United Nations A/C.6/66/SR.20

General Assembly
Sixty-sixth session

Official Records

Distr.: General
23 November 2011

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Wednesday, 26 October 2011, at 3 p.m.

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

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11-56502 (E)

The meeting was called to order at 3.10 p.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. Pírez Pérez** (Cuba) said that while he welcomed the availability of the report of the International Law Commission on the work of its sixty-third session (A/66/10 and Add.1) in electronic form, the delay in issuing it in the six official languages of the Organization would make it difficult for delegations and experts in their capitals to study the topics under consideration by the Commission. The more equitable geographic and gender balance of its members would provide a broader range of views and he was pleased that the Commission had begun to meet in New York, thereby facilitating interaction between its special rapporteurs and members of the Committee.

2. The Guide to Practice on Reservations to Treaties would be a valuable resource for States and international organizations; however, none of the guidelines contained therein should be permitted to weaken the Vienna regime. His delegation could not endorse the recommendation concerning the establishment of a mechanism of assistance in relation to reservations since no "observatory" mechanism could replace or limit the sovereignty of States in such matters; any disputes should be resolved through negotiation between the States parties to the treaty.

3. He noted with satisfaction the adoption on second reading of the draft articles on the responsibility of international organizations, which, despite their complexity, reflected important principles of international law, and drew attention to some of the issues raised by his Government in its comments and observations on the topic (A/CN.4/636). The definition of "international organization" in draft article 2 (a) was broader than that of the 1986 Vienna Convention on the Law of Treaties; the reference to "other entities" should therefore be deleted. The concept of "injury" should be included in the definition of an internationally wrongful act of an international organization (draft articles 3 and 4) in order to establish the injured party's right to reparation, cessation of the breach and guarantee of non-repetition. In draft article 24, the meaning of "essential interest" must be explained. Draft article 57 (Measures taken by States or international organizations other than an injured State or organization) should be reworded to include a reference to the collective security system envisaged in the Charter of the United Nations. Lastly, a mechanism for the settlement of disputes relating to the interpretation of responsibility would provide a guarantee of peaceful dispute settlement, essentially for the underdeveloped countries that were often the victims when conflicts were resolved by the use of force.

4. **Mr. Mangueira** (Angola) said that while he was in favour of greater interaction between the Commission and Member States, that relationship must be interactive. He therefore endorsed the proposals made by the representative of Chile on behalf of the Rio Group.

5. With respect to the topic of reservations to treaties, the recommendation that a reservations assistance mechanism should be established must be considered in the context of the specific interests of the States, and the content of the treaties, in question.

6. He welcomed the adoption of the draft articles on the responsibility of international organizations. Angola had been the victim of wrongful acts committed by former members of the three United Nations Angola Verification Missions (UNAVEM I, II and III), many of whom had not been brought to justice owing to the privileges and immunities granted to them. His delegation believed that those acts fell within the scope of the articles on the responsibility of States for internationally wrongful acts (contained in annex to General Assembly resolution 56/83) owing to the status granted to mission staff in the States in which they were deployed; the privileges and immunities granted to them, which equalled those accorded to diplomats; and the fact that respect for the domestic rules of concerned States was a principle of international law. However, that did not free the agent from responsibility for wrongful acts committed in a third State. It was important to expand the scope of responsibility in the draft articles on the responsibility of international organizations in light of the fact that, pursuant to draft article 2 (a), (c) and (d), organs and agents of international organizations were included in the definition of "international organization".

7. **Mr. Zidar** (Slovenia) said that the Guide to Practice on Reservations to Treaties would help governments deal with reservations in their day-to-day

[1] To be issued.

practice. He looked forward to further consideration of the proposal to establish a reservations assistance mechanism.

8. The draft articles on the responsibility of international organizations provided useful guidance to States and, in particular, to international organizations. However, the Committee needed more time for reflection before deciding on their final form.

9. All the new topics included in the Commission's long-term programme of work deserved further examination; of particular relevance were the topics on the formation and evidence of customary international law, protection of the environment in relation to armed conflicts and protection of the atmosphere. However, he encouraged the Commission and its special rapporteurs to conclude work on the other topics on its agenda; he especially regretted the lack of substantial progress on the challenging topic of the obligation to extradite or prosecute (*aut dedere aut judicare*).

10. He commended the Commission's achievements in the progressive development and codification of international law, which was of paramount importance in strengthening respect for the rule of law. Addressing that issue at the national and international levels was essential to the coherent development of international law, which could be achieved only through enhanced cooperation and dialogue among international courts, tribunals and institutions and between those bodies and States.

