implementation of article 25 of the Vienna Convention on the Law of Treaties and any

[1] To be issued.

general conclusions to be drawn regarding that practice. As for the fair and equitable treatment standard in international investment law, there was a real disparity of views among States and academics on the definition of such treatment in the context of investment treaties. While the desire to bring clarity to the concept was understandable, the application of the fair and equitable treatment standard was necessarily dependent on the specific facts of the case, and it would be difficult and potentially undesirable to attempt to define a taxonomy of its component elements. In addition, the fact that similar studies had already been carried by more specialized international bodies dealing with investment issues raised doubts as to whether the Commission was the appropriate body to undertake further study on the topic.

8. His delegation did not consider it useful for the Commission to study the two remaining topics, protection of the atmosphere and protection of the environment in relation to armed conflicts. With regard to the latter, it would be pointless to review long-established rules that already addressed the matter unless concerns had been clearly identified and were likely to be addressed satisfactorily by the Commission.

9. With respect to the draft articles on the responsibility of international organizations, His delegation welcomed the general commentary, which would provide useful guidance in applying the draft articles, and agreed with a number of specific points, namely, that limited availability of pertinent practice moved several of the draft articles in the direction of progressive development, rather than codification; that even though an article on State responsibility might be considered to reflect customary international law, such would not necessarily be the case with the corresponding draft article on the responsibility of international organizations; and that the draft articles should not yet be seen as having the same authority as the corresponding articles on State responsibility. The general commentary recognized the diversity of international organizations, which was also taken into account in the *lex specialis* provision in draft article 64.

10. It should be recalled that, unlike international organizations, States enjoyed full sovereignty under international law and had a full range of powers to carry out their international obligations. His Government continued to have concerns, therefore, about the wholesale application in some places of the articles on State responsibility to international organizations, without giving proper consideration to the difference between States and international organizations.

11. The commentaries to the draft articles were less detailed than one might expect and, moreover, far less detailed than the commentaries to the articles on State responsibility. In part that was owing to the lack of practice, but the numerous cross-references to the articles on State responsibility were cumbersome and confusing. In future, draft articles should stand alone to the extent possible, with minimal cross-referencing.

12. It remained unclear to what extent a number of the draft articles, for example draft articles 21 (Self-defence), 24 (Distress) and 25 (Necessity), would be applicable to international organizations. While recognizing the need for the draft articles to express general principles, their utility in providing clear and practical guidance to States and international organizations was lessened wherever they were unsupported by significant practice, as was the case with draft articles 14 to 16, which concerned aid or assistance, direction and control and coercion in connection with the commission of an internationally wrongful act. His delegation would circulate more detailed comments on the draft articles in writing to Committee members. The law on the responsibility of international organizations was not sufficiently cohesive to merit moving towards a convention. Therefore, his delegation supported the Commission's recommendation that the General Assembly should simply take note of the draft articles.

13. With respect to the Commission's recommendations under the topic of reservations to treaties, his delegation had doubts about the need for a mechanism of assistance and wondered whether such a mechanism would detract from the flexibility required for a successful reservations dialogue. While the mechanism was said to take its inspiration from the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), which acted as the European Observatory of Reservations to International Treaties, CAHDI did not provide technical assistance on the formulation of reservations to other States, nor did it provide a forum for the resolution of disputes regarding reservations. While CAHDI might occasionally enquire as to a reserving State's reasons for making a particular reservation, any response simply served to help the States members of the Council of Europe decide whether or not they should lodge an objection.

The idea of a dispute settlement mechanism therefore seemed ill-conceived.

14. His delegation fully supported the Commission's recommendation on the reservations dialogue. Regrettably, it was his Government's experience that where enquiries were made as to the basis of a reservation, a meaningful response was only very rarely provided. Such situations were conducive neither to the smooth operation of treaty relations nor to legal certainty. The Commission's recommendation set out a clear process to be followed by States and international organizations in respect of reservations and would help contracting parties to assess the permissibility of reservations. In addition, it allowed for the flexibility necessary to ensure a successful reservations dialogue.

15. **Mr. Huang** Huikang (China) said that his delegation was satisfied overall with the Commission's work, and welcomed the inclusion of new topics of study. There remained some concern, however, at the lack of in-depth study of some current topics, and at the excessive length of some outcome documents. It was to be hoped that the Commission would continue to improve its working methods to ensure the practicality of its outcome documents, while maintaining academic rigor, fully utilizing existing resources and contributing further to the codification and progressive development of international law.

