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

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11-56121 (E)

The meeting was called to order at 10.05 a.m.

Tribute to the memory of Justice Antonio Cassese, noted jurist

1. **The Chair** paid tribute to the memory of Justice Antonio Cassese, the first President of the International Tribunal for the Former Yugoslavia and a jurist highly respected in the international community.

2. **Mr. Zappala** (Italy) said that his delegation appreciated the expressions of sorrow and sympathy at the death of his distinguished countryman, Professor Cassese, a man of scholarship and action, a humanist in the fullest sense and a champion of justice and human rights.

3. *At the invitation of the Chair, the Committee observed a minute of silence.*

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

4. **The Chair** said that the richness, density and quality of the report of the Commission on the work of the last session of its current quinquennium attested to the unique and irreplaceable role it continued to play in the codification and progressive development of international law. As in the past, the Bureau had recommended that the Committee consider the Commission's report in three parts, the first part to consist of chapters I to V, the second part chapters VI to IX and the third part chapters X to XIII. He recalled that, since the addendum to the report (A/66/10/Add.1) containing the text of the Guide to Practice on Reservations to Treaties, comprising an introduction, the guidelines and commentaries thereto and an annex on the reservations dialogue, was not yet available, the Committee had decided to postpone the substantive debate on the Guide to Practice to the sixty-seventh session of the General Assembly.

5. **Mr. Kamto** (Chairman of the International Law Commission), introducing the Commission's report (A/66/10 and Add.1), said that during its extremely productive sixty-third session the Commission had adopted on second reading the Guide to Practice on Reservations to Treaties and complete sets of draft articles on the responsibility of international organizations and on the effects of armed conflicts on treaties. The Commission had also made significant progress on the topics protection of persons in the event of natural disasters and immunity of State officials from foreign criminal jurisdiction. It had continued its work on the obligation to extradite or prosecute (*aut dedere aut judicare*), focusing on the sources of that obligation. It had also made progress, in two working groups, on the topics treaties over time and the most-favoured-nation clause.

6. Turning to chapter IV of the report, he explained that, while the text of the guidelines on reservations to treaties were contained in A/66/10, the full text of the Guide to Practice, completed after 17 years' work, would appear in the addendum to the Commission's report (A/66/10/Add.1), to be issued. The Commission had decided to recommend to the General Assembly to take note of the Guide to Practice and ensure its widest possible dissemination, but it understood that the Committee's in-depth consideration of the Guide to Practice would have to be deferred to the sixty-seventh session. The text of the guidelines provisionally adopted in 2010 had been revised in the light of oral and written observations by States on the subject since 1995, including written observations received from Governments during 2011, which were reproduced in document A/CN.4/639 and Add.1.

7. In part 1 (Definitions), the text had been simplified by deleting some guidelines and reflecting their content in commentaries to other guidelines, notably those referring to examples of unilateral statements that were outside the scope of the Guide to Practice; in the final version such examples were mentioned in the commentary to guideline 1.1. Guideline 1.4 reflected the Commission's conclusion that conditional interpretative declarations were subject to the rules applicable to reservations. Consequently, all the other guidelines dealing specifically with such declarations had been deleted.

8. In part 2 (Procedure) the Commission had made certain editorial or technical changes to the final text of the guidelines and had deleted some guidelines or model clauses which now featured, in their essentials, in the commentaries. In particular, the Commission had deleted former guideline 2.1.8 (Procedure in case of manifestly impermissible reservations) owing to objections from some Governments that it would have had the effect of assigning to the depository functions that went beyond those recognized by the Vienna Convention. The Commission had also decided to

[1] To be issued.

revise the definition of objections to reservations given in guideline 2.6.1, in order to take account of the variety of effects which an objection might be intended to produce.

9. In part 3 (Permissibility of reservations and interpretative declarations) the Commission had decided to use the term "permissibility", rather than "validity", which was used elsewhere in the Guide to refer to both the substantive and the formal requirements for validity. Guideline 3.1.5.6 (Reservations to treaties containing numerous interdependent rights and obligations), incorporated the substance of former guideline 3.1.12 (Reservations to general human rights treaties) without referring specifically to human rights treaties. Former guideline 3.3.3 (Effect of collective acceptance of an impermissible reservation), had been deleted in the light of negative reactions from a number of Governments and the concerns expressed by the Human Rights Committee. Some of the guidelines in part 3 had been renumbered, and others had been deleted and their content had been reflected in the commentaries.

10. Part 4 (Legal effects of reservations, objections to reservations and interpretative declarations) contained a new guideline 4.2.6 (Interpretation of reservations). Guideline 4.5.3, on the difficult question of the status of the author of an invalid reservation in relation to the treaty, had been reworded in an effort to reconcile the differing views expressed by Governments in respect of former guideline 4.5.2. The final text of part 5 (Reservations, acceptance of reservations, objections to reservations and interpretative declarations in cases of succession of States) was largely the same as the provisional version of 2010.

11. The annex on the reservations dialogue contained nine conclusions by the Commission, preceded by a preamble and followed by a recommendation to the General Assembly to call upon States and international organizations, as well as monitoring bodies, to pursue such a reservations dialogue in a pragmatic and transparent manner. In addition, the Commission had adopted a recommendation to the General Assembly, contained in paragraph 73 of the report, on mechanisms of assistance in relation to reservations to treaties. The purpose of such mechanisms would be to assist States in resolving difficulties encountered in the formulation, interpretation, assessment of the permissibility and implementation of reservations and objections thereto. The Commission suggested setting up an assistance mechanism consisting of a small number of experts and establishing "observatories", within the Sixth Committee and at regional and subregional levels, to monitor reservations, along the lines of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe.

12. Turning to chapter V of the report, he said that the Commission had completed its second reading of the draft articles on the responsibility of international organizations, based on the eighth report of the Special Rapporteur (A/CN.4/640) and written comments received from Governments and international organizations (A/CN.4/637 and Add.1) on the text adopted in first reading in 2009. The conclusion of its work on the topic, taken up following the completion in 2001 of the articles on responsibility of States for internationally wrongful acts, signified the close of the Commission's consideration of the subject of international responsibility, which had been among the original topics selected in 1949. The Commission had decided to recommend to the General Assembly to take note of the draft articles and annex them to its resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. There was an error in the French version of the recommendation: in paragraph 85 (a) "*d'adopter*" should be replaced by "*de prendre note*".

13. The basic structure of the draft articles adopted on first reading (A/64/10) had been retained, with some reformulations and the addition of one draft article, bringing the number of 67. In part one (Introduction), a definition of the phrase "organ of an international organization" had been added to draft article 2. In part two (The internationally wrongful act of an international organization), chapter I (General principles) contained a new provision, current draft article 5, concerning the characterization of an act of an international organization as internationally wrongful. That provision was modelled on the first sentence of article 3 of the articles on State responsibility and had been included to prevent the *lex specialis* principle from being interpreted in such a way as to imply that if an act was lawful under the rules of an international organization it would therefore be lawful under international law. The Commission had, however, decided not to include a provision analogous to the second sentence of article 3 of the articles on State responsibility, because it could not be asserted that the characterization of an act as internationally wrongful would be unaffected by the

rules of the organization, which might conceivably include rules of international law relevant to such a characterization.

14. The draft articles in part two, chapter II (Attribution of conduct to an international organization) and chapter III (Breach of an international obligation) were largely unchanged. In draft article 10, the Commission had taken the view that although breaches of the rules of an organization were not per se breaches of international law, the organization's rules might nonetheless serve as the basis of obligations arising under international law.

15. In part two, chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization) the only substantive change was to draft article 17, which dealt with the possibility of an international organization incurring responsibility for circumvention of its international obligations through decisions and authorizations addressed to its members. The Commission had decided to limit the scope of that provision to situations in which an international organization had adopted a decision binding on its members, or where it had authorized its members to commit an act that would be wrongful if committed by the organization. There was now no provision that responsibility could arise from a mere recommendation of the organization. In addition, draft article 17, paragraph 2, included the requirement of a causal connection between the authorization and the act in question.

16. In part two, chapter V (Circumstances precluding wrongfulness) changes had been made only to draft articles 22 and 25. Draft article 22 (Countermeasures) had been elaborated to distinguish between three scenarios. First, countermeasures taken by an international organization against non-member States or organizations were not wrongful if taken in accordance with international law. Second, countermeasures taken by an international organization against one of its members for the breach of an obligation unrelated to membership were not wrongful if they satisfied the criteria contained, in paragraph 2. Third, countermeasures taken by an international organization against one of its members for the breach of an obligation arising as a consequence of membership was not wrongful if the rules of the organization expressly provided for such countermeasures. Draft article 25 dealt with the invocation of necessity as a circumstance precluding wrongfulness. The principal change had been to include the essential interests of member States of an international organization as a further basis for the invocation of necessity.