16. On the topic of reservations to treaties, although the Guide to Practice would be a useful document for academic study and for practitioners, his delegation had concerns about some of the guidelines, for example, guideline 4.5.3, which was not compatible with the principle of State consent in treaty law. The Guide to Practice was also somewhat eclectic in terms of content, which made it difficult to implement. His Government concurred with other States in doubting the need for a mechanism of assistance in relation to reservations recommended by the Commission.

17. The adoption of the draft articles on the responsibility of international organizations and their commentaries on second reading represented another major step in the codification and development of international law relating to international responsibility. Nonetheless, his delegation had taken note of the comments made by a number of States and international organizations on the draft articles following their first reading. The topic was a relatively new one in international law and to date there was in sufficient practice in the matter. Moreover, it had been stressed that the diversity of international organizations made it doubtful whether uniform rules of international responsibility were applicable to all of them. Those comments by States and international organizations demonstrated the lack of consensus in the international community on the relevant rules of the responsibility of such organizations. While imperfect, the current draft articles nevertheless covered existing practice, jurisprudence and literature, and thus were useful in providing guidance for international organizations and in laying a foundation for further discussion of the topic. His delegation was therefore in favour of including the draft articles and their commentaries as adopted on second reading in the annex to the relevant General Assembly resolution.

18. **Mr. Tchiloemba Tchitembo** (Congo) said that the Guide to Practice on Reservations to Treaties provided practical solutions to a number of issues, both doctrinal and technical, allowing for flexibility in the application of the guidelines it contained, even with regard to relations between States of different legal systems and between States and international organizations. More specifically, guideline 1.1 (Definition of reservations), and guideline 1.3 (Distinction between reservations and interpretative declarations), adequately resolved any ambiguity between the two concepts. The Guide to Practice struck a balance between the exercise of a treaty prerogative to formulate reservations, which should be viewed as a right rather than an obligation, and the need for stable treaty relations, which did not encourage the excessive use of reservations. Moreover, the Guide to Practice, in its Part 5, had also found good solutions for some legally and politically complex problems arising in cases of succession of States that had not been resolved by either the Vienna Convention on Succession of States in respect of Treaties or the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

19. It was regrettable that the guidelines on the effect of collective acceptance of an impermissible reservation and the permissibility of acceptance of a reservation had been simply eliminated from the current Guide to Practice, as an alternative solution might have been found. Guideline 2.6.13 (Objections formulated late), which stated that an objection formulated after the period stipulated in guideline 2.6.12 (Time period for

formulating objections) did not produce all the legal effects of a timely objection, implied that a late objection could produce at least some legal effects. If that was in fact the case, it should be clarified what legal effects might be produced and in what circumstances. Notwithstanding those few comments, the Guide to Practice filled many gaps in the treaty framework and would be extremely useful.

20. **Ms. Lijnzaad** (Netherlands) said that her delegation welcomed the Commission's efforts to improve its working methods, including the suggestion to maintain an attendance record. With regard to reservations to treaties, while the Special Rapporteur's extensive work had provided significant insight into a complex subject in treaty law, the Guide to Practice departed from the original aim, which had been to prepare practical guidelines for the daily work of government lawyers, officials of international organizations and members of supervisory bodies.

21. Her delegation supported the reservations dialogue and stressed that it was important to ensure the flexibility and effectiveness of such a tool in preventing far-reaching reservations and in ensuring the withdrawal of those already formulated. The proposal to establish an observatory on reservations to treaties within the Sixth Committee, however, was ill-advised, given the informal character of the reservations dialogue. The success of existing observatories was due to the active participation of a limited group of States with unity of purpose and determination, acting in a setting of confidentiality and mutual respect; a larger setting for such a mechanism might be inappropriate.

22. Moreover, the suggestion that there might be a reason to consider dispute settlement in respect of reservations appeared unrealistic. There was, after all, no obligation to accept reservations: the onus was on the reserving State to ensure that its reservation would be acceptable to other States. Reservations were of a contractual nature, and, while a difference of views might translate into States' choosing not to accept a reservation, that in itself did not constitute a dispute.

23. Her delegation could not agree with the somewhat cavalier characterization in guideline 1.1.3 of statements relating to the territorial application of the treaty as reservations. Article 29 of the Vienna Convention on the Law of Treaties, which was the standard in such situations, had not been given due consideration in the formulation of the guideline. With regard to guideline 2.3.1 (Acceptance of the late formulation of a reservation), her delegation strongly disagreed that a late reservation should be deemed to have been accepted unless a contracting State or organization had objected to it. There was no practice to support that view, which was, moreover, at odds with the Commission's recommendation to safeguard the integrity of multilateral treaties.