17. In part three (Content of the international responsibility of an international organization), chapter I (General principles) was essentially unchanged from the version adopted on first reading, with a few refinements. In chapter II (Reparation for injury), a new draft article 40 (Ensuring fulfilment of the obligation to make reparation) introduced a requirement that the responsible international organization must take all appropriate measures, in accordance with its rules, to ensure that its members provided it with the means for effectively making reparation. The draft articles in chapter III (Serious breaches of obligations under peremptory norms of general international law) had been adopted as proposed on first reading.

18. In part four (The implementation of the international responsibility of an international organization), the draft articles in chapter I (Invocation of the responsibility of an international organization) had been adopted largely unchanged. The exception was draft article 50, in which the provision that the entirety of part four was without prejudice to the entitlement of a non-State or non-international organization entity to invoke the responsibility of an international organization had been narrowed to refer only to chapter I of part four, to avoid implying that such entities were also entitled to take countermeasures under chapter II.

19. Chapter II of part four dealt with the substantive rules governing the taking of countermeasures and was largely unchanged from the version adopted on first reading. Draft article 52, paragraph 2, reflected the distinction introduced in draft article 22 by limiting the taking of countermeasures against members to cases where that possibility was provided for by the rules of the organization.

20. In part five (Responsibility of a State in connection with the conduct of an international organization) new paragraph 2 of draft article 58 (formerly draft article 57), which dealt with State responsibility for aiding or assisting the commission of an internationally wrongful act, made clearer the distinction between participation in the decision-making process within an international organization in

accordance with its rules and conduct by which the organization was aided or assisted to commit an internationally wrongful act. New paragraph 2 of draft article 59 (formerly 58), which dealt with State responsibility for direction and control of such an act, drew the same distinction. There was no such provision in draft article 60, since coercion would not, by definition, be in accordance with the rules of the organization. Draft articles 61, 62 and 63 contained some additional refinements.

21. In part six (General provisions) only draft article 64 (*Lex specialis*), had been amended to make it clearer. Its second sentence now anticipated the possibility that special rules of international law might be contained in the rules of the international organization applicable to the relations between itself and its members.

22. **Ms. O'Brien** (The Legal Counsel) said that the topic of responsibility of international organizations was of great interest to the Office of Legal Affairs. International organizations had grown in number and complexity and were undertaking an unprecedented range of activities in an increasing number of fields in cooperation with many more actors. In an age of globalization, their impact was greater than ever before. The Commission's work was helping to set out the relevant legal principles at a time when issues of responsibility were at the top of the international agenda. Its draft articles were already influencing the jurisprudence of regional and national courts and could have significant implications for the United Nations and other international organizations in the future. The principle of international responsibility of international organizations was well established, but its scope, limitations and practical application had yet to be defined, not only in current activities of the United Nations, such as peacekeeping, but also in new fields such as the establishment of judicial and non-judicial mechanisms of accountability and of United Nations transitional administrations. Moreover, they remained to be defined not only in relation to the subsidiary organs of the United Nations, but in relation to the principal organs as well.

23. The Office of Legal Affairs had reviewed its practice, following the adoption of the draft articles on first reading, to examine how far they conformed to that practice and how appropriate they were where no relevant practice existed. It had concluded that, although some of the draft articles were supported by well-established practice, others were inconsistent with it, or appeared to be based on no practice at all. In some cases, the Office had been unable to envisage how the underlying principles might apply to the United Nations. In its observations on the draft articles, the Office had commented on the weight that should be given to the draft articles where they were unsupported, or supported only to a limited extent, by the practice of international organizations; on the need to recognize the differences between States and international organizations when seeking to apply to the latter principles of the existing articles on State responsibility; on the differences between international organizations in relation to the principle of "speciality"; and on the dichotomy between primary and secondary rules, which was especially pertinent because the scope of application of some of the primary rules in respect of international organizations had yet to be determined.

24. The revised draft articles, as adopted on second reading, did address a number of the issues raised by the Office. The general commentary noted that the principle of *lex specialis* had particular prominence in the context because of the specific character and functions of different international organizations. That acknowledgement was important for the United Nations, especially in view of its practice in the context of peacekeeping operations, where the General Assembly had established financial limits for injury or damage according to the nature and timing of the operation. The Commission had also acknowledged in its general commentary that because they were based on limited practice a number of the draft articles were more in the nature of progressive development than codification; that they did not necessarily have the same authority as the articles on State responsibility; and that the degree of their authority would depend on their reception.

25. The changes made by the Commission to the definition of an "agent of an international organization", in draft article 2 (d), brought the definition closer to that of the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. Since numerous United Nations bodies worked with implementing partners and contractors to provide goods and services in a wide range of situations, it was important that the definition of an "agent" should be limited to persons performing the functions of the Organization, otherwise it could expose the United Nations to unreasonable liability

towards persons or entities over whom it had little or no control, engaged in the provision of goods and services which were merely incidental to its mandated tasks.

26. Draft article 10, paragraph 2, provided that a breach of an international obligation by an international organization might also arise under the rules of the organization. The Office had commented that a violation of the rules of the organization would entail responsibility not for the violation itself but for the international law obligation enshrined in the rule. In its new draft article 5, and in the commentary to draft article 10, the Commission had made it clear that it was international law which determined whether an act of an international organization was wrongful, including in cases where the act breached the rules of the organization. Thus, a failure by the United Nations to perform a mandate could not in itself be considered an internationally wrongful act, unless the mandate contained an international law obligation to be performed.

27. The Commission had also clarified the issue of attribution of conduct to an international organization. In paragraph (5) of its commentary to part two, chapter II, it had reaffirmed the principle, long established in United Nations practice, that military operations conducted under national or regional command and control, rather than under United Nations command and control, did not entail the responsibility of the Organization, even when they were authorized by the Security Council. 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), the Commission established the test of "effective control", which was applicable in the relationship between the United Nations and an organ placed at its disposal, for example by troop-contributing countries. The responsibility of the Organization was conditional upon the extent of its effective control over the conduct of the troops in question.

28. In its comments, the Office had also questioned the inclusion of certain draft articles on the basis that there was no practice to support them in their current form and that it was hardly conceivable that they could have any practical application to international organizations. Those comments applied to the provisions on countermeasures and to draft articles 15, 16 and 17, which were of little effect in the practice of the United Nations. However, draft article 14 (Aid or assistance in the commission of an internationally wrongful act) was directly relevant to the experience of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC, now MONUSCO), which had provided support to the country's own armed forces, the Force armées de la République démocratique du Congo (FARDC), to disarm foreign and Congolese armed groups. Faced with reports that members of FARDC units were looting, killing and raping the very population they were supposed to protect, the Secretariat had devised a policy, subsequently endorsed by the Security Council, that United Nations missions would not participate in or support operations with FARDC units if there were substantial grounds for believing that there was a real risk of such units violating international humanitarian or human rights law, or refugee law. That policy was now applied wherever the United Nations was considering providing support to non-United Nations security forces, so as to avoid its being implicated, or perceived to be implicated, in aiding or assisting the commission of a wrongful act. In any case, under draft article 14, subparagraph (a), the responsibility of the United Nations would only be engaged if it had knowledge of the circumstances of the internationally wrongful act.

29. The real test of the regime of the responsibility of international organizations would be in its practical application. It would be interesting to see how practice would affect the development of the principles and how the principles would influence practice.

30. **Mr. Braad** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), noted with satisfaction that the Commission was increasingly attentive to the views put forward by States in the Sixth Committee. The Commission's decision to establish a Working Group on Methods of Work was commendable and should result in more efficient working methods. The Nordic delegations supported the retention of split sessions of the Commission, which allowed for proper preparation of its work. It would be useful to keep a record of attendance of the Commission's members at its sessions. When nominating members of the Commission, States should choose those with the strongest possible background in, and knowledge of, international law. The Nordic countries welcomed the reconstitution of the Working Group on the Long-term Programme of Work and hoped that, among the

proposed new topics, the Commission would give priority to protection of the environment in relation to armed conflict, protection of the atmosphere, and formation and evidence of customary law.

31. Turning to the topic of responsibility of international organizations, he said that the draft articles adopted on second reading represented a useful attempt at describing practice and the applicable rules in that area. In many respects the draft articles did reflect current customary law. However, in some areas the available practice was relatively sparse and not always consistent, which raised the question whether the rules had matured sufficiently to form the basis for a convention. In the view of the Nordic countries, the draft articles should be used as inspiration and be further refined in the future practice of States and international organizations.

32. Concerning the topic of reservations to treaties, the Nordic countries supported the emphasis placed by the Commission on the reservations dialogue, although they did not support the proposal for a dispute resolution mechanism. Nor did they support the proposed change of presumption in the text adopted for Guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), according to which that status would now depend on the intention expressed by the reserving State or international organization: the author of an invalid reservation could express at any time its intention not to be bound by the treaty without the benefit of the reservation. That change did not appear compatible with the principles of treaty law under the Vienna Convention on the Law of Treaties. The severability of an impermissible reservation was supported by State practice; it secured bilateral treaty relations and opened up the possibility of dialogue within the treaty regime. The Nordic countries therefore held to their view that the author of an invalid reservation would continue to be bound by the treaty in question, without the benefit of the reservation.