24. Regarding guidelines 2.9.1 and 2.9.2, it was far from common practice for contracting States or organizations to approve or oppose interpretative declarations. Presumptions regarding the consequences of the silence of subjects of international law with regard to such declarations or the conduct of States on the basis of such declarations belonged to other areas of international law and should not be addressed in the Guide to Practice.

25. With regard to the draft articles on the responsibility of international organizations, although there was indeed great diversity among international organizations, it was nevertheless important, at a time in which international organizations played increasingly important roles in international affairs, to establish a set of rules specifying under which conditions international organizations could be held accountable for any wrongful acts they committed. Furthermore, despite the great diversity among States, there was only one set of articles on State responsibility.

26. The Commission had rightly decided to take as its basis for the draft articles those articles on State responsibility and thus avoided reopening complex responsibility issues where there was clearly no need to do so. Extensive analysis and discussion of all available practice had taken place prior to the drafting of the articles on the responsibility of international organizations, even if the resulting articles were often similar to those on State responsibility.

27. Although it was true that there was limited practice in the field, in recent years, there had been an increasing number of claims of internationally wrongful acts committed by international organizations. It was therefore crucial to have in place of a set of general rules on the responsibility of international organizations, drafted in an open and multilateral process. Otherwise, national and international courts to which claims against international organizations and

members of international organizations were referred would have no choice but to seek inspiration from the articles on State responsibility and make their own decisions on whether and to what extent those articles could be applied mutatis mutandis. Furthermore, the lack of such rules might impede the future exercise of powers by international organizations, as well as the possible establishment of new international organizations as appropriate.

28. The General Assembly should take note of the draft articles on the responsibility of international organizations. However, her delegation agreed the time was not yet ripe for the elaboration of a convention.

29. **Mr. Shin** Maengho (Republic of Korea) said that the daily conduct of international relations in the modern era would be impossible without such basic instruments, first drafted by the Commission, as the conventions on diplomatic and consular relations, the law of treaties and the law of the sea. Since it already had nine topics on its current programme of work, the Commission should be careful not to overload its agenda and add new topics only to the extent to which they were useful in dealing with current problems. The five topics added to its long-term programme of work were all interesting issues but still somewhat abstract and theoretical.

30. His delegation commended the Commission for the completion of the Guide to Practice on Reservations to Treaties and hoped that it would become a useful tool for diplomatic officials. The Guide to Practice reflected both codification and development of international law. The topic of reservations to treaties was related to more fundamental goals of international law enshrined in the Charter of the United Nations and the 1969 Vienna Convention on the Law of Treaties.

31. As multilateral diplomacy gained increasingly in importance in the international community, it had become crucial to address the issue of the responsibility of international organizations. Since States and international organizations were separate subjects of international law, the need for the separate set of draft articles, based on but different from the articles on State responsibility, was evident. On a specific point, the “without prejudice” provision in article 32, paragraph 2, concerning the application of the rules of the organization in respect of its members was a useful reminder that the general statement in paragraph 1 could admit of exceptions. In conclusion, his delegation considered the subject important even in the absence of sufficient relevant practice and saw a need for further collection and analysis of practice in that regard.

32. **Ms. Daskalopoulou-Livada** (Greece) said that what had made the endeavour to elaborate a set of draft articles on the responsibility of international organizations daunting was the difficulty of encompassing in the text the great variety of international organizations, each with its own specific features sometimes widely different from those of others. Regional integration organizations, such as the European Union, had been gathered under the same umbrella as looser types of organizations. It was understandable that the articles on State responsibility had been used as the prototype, but an altogether different approach — an approach that consisted in categorizing the types of organizations that could be identified and dealing separately with each category — might have overcome the difficulty. The Commission had sought to achieve the same result with the commentaries, but if a normative text were eventually to be adopted the commentaries would cease to be prominent. Given the scant relevant practice available, the Commission had been obliged to engage in progressive development in large measure, rather than codification, with the inevitable result that the draft articles would have less authority, at least until there were clear indications of their positive reception by the international community. In the view of her delegation such a postponement was necessary; the text could be revisited in a number of years in the light of future developments.