33. **Ms. Quezada** (Chile), speaking on behalf of the Rio Group, said that the Group attached great importance to article 1 of the Statute of the Commission. Comments and observations by Member States could assist the Commission to discharge its functions more effectively, while taking account of national perspectives and opinions on the legal issues on its agenda.

34. The Rio Group appreciated receiving an advance copy of chapters II and III of the Commission's report, but it wished to reiterate the need to receive the Commission's report some weeks before the beginning of the General Assembly, to enable delegations and their Governments to consider it in depth. It might be useful to move the session of the Commission to dates earlier in the year, so as to ensure that its report would be available promptly. The practice of publishing the provisional summary records of the Commission on the web page allowed States to be fully aware of the substance of the debates.

35. In view of the burden of research placed on the Special Rapporteurs, it was important to find alternative ways of supporting their work. While the Commission should be encouraged to continue taking cost-saving measures, the Rio Group agreed with the Commission that such measures should not prejudice the quality of its studies and documentation.

36. A fluid interaction between the Commission and Member States was critical to the success of the mutual endeavour. Questionnaires elaborated by the Special Rapporteurs should focus more on the main aspects of the topic under consideration and be drafted in such a way that more States would be able to furnish replies, including information on national legislation, in a timely manner. The differences in size and infrastructure between legal departments of various States should not have the result that the views of States able to participate more actively in the discussions were the only ones taken into account. Efforts must be made to encourage more States to contribute to debates on the Commission's work. In order to enhance direct dialogue between the Commission and Member States, it would be useful if part of the Commission's sixty-fourth session were to take place in New York. Ways should be explored of ensuring the full participation in meetings of the Sixth Committee of Special Rapporteurs, who should also be available during the days that their topics were being considered to enable delegations to ask questions and comment on their work in a more informal setting. The "thematic dialogue" between the Commission and the Sixth Committee should be scheduled close in time to the meeting of legal advisers and should not overlap with relevant meetings of the General Assembly. There should be a short list of topics for the thematic dialogue, announced well in advance so as to allow for better preparation.

37. The Rio Group also welcomed the voluntary contributions from States to the trust funds used to facilitate publications by the Commission and participation in the International Law Seminar, and invited States to continue their contributions. The participation in the Seminar of the legal advisers who represented their Governments in the Sixth Committee, especially those from developing countries, could make a valuable contribution to the Seminar while also enhancing dialogue between the Committee and the Commission.

38. **Mr. Gussetti** (Observer for the European Union) said that international rules of law on the responsibility of international organizations could have a considerable implications for the European Union. Since its member States had transferred competences and decision-making authority in some areas to the Union, it participated in the international arena in its own name, and its large-scale participation in multilateral treaties had significantly shaped treaty law and practice.

39. The European Union had submitted comments (A/CN.4/637) on the draft articles adopted on first reading in 2009 and related commentaries. Its major concern had been that the draft articles did not sufficiently take account of the special characteristics of the European Union as a regional integration organization. While maintaining its earlier views, the European Union welcomed the general commentary to the draft articles adopted on second reading, in which the Commission acknowledged, among other things, that several of the draft articles were based on scarce practice and tended towards progressive development; that the draft articles did not have the same authority as the corresponding provisions on State responsibility; that international organizations were quite different from States; that because of the diversity of international organizations draft article 64 (*Lex specialis*) assumed particular importance; and that the rules of the organization could be relevant for non-members as well. It also took note of the Commission's recommendation to the General Assembly concerning the draft articles.

40. **Mr. Zellweger** (Switzerland) said that the Guide to Practice on Reservations to Treaties would undoubtedly become a reference work facilitating the resolution of complex problems in that area. His delegation also welcomed the Commission's draft articles on the responsibility of international organizations. In a world in which problems were becoming increasingly global, international cooperation was becoming more important, not only through bilateral exchanges, but also in the framework of international organizations. The draft articles would undoubtedly have an influence on the behaviour of international organizations, the behaviour of States within them and their relations with the organizations. Despite the diversity of international organizations, in general terms the draft articles would provide appropriate responses to the legal issues concerned, and serve as a reference text to guide the practice of States and of international organizations. As for the action to be taken on the Commission's recommendation, his delegation suggested that the General Assembly should take note "with appreciation" of the draft articles in a resolution. The question of elaborating a convention on the basis of the draft articles could be considered at a later stage.

41. **Mr. Ruiz** (Colombia) noted that the Commission had successfully completed five topics during the quinquennium just concluded, which constituted a considerable achievement. His delegation supported the Commission's recommendation to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and ensure its widest possible dissemination. With regard to the separate recommendation that the General Assembly consider establishing a reservations assistance mechanism, and also the Commission's conclusions on the reservations dialogue, contained in the annex to the Guide to Practice, both texts warranted more detailed examination.

42. His delegation took special note of the topics listed in chapter III of the Commission's report (Specific issues on which comments would be of particular interest to the Commission). Of equal importance were the five new topics proposed by the Commission for its long-term programme of work, and the preliminary information about them contained in the annexes to the report. The topics of the fair and equitable treatment standard in international investment law and protection of the environment in relation to armed conflicts seemed particularly relevant and timely. In choosing those topics, and the topic of protection of persons in the event of disasters several years earlier, the Commission had chosen to focus on matters of great current significance and had shown itself to be in tune with existing trends in international practice. His Government would be submitting its views on each of those topics and would also consider

proposing additional topics for the Commission's long-term programme of work.

43. **Mr. Montecino Giralt** (El Salvador) said that the Guide to Practice on Reservations to Treaties was one of the Commission's most notable achievements of the past decade and provided technical solutions for the many problems that arose in that area of the law of treaties. His delegation noted with satisfaction that the Commission, in finalizing the Guide to Practice, had taken into consideration the comments submitted by States and international organizations. It had made the correct decision in deleting guideline 3.3.3 (Effect of collective acceptance of an impermissible reservation) adopted on first reading, since collective acceptance of an invalid reservation belonged to the sphere of treaty modification rather than to that of reservations *stricto sensu*. His delegation supported the other recent changes to the Guide to Practice, which made it clearer and would ensure its correct use in practice.

44. It also supported the recommendation on the reservations dialogue annexed to the Guide to Practice, which would be useful in achieving a proper balance between the formulation of reservations and their compatibility with the object and purpose of a treaty. With regard to the Commission's other recommendation, the proposed establishment of a reservations assistance mechanism would bring significant benefits and would be compatible with the non-binding character of the Guide to Practice. However, the text of the recommendation merely described the scope of such a mechanism and did not provide the details needed for implementation, such as the number of members of such a body, the procedure for electing them, the applicable rules of procedure, whether or not the body would form an organic part of the United Nations, and how its decisions would be taken. Those matters should be clarified.

45. With regard to the draft articles on the responsibility of international organizations, his delegation noted with satisfaction the harmony achieved between the draft articles and the rules on State responsibility. Both instruments were based on the same principle of international law, that every internationally wrongful act incurred international responsibility. The many difficulties arising from the scarcity of international practice relevant to the topic had been successfully solved. Given the principle of specialty governing the activities of international organizations in their areas of competence, the role of the "rules of the organization", as defined in draft article 2 (b), was fundamental.

46. Since the international legal system had no hierarchical structure to enforce the performance of obligations, the Commission had correctly decided to regulate countermeasures and set limits to them. In that regard he was pleased to note that the current draft article 53, paragraph 1 (b), reflected El Salvador's proposal to replace the term "fundamental human rights" by "human rights". Uncertainty about just which rights were to be considered "fundamental" allowed for too high a degree of discretion in the taking of countermeasures; in that respect the draft article was superior to the corresponding article on State responsibility.

47. His delegation supported the Commission's recommendations to the General Assembly concerning the draft articles. The articles dealing with State responsibility and those dealing with the responsibility of international organizations were essentially complementary in character, and for the sake of their proper application in the future both instruments should be binding.

48. **Mr. Zappala** (Italy) said that the Commission had made remarkable progress in its sixty-third session by completing its consideration of three difficult topics. He noted with a certain pride the contribution that Italian scholars had made as Commission members to the study of international responsibility. There was a praiseworthy continuity in the Commission's work on the subject; it was essential for the draft articles on responsibility of international organizations to be coherent with those on State responsibility. The draft articles provided an indication of the extent to which the same or similar rules applied to States and international organizations, while identifying certain rules specific to the latter. The issue of the responsibility, if any, of States when an organization of which they were members incurred international responsibility, which had been left "without prejudice" in the articles on State responsibility, had now been addressed.

49. The useful new general commentary pointed out that, given the limited practice in the field, the work on responsibility of international organizations had involved a greater degree of progressive development of the law than the articles on State responsibility. However, there was a need for such development in

order to cover the responsibility of the large number of existing international organizations. It was noteworthy that some of the draft articles, as provisionally adopted, had already been taken into consideration by various international and domestic courts and tribunals.