33. Despite some improvements to article 22 (Countermeasures), her delegation had serious reservations concerning countermeasures both against third States or international organizations and against member States. The latter possibility had been retained on condition that the countermeasures were provided for by the rules of the organization, but that seemed to be a remote possibility, since a provision for sanctions was far more probable. Similar problems arose in connection with draft article 51, which dealt with countermeasures taken by members of an international organization. It would be better to exclude countermeasures from the scope of the draft articles and leave them in the realm of general international law.

34. With respect to article 40 (Ensuring the fulfilment of the obligation to make reparation), her delegation was not entirely reassured that member States were insulated from subsidiary responsibility for reparation. Even if no rule of international law imposed such an obligation, the mandatory form of the requirement to take all appropriate measures clearly promoted such subsidiary responsibility. On the other hand, her delegation found much merit in other draft articles, such as those in Part Three, chapter III (Serious breaches of obligations under peremptory norms of general international law).

35. **Ms. Escobar Hernández** (Spain) said that the Commission's sixty-third session, the last of the quinquennium, had been remarkable for the completion of work on three long-standing topics: reservations to treaties, responsibility of international organizations, and effects of armed conflicts on treaties. Completion of work on those three topics enabled the Commission to turn its attention to topics already on its agenda and to take up new ones While the Commission had an impressive array of topics on its agenda that were of great interest to States and for international practice, it should focus on a limited number of topics in order to be more effective and efficient and to deliver valuable and useful results for States and the international community as a whole. In that connection, it hoped that the Commission would prioritize its work accordingly and submit its plan to the Sixth Committee for consideration at its sixty-seventh session. In setting its priorities, the Commission should to take into account the opinions of States, especially as expressed during the debates in the Sixth Committee.

36. Completion of work on the Guide to Practice on Reservations to Treaties was one of the Commission's main achievements of its last session. Spain welcomed the Commission's recommendation that the General Assembly should take note of the Guide to Practice and ensure its widest possible dissemination. While her delegation reserved the right to make specific comments on some of the guidelines during the fuller debate during the sixty-seventh session, it considered the Guide to Practice — which addressed in a comprehensive manner the various elements related to reservations and objections to reservations that might be of interest to States — to be a useful reference tool for States in the difficult task of deciding whether they could or should formulate reservations to treaties or objections to reservations.

37. The Commission's two recommendations relating to the reservations dialogue drew attention to the reality that reservations and objections created major practical problems that, in many cases, could not be resolved by merely applying the standards of the Vienna Conventions on the Law of Treaties or the guidelines themselves. Indeed, reservations and objections often gave rise to openly conflicting positions. The issue should therefore be addressed in a transparent manner, with the aim of safeguarding the integrity of treaties, but also enhancing their flexibility and securing the widest possible participation of States and international organizations in treaty-based legal regimes. Her delegation therefore welcomed the Commission's recommendation regarding the reservations dialogue. It viewed the mechanism of assistance and settlement of disputes in relation to reservations to treaties as an element of support for the reservations dialogue and was open to participating in a debate on the establishment of such a mechanism.

38. The topic of the responsibility of international organizations had great practical implications and called for international regulation. The text of the draft articles on the topic maintained the basic balance between the various issues at stake, without overlooking the important dimension of the responsibility of States in connection with the conduct of an international organization. The draft articles were largely similar in overall structure and content to the articles on State responsibility. Nonetheless, each form of responsibility had its own unique set of features, so that it was not always possible to transpose the rules mutatis mutandis. The general commentary to the draft articles, in any case, acknowledged the diversity of international organizations and the specificity of the international responsibility that they might incur.

39. Her delegation could support the recommendation that the General Assembly should take note of the draft articles. With regard to the possible elaboration of a convention, while a topic of such importance should be governed by a treaty, the wide variety of positions showed that the matter required further reflection and debate and should therefore be considered at a later stage.

40. **Ms. Chowdhary** (India) said that he delegation welcomed the adoption of the exhaustive "Guide to Practice on Reservations to Treaties", which was based on an in-depth analysis of State practice and case law and would be an invaluable tool for government legal

advisers and practitioners in resolving problems posed by reservations to treaties and interpretative declarations.

41. The adoption by the Commission of the draft articles on responsibility of international organizations was a significant achievement. The draft articles followed the pattern of the articles on State responsibility, while taking into account the different nature and function of international organizations. Her delegation welcomed draft article 5, as it clarified that international law determined whether or not an act of an international organization was wrongful. The general provisions contained in Part Six, that safeguarded the application of special rules of international law and of the provisions of the Charter of the United Nations. An internationally wrongful act could create direct liability, in the form of joint or several responsibilities, between an international organization and its member States. Indirect responsibility, triggered by the acts of a State that assisted an international organization in the commission of an internationally wrongful act, needed to be examined carefully.