50. The general commentary rightly acknowledged that special rules, which the draft articles did not attempt to identify, could play a significant role, especially in the relations between an international organization and its members. However, international organizations, in their comments on the draft, had given very few examples of special rules concerning specific issues of international responsibility. One might wonder whether some organizations, by insisting on the applicability of their special rules, were primarily seeking to exempt themselves from the application of the general rules. Nevertheless, a general framework of rules governing international responsibility needed to be upheld to ensure the rule of law, and it would be the task of those interpreting the law to ensure that its development contributed to the security of international relations without hampering the activities of international organizations.

51. His delegation commended the Commission on its detailed and extensive work on reservations to treaties.

52. **Mr. Labardini** (Mexico) said that, in chapter III of its report the Commission had asked States what approach they wished the Commission to take to the question of immunity of State officials from foreign criminal jurisdiction. His Government's view was that there was no rule of customary international law (*lex lata*) governing the question as a whole. In approaching the question as *lex ferenda*, a balance had to be struck between the need for stability in international relations and the need to combat impunity for grave crimes that violated international law.

53. As for the second of the Commission's questions on that topic, although customary international law recognized the immunity of Heads of State or Government and ministers for foreign affairs, nevertheless in the case of serious violations of human rights such as war crimes and genocide that immunity had been interpreted restrictively. An exercise of progressive development was therefore needed.

54. As for the crimes which were or should be excluded from immunity *ratione personae* or *ratione materiae*, the exceptions to the first should be those linked to the commission of grave crimes committed by State officials in the discharge of their functions, including the exceptions which had arisen to restrict that immunity as a result of evolving customary law. Mexico's practice in relation to Heads of State and Government and ministers of foreign affairs was to safeguard immunity *ratione personae*, which extended to acts performed by an official in the discharge of his official functions; this was considered *lex lata*. Mexico had no legislation providing specifically for the protection of Heads of State, or for a waiver of immunity, in connection with criminal offences. In practice, there had been instances of claims brought against former Heads of State for acts performed while in office in which the Governments concerned had assumed the defence in order to protect the institution those persons had represented, usually the presidency. However, no official defence had been undertaken for such individuals where the acts had been performed in a personal capacity. On the other hand, the Government of Mexico had safeguarded the immunity of former presidents from foreign judicial proceedings.

55. With regard to the Commission's questions on protection of persons in the event of disasters, his Government's view was that, in the absence of *lex specialis*, the duty to cooperate should not be understood as a duty to provide assistance but simply as a duty to consider requests for assistance made by the affected State. Mexico also took the view that, in the light of draft articles 5 (Duty to cooperate) and 10 (Duty of the affected State to seek assistance), any duty to cooperate that might arise would be conditional upon the affected State having concluded that the disaster exceeded its national response capacity and upon the capacity of the requested State, since that State alone could decide whether it was able to provide the assistance requested.

56. Concerning the questions put by the Commission in relation to the obligation to extradite or prosecute, in Mexico the International Extradition Act was residual in nature, applying only when there was no treaty with the State seeking extradition. The Act did not specify a particular category of crimes, or "core crimes", to which extradition would apply, and most of Mexico's bilateral extradition treaties took the same approach. None of its national courts had relied on customary international law in order to implement the obligation to extradite or prosecute.

57. With regard to the topics to be included in the Commission's long-term programme of work, three of the suggested topics fully met the criteria that the Commission had set at its fiftieth session (1998) and could be regarded as priority topics for its future work: formation and evidence of customary international law, provisional application of treaties, and protection of the environment in relation to armed conflicts. The Commission should, however, remain open to suggestions by the Sixth Committee for new topics.

58. **Mr. Murase** (Japan) said his Government firmly believed that the Commission should continue its work as a body of members elected in their individual capacity, working in a collegial spirit while representing their own legal cultures and backgrounds. However, in recent years some critics, particularly in academic circles, had been saying that the Commission was useless and should be disbanded. His Government did not share that view, but did believe that the Sixth Committee and the Commission itself should respond to the criticisms with the utmost sincerity.

59. On the question of the Commission's methods of work, Japan had been concerned in recent years at the slow pace of progress on certain topics, due in part to delays in the submission of reports by Special Rapporteurs, and hoped that the Commission would take a disciplined stance to ensure steady progress on each topic and the compliance of each Special Rapporteur, as far as possible, with the new guidelines. His delegation welcomed the new requirement by the Commission that its study groups should aim at achieving concrete outcomes within a reasonable time. A study group could well be converted to a normal procedure at a certain stage, a Special Rapporteur being appointed for the topic in question.

60. One of the Commission's goals was to transform international law, traditionally dominated by western States, into a more equitable international legal order. In that regard, it was gratifying to note that the Asian-African Legal Consultative Organization (AALCO) had been revitalized under its new Secretary-General and was establishing close cooperation with the Commission. There should be more active participation by Asian and African members in the Commission's work. It was regrettable that there was currently no Special Rapporteur from Asia. Unlike those from developed countries, Special Rapporteurs from developing countries did not always have adequate financial and other resources to support their research. He appealed to members of the Committee to find a remedy for that situation.

61. According to some views, the Commission should place more emphasis on producing "soft law" instruments, such as guides to practice and guidelines, and less on formulating binding conventions. His delegation did not agree. If the Sixth Committee ceased to have an interest in treaty-making, its own raison d'être would be diminished. The Commission should concentrate on elaborating draft articles for future conventions.

62. Some critics also argued that specialized law-making bodies were much more effective than a body such as the Commission composed of experts on general international law. However, the development of laws within self-contained regimes without coherent links among them could result in the fragmentation of international law. It was therefore important for the Commission to ensure the coherence of each field of law within the framework of general international law. While looking to the codification and progressive development of new topics in specialized fields, it should consider those new topics in relation to the doctrines and jurisprudence of general international law. Efforts by the Commission for the codification and progressive development of international law, through a generalist or integrative approach, were now more important than ever before.

63. His delegation supported the inclusion in the Commission's long-term programme of work of the topic protection of the atmosphere. The many regional and multilateral conventions on transboundary air pollution and climate change remained a patchwork of instruments, with significant gaps in geographical coverage, regulated activities, regulated substances and, most importantly, applicable principles and rules. The deteriorating state of the atmosphere made its protection a pressing concern, and abundant State practice and judicial precedent was available. The topic called for a comprehensive and systematic approach by the Commission, one that avoided political debate and focused solely on the legal issues.

64. Concerning the relations between the Commission and the Sixth Committee, his delegation urged the Committee to treat the final products of the Commission's work in a responsible manner, rather than postponing their consideration year after year, as had happened with the draft articles on nationality in

relation to the succession of States and the draft articles on the law of transboundary aquifers. In the same vein, his delegation proposed that the United Nations Convention on Jurisdictional Immunities of States and Their Property, another product of the Commission, should be included in a future United Nations treaty event, to promote its ratification by more States.

65. **Mr. Šturma** (Czech Republic) said that the adoption of the draft articles on responsibility of international organizations on second reading was a major achievement of the quinquennium. The special and functional nature of the legal personality and competences of international organizations was well known. Although a number of organizations had urged that more emphasis should be given to the principle of speciality, it had been the Commission's task to draft general rules. The priority of special rules was safeguarded in draft article 64 (*Lex specialis*), which seemed to be better placed in its new position in part six (General provisions) than in part one (Introduction).

66. The inclusion, in draft article 2 (Use of terms) of a definition of an "organ of an international organization" in addition to that of an "agent of an international organization" was a helpful change. The new draft article 5 was also helpful in explaining that the characterization of an act of an international organization as internationally wrongful was governed by international law. Draft article 10, by providing that the rules of an international organization could also be among its international obligations, made it clear that relations between an international organization and its members were generally governed by international law.

67. The general principle underlying paragraph 1 of draft article 17 (Circumvention of an international obligation through decisions and authorizations addressed to members) was acceptable. The question that had been raised as to whether "circumvention" of an obligation was a second, additional requirement seemed to be settled in the commentary, which treated the term as explanatory rather than conditional. Another issue concerned the line between binding and non-binding acts adopted by an international organization. Paragraph 1 dealt with binding decisions; paragraph 2 of draft article 17 had been improved by the omission of any reference to a recommendation by an international organization, and dealt only with an authorization. That change made the article as a whole more generally acceptable. In part five (Responsibility of a State in connection with the conduct of an international organization), the key provision seemed to be the compromise wording in draft article 61 (Circumvention of obligations of a State member of an international organization), which mirrored draft article 17.

68. His delegation would prefer the draft articles to be adopted in a non-binding form, as an annex to a resolution of the General Assembly.

69. Concerning the Commission's long-term programme of work, his delegation welcomed the inclusion of the fair and equitable treatment standard in international investment law as a topic, since different views existed on the content of the notion and the source of the standard. It also appreciated the inclusion of the topic provisional application of treaties, a complex issue that included the process of domestic approval of treaties.

The meeting rose at 1 p.m.