42. Disputes between an international organization and its members should be settled in accordance with the rules and procedures of the organization, and there should be no question of countermeasures unless expressly provided for in the rules of the organization. With the welcome addition of detailed criteria and conditions to the countermeasures regime under draft articles 22 and 51-57, would ensure that countermeasures met the requirement of proportionality and were employed only in exceptional cases. Her delegation supported the Commission's recommendation that the General Assembly should take note of the draft articles in, and annex them to, a resolution and consider the elaboration of a convention on the basis of the draft articles at a later stage.

43. **Mr. Garba Abdou** (Niger) said that the specific issues on which the Commission solicited State comments were handled differently by national legal systems and merited the establishment of a universally accepted legal regime for each of them. His delegation believed that the immunity of State officials from foreign criminal jurisdiction was inseparable from the jurisdictional immunity of States whose will they embodied and whose missions they fulfilled. Putting immunity of State officials it into question undermined the principle of State sovereignty and the ability of State representatives to transmit, at the domestic and international levels, the full scope of the competencies that formed the foundation of State authority. It was vital to uphold the principle of immunity of State officials from foreign criminal jurisdiction as necessary for normal relations among States.

44. With respect to the draft articles on responsibility of international organizations for internationally wrongful acts, the acts covered by draft article 6 (Conduct of organs or agents of an international organization) most often involved the abuse of the privileges and immunities granted to the representatives or agents of international organizations under the organizations' constituent instruments or the headquarters agreements, notably with respect to compliance with host country labour laws, as required in the Convention on the Privileges and Immunities of the Specialized Agencies. Those situations should be covered in the draft articles in order to guarantee fair and adequate compensation for victims whose work contracts were wrongfully terminated.

45. **Mr. Kessel** (Canada) said that his delegation was pleased with the establishment of the Working Group on the Methods of Work, which had provided important practical guidance to the Commission in setting out clear expectations for the responsibilities of the Special Rapporteurs and the length of their substantive reports and the working methods of the study groups, the drafting committee and the planning committee. His delegation applauded the Commission for striving to enhance its efficiency. The Commission could also strive to take on topics that could be completed within one quinquennium to help ensure consistency and timeliness.

46. With regard to the new topics that had been endorsed by the Commission for inclusion in its long-term programme of work, his Government would be particularly interested in the Commission's views on the formation and evidence of customary international law, which had enormous significance for regulating the affairs of States, yet its sources were not always easy to find and apply. The Commission's proposed work on the protection of the atmosphere was also of interest. In that connection, the utility of producing guidelines and principles, in addition to draft articles, to enable States to take full advantage of the expertise of the Commission, should be considered.

47. His delegation welcomed the suggestion to encourage States to engage in a dialogue on the

guidelines on reservations to treaties and noted that there was evidence of genuine interest from States and international organizations in that regard.

48. With regard to the draft articles on responsibility of international organizations, it was difficult to contemplate suitable norms applicable to all international organizations. International organizations were not all conceptually similar and rules that were well suited for large organizations were not always suitable for smaller or regional ones. The Commission was encouraged to solicit input from international organizations in order to develop draft articles which fully reflected their diversity and were better suited to the unique circumstances of each.

49. **Mr. Joyini** (South Africa) said that the Guide to Practice on Reservations to Treaties was, for the most part, within the scope and spirit of the Vienna Convention on the Law of Treaties. Its usefulness lay in its ability to assist States and international organizations traverse the complex maze of reservations, acceptance of reservations and objections thereto. As it was important for the draft articles to be practice-oriented, the chapeau to paragraph 3.1.1 (Reservations prohibited by the treaty) could be drafted to make it clear whether the word "it" referred to the treaty or the reservation. Similarly, it was unclear whether "the act" in subparagraph 2 of 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) referred to the specific report, decision or finding in which the assessment was made. In that connection, making the commentaries available earlier would have given delegations more time to respond properly.

50. The International Court of Justice, in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, made clear the need for a balance between the integrity of a treaty and the pursuit of universality. That balance was reflected in article 19 of the Vienna Convention on the Law of Treaties, which set conditions for the permissibility of reservations and limited their formulation to the time of signature, ratification, acceptance, approval or accession to a treaty. While that principle was reiterated in guideline 1.1 (Definition of reservations), it was uncertain whether guideline 2.3, by condoning the late formulation of a reservation, was intended as progressive development or clarification of the Vienna Convention. It was unclear why the lack of a response from other contracting States should validate what would otherwise be an invalid reservation. The provision placed the onus on other States to respond, when normally there was no such obligation, and that could have the result of tilting the aforementioned balance. The Committee should be careful not to create the impression that the integrity of a treaty was less important than the drive for universality.

51. His delegation agreed with the Guide to Practice with respect to the legal effect of reservations and specifically with guideline 4.5.1 (Nullity of an invalid reservation), which was in line with the positions of well-known international law scholars, State practice and the logic followed in the Vienna Conventions. A reservation that did not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice was devoid of legal effect.

52. On the question of whether a ratification made with a null and void reservation still stood or whether the entire treaty applied to the State concerned, his delegation's view was that the treaty in its entirety should apply, including the provisions to which the State had made the invalid reservation. States had a sovereign right to enter into treaties and make reservations that were consistent with the terms of the treaty. If a State had made an invalid reservation, and its invalidity had been brought to the attention of the reserving State, then the State could not rely upon it. The State in question had the recourse to withdraw from the treaty and must be treated as intending to be bound by it if it did not exercise that right. Guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) considered the author of an invalid reservation bound by the treaty without the benefit of a reservation unless the author had expressly indicated its intention not to be bound. Given the complexity of the matter, instead of the nebulous construction "or such an intention is otherwise established" in paragraph 2, the guideline should emphasize that States should be careful when drafting and making reservations to treaties and be clear regarding their intentions and the legal obligations that bound them.

53. With regard to the draft articles on the responsibility of international organizations, the key remaining questions concerned the nature of an international organization. The International Court of Justice found in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*

that, while an international organization had international legal personality, it was certainly not a State and its legal personality, rights and duties were not the same as those of States. Although the draft articles on State responsibility could be taken as a point of departure, it was worth studying whether the specific characteristics of the international organization needed to be reflected in each particular case. For example, it was unclear whether draft articles 15 (Direction and control exercised over the commission of an internationally wrongful act), 16 (Coercion of a State or another international organization) and 17 (Circumvention of international obligations through decisions and authorizations addressed to members) took into account the nature of the international organization, where decisions were taken by constituent States which were also subjects of international law, or the specific decision-making structure of a particular organization. His Government fully endorsed the notion that an international organization had a legal personality separate from its constituent States, which implied that its conduct could be judged independently. The issue was sufficiently complex to require more detailed analysis by the Commission or by the Member States.

54. **Mr. Horváth** (Hungary) said that the Commission had advanced significantly in its work during its sixty-third session by adopting complete sets of draft articles on the responsibility of international organizations and the effects of armed conflicts on treaties and completing its work on reservations to treaties. However, his delegation wished to underline the importance of finalizing some topics that had been on the Commission's agenda for too long with moderate success.

55. With respect to the Commission's specific questions in connection with the immunity of State officials from foreign criminal jurisdiction, his delegation recommended a two-step approach. The Commission should first attempt to set out the existing rules of international law laid down in conventions concerning international crimes or diplomatic and consular relations. His delegation agreed with the Special Rapporteur that the principal source of the immunity of State officials from foreign criminal jurisdiction was customary international law. Only after an attempt at codifying customary rules had proved insufficient should the Commission embark on the exercise of progressive development.

56. Heads of State and Government and ministers for foreign affairs enjoyed complete immunity by virtue of their official capacity. That rule of customary law was virtually unchallenged and was upheld by the International Court of Justice in its judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*). However, there were insufficient precedents to support the conclusion that customary international law allowed for the extension of personal immunity to other high-ranking officials. Nonetheless, if a representative of a State other than those mentioned paid an official visit to another State, that individual should be able to claim *de lege lata* functional immunity. That principle was in the interest of ensuring the smooth conduct of international relations and was dealt with in the Convention on Special Missions. Under the Vienna Convention on Diplomatic Relations, diplomatic staff and administrative and technical staff of diplomatic missions enjoyed *de lege lata* personal immunity from the criminal jurisdiction of the receiving State.

57. With regard to the Commission's question about the obligation to extradite or prosecute (*aut dedere aut judicare*), Hungarian law was in keeping with the law of the European Union and international agreements with respect to acquisition and transfer of jurisdiction for service of sentence, offer to prosecute or extradition. Although Hungarian law did not explicitly refer to the principle *aut dedere aut judicare*, there were relevant provisions. For example, in the case of crimes committed by foreigners in Hungary or on board a Hungarian aircraft or vessel, under its international criminal cooperation legislation transfer of prosecution was compulsory if Hungary waived the right to prosecute under an international treaty.

58. Most of the proposed new topics followed naturally from the Commission's previous work, but the fair and equitable treatment standard in international investment law, did not fall strictly within the scope of public international law. Although the Commission was not precluded from entering the field of private international law, it was vital for the Commission to cooperate in that area with other international bodies in the United Nations system, especially the United Nations Commission on International Trade Law (UNCITRAL).

59. His delegation welcomed the completion of the entire set of draft articles and commentaries on the

responsibility of international organizations, which formed a valuable complement to the articles on responsibility of States for internationally/wrongful acts. It supported the Commission's recommendation to the General Assembly to take note of the draft articles and to consider at a later stage the elaboration of a convention based upon them. The Commission had found an appropriate solution for the former draft article 2, paragraph 2 (c), by dividing it into two and providing separate definitions of "organ of an international organization and "agent of an international organization". The new draft article 5 (Characterization of an act of an international organization as internationally wrongful) helped to avoid an incorrect interpretation of draft article 64, namely, that if an act was lawful under the rules of the international organization it would necessarily be lawful under international law. In that regard, the additional language in draft article 10, paragraph 2, was also helpful. With regard to draft article 40, his delegation was pleased to see that the additional paragraph 2 suggested by the Special Rapporteur had found support and was included in the final text.

60. **Ms. Abdul Hamid** (Malaysia) said that the Commission was to be congratulated on the adoption of the complete Guide to Practice on Reservations to Treaties. Her delegation noted with appreciation that the final version of the guidelines reflected some of the comments made by States, including Malaysia, regarding former guidelines 1.4.2 (Unilateral statements purporting to add further elements to a treaty), 2.1.8 (Procedure in case of manifestly impermissible reservations), 2.9.9 (Silence with respect to an interpretative declaration), 3.4.1 (Permissibility of the acceptance of a reservation) and former guidelines 3.6, 3.6.1 and 3.6.2, which dealt with the permissibility of the various possible reactions to interpretative declarations.

61. However, in detailed written comments submitted to the Secretariat Malaysia had expressed some views not reflected in the final version of the Guide to Practice. With respect to guidelines 1.1.1 (Statements purporting to limit the obligations of their author), 1.1.2 (Statements purporting to discharge an obligation by equivalent means) and 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty), her delegation considered that the definitions contained in those guidelines unduly restricted States by insisting at the outset that the unilateral statements so defined constituted reservations, even though that might not have been the intention of the reserving States, whereas guidelines 1.3.1, 1.3.2 and 1.3.3 suggested that the nature of a unilateral statement depended on the legal effect that its author purported to produce. With respect to guideline 1.7.1 (Alternatives to reservations), the mechanism for the formulation of such alternatives and the means to differentiate them from reservations needed to be clearly specified to avoid confusion. In relation to guideline 3.2 (Assessment of the permissibility of reservations), her delegation was of the view that a treaty monitoring body should be composed of independent experts and not representatives of States so that the body could perform its functions without political influence. The spirit of guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) was that treaty monitoring bodies could not deprive a reserving State of its reservation but could rather assist reserving States to craft their reservations so as to make them permissible. It would be useful if the extent of the legal effects of the assessment by the treaty monitoring body could be made clear in the guideline. Such an assessment should not be binding on the State party but should serve merely as a recommendation. In consequence, paragraph 4 of guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), which imposed a specific time period for the State to clarify its intention, should be deleted.

62. Her delegation was concerned that guideline 2.4.7 (Late formulation of an interpretative declaration) might have the effect of overriding a treaty provision concerning the time limits required for the formulation of interpretative declarations and sought further clarification on the provision. With respect to guideline 2.4.8 (Modification of an interpretative declaration), her delegation was concerned that, since the wording of the guideline and commentaries did not indicate whether the procedures applicable to the formulation of an interpretative declaration also applied to its modification, States parties might not be aware of actions taken by States that decided to modify their position through conduct without communicating the change of position to others.

63. With regard to guideline 3.5 (Permissibility of an interpretative declaration), according to which an interpretative declaration might be formulated unless it

was prohibited by the treaty, the condition should apply only with respect to specifically expressed prohibitions. Concerning guideline 3.5.1 (Permissibility of an interpretative declaration which is in fact a reservation), unless it was conclusively determined that a unilateral statement was actually a reservation, conditions for its permissibility should not be imposed. Moreover, it was not clear who would make such a determination.

64. In terms of the application of the Guide to Practice to international organizations, it should be borne in mind that the power of an international organization to conclude treaties differed from that of States and depended largely on the terms of the constituent instrument and the mandate granted to the organization by its member States. It followed that a separate legal regime should be developed for international organizations. Her delegation therefore considered that the mention of international organizations in the current Guide to Practice, in particular in guidelines 2.8.7 to 2.8.11 and 4.1.3, was inappropriate.

65. With respect to the recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties, the technical assistance mentioned should be available only at the request of States.

66. **Mr. Martinsen** (Argentina) said that one of the major achievements of the Guide to Practice on Reservations to Treaties was the systematic analysis of State practice regarding express or tacit acceptance of reservations and the formulation of objections to reservations. The Commission's work had also clarified the regime applicable to interpretative declarations and their effects. The Guide addressed a number of issues relating to the progressive development of international law which might possibly require further examination, such as the object of reservations and the succession of States in relation to reservations. Some of the Commission's recommendations, however, such as the proposed observatory on reservations to treaties, required careful consideration in the light of the need to safeguard the integrity of international law.

67. With regard to the draft articles on the responsibility of international organizations, his delegation shared the view that it was essential to recognize the diversity of such organizations. It nevertheless welcomed the Commission's efforts to identify common elements regarding the international responsibility they could incur vis-à-vis States and other international organizations. With reference to draft article 22 (Countermeasures) and paragraph (2) of the commentary to it, the application by analogy of the specific principles governing the responsibility between States to the relations between international organizations and non-member States required careful examination in the light of the *pacta tertiis* principle. The limits of the competences of international organizations also merited specific consideration.

68. **Mr. Kuzmin** (Russian Federation) said that, while criticisms of the Commission were frequently exaggerated, an open dialogue between delegates and the Commission members was important to address legitimate concerns. Close cooperation would help rectify any shortcomings and improve the Commission's efficacy, ultimately benefiting the greater objective of reaffirming the rule of law in international relations on the basis of ideologically unbiased work of legal scholars and practitioners.

69. Much of the Commission's work had not taken the form of binding international instruments, owing in part to the inertia of the Sixth Committee which should engage more actively with the Commission, particularly with regard to completed topics. Increasingly, the Commission was adopting recommendations or guidelines for State practice, and other "soft law" instruments, rather than draft conventions, while the Committee postponed consideration of prepared draft articles indefinitely. The unwillingness of States to elaborate a convention on the basis of the draft articles prepared thus far by the Commission threatened to complicate the codification and progressive development of international law in more specialized fields, in which States would be even less prepared to take on legal obligations. Therefore, the Sixth Committee should use its authority to direct the work of the Commission to topics of pressing concern to the international community as a whole with a view to elaborating and adopting legal instruments in the near future.

70. His delegation welcomed the proposed elaboration of practical recommendations by the Commission on the formation and evidence of customary international law, there being no uniform understanding of that process. Authoritative guidelines on the topic would be of great help to judges and other practitioners. The other topics endorsed by the

Commission required further careful consideration by the Sixth Committee.

71. With regard to the Guide to Practice on Reservations to Treaties, his delegation hoped that it would find broad acceptance within the international community and serve as a useful instrument for resolving the numerous issues arising in connection with reservations and interpretative declarations. The Guide to Practice touched on a number of issues that were not directly governed by the Vienna Convention on the Law of Treaties, including the effects of reservations, and drew a clear distinction between the effects of reservations that met validity requirements and the effects of invalid reservations.

72. The draft articles on the responsibility of international organizations had inherited the wording of the draft articles on State responsibility, while taking into account the specific traits of international organizations to some extent. While important issues had been addressed in articles 14 (Aid or assistance in the commission of an internationally wrongful act), 17 (Circumvention of an international obligation through decisions and authorizations addressed to members) and 32 (Relevance of the rules of the organization), a number of the provisions were subject to debate. The idea that international organizations had certain rights previously recognized only as being the rights of States, such as the right to self-defence, was a contentious one. The concept of “effective control”, the term used in draft article 7 (Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization), in relation to the responsibility of an international organization for the actions of third parties also required further analysis. Draft article 40 (Ensuring the fulfilment of the obligation to make reparation), according to which the members of an international organization were required to take all appropriate measures in order to enable the organization to fulfil its obligation to make reparation for international wrongful acts it committed, also warranted further discussion.

The meeting rose at 1 p.m.