11. On the issue of protection of persons in the event of disasters, to which Secretaries-General Kofi Annan and Ban Ki-moon attached great importance, he stressed that international cooperation and solidarity were paramount in ensuring efficient disaster relief and that legal guidance was a prerequisite for timely, effective response. In addressing the topic, the Commission's primary goal should be to prepare a comprehensive set of international rules. Draft articles 1 to 12 struck the proper balance between the duty to ensure the protection of persons affected by disasters and the need to respect the fundamental principles of the sovereignty of States and non-interference in their affairs, making it clear that sovereignty entailed both rights and obligations. States affected by natural disasters had the duty to preserve the victims' lives and protect their human rights, including the right to life, food, health, drinking water and housing. The State did not have unlimited discretion regarding its consent to external assistance, which it was obliged to seek if the disaster exceeded its response capacity and which, if it lacked the capacity or the will to do so, should nonetheless be guaranteed. It was therefore his delegation's understanding that the words "as appropriate" in draft article 10 referred only to the affected State's right to choose among the various external actors offering assistance.

12. On the question of whether the duty to cooperate included a duty on States to provide assistance when requested by the affected State, his delegation considered that, as the Special Rapporteur had noted in his fourth report (A/CN.4/643 and Corr.1), disasters had a dual nature: as a primary responsibility of the affected State and as a global event of interest for the international community as a whole. The right of non-affected actors to offer assistance arose from that duality and should not be interpreted as interference in the internal affairs of the affected State; the latter's sovereignty and primary responsibility were not affected since, notwithstanding the duties set out in draft article 10 and draft article 11, paragraph 2, it could still decide whether to accept the offered assistance. Recognition of a positive, specific legal obligation of the international community to offer assistance had no basis in the relevant international law and instruments and would pose numerous obstacles in practice. He therefore encouraged the Commission to continue its work on the basis of the draft articles that had already been adopted, whereby non-affected actors were encouraged to offer assistance to the affected State through solidarity and cooperation, not as a duty.

13. Lastly, he supported the appeal to the General Assembly to reconsider the adoption of additional measures in order to increase the effectiveness of the special rapporteurs as proposed in paragraph 400 of the Commission's report.

14. **Mr. Simonoff** (United States of America), responding to the Commission's request for States' views on the new topics included in its long-term programme of work, said that the working paper on the peaceful settlement of disputes, prepared by Sir Michael Wood and contained in annex A to the report of the Commission (A/66/10) provided an excellent road map for future work on the topic and touched insightfully on a number of issues that merited consideration, including the kinds of acts that could be counted as State practice, the relationship between State practice and *opinio juris* and the role of treaties

in the formation of customary law. It would also be useful to gather information on the approaches to the formation of customary law taken by national courts and other municipal organs. He agreed that flexibility remained an essential feature of the formation of customary international law, that it was therefore important not to be overly prescriptive and that an appropriate outcome could be a series of propositions with commentaries.

15. On the topic of protection of the atmosphere, he welcomed the working paper prepared by Mr. Shinya Murase and contained in annex B to the Commission's report. The United States was a party to many treaties on air pollution and its current Government had pushed for the conclusion of a global treaty on mercury. However, as the current structure of law in that area was treaty-based, focused and relatively effective, and in light of the ongoing negotiations designed to address evolving and complex circumstances, it would be preferable not to attempt to codify rules in that area at present.

16. His delegation looked forward to studying the working paper on the provisional application of treaties, prepared by Mr. Giorgio Gaya and contained in annex C to the report of the Commission. However, as to whether States should give notice prior to terminating such application, he urged caution in proposing any rule that could create tension with respect to the clear language of article 25 of the Vienna Convention on the Law of Treaties. A decision on the final form of work on the topic should be taken at a later date.

17. He welcomed the working paper on the fair and equitable treatment standard in international investment law, prepared by Mr. Stephen C. Vasciannie and contained in annex D to the Commission's report. The related work of other international organizations, including the Organization for Economic Cooperation and Development (OSCE) and the United Nations Conference on Trade and Development (UNCTAD), might be a useful point of departure for the Commission. In light of the different formulations of the fair and equitable treatment standard in the various investment treaties, the Commission should avoid restating or interpreting the intentions of the parties to those instruments. It should focus on describing the formulations used in references to the standard and should not necessarily limit itself to the issues identified in the working paper. Since the standards embodied in treaties differed considerably in structure, scope and language, he welcomed the Commission's acknowledgment that the mere inclusion of the fair and equitable treatment standard in over 3,000 treaties did not prove that it was part of customary international law. In light of the nature of those provisions, it would probably be impossible to develop uniform rules or a definitive statement on the meaning of the standard, but a description of current State practice and jurisprudence would provide a useful resource for governments and practitioners.

18. He supported the Commission's work on the topic of promotion and protection of the environment in relation to armed conflicts. However, as acknowledged in the working paper prepared by Ms. Marie G. Jacobsson and contained in annex E to the report of the Commission, the topic was very broad in scope and he feared that it might not be sufficiently focused to benefit from the Commission's expertise. He also noted that, as mentioned in paragraph 12 of the working paper, the International Commission of the Red Cross (ICRC) had reported a lack of State support for work on the topic.

19. On the topic of reservations to treaties, he stressed that guideline 4.5.3 of the Guide to Practice on Reservations to Treaties — which would not be considered formally by the Committee until the sixty-seventh session of the General Assembly — should not be understood to reflect consistent practice on the part of States. His delegation found the approach articulated in that section difficult to reconcile with the fundamental principle of treaty law that a State should be bound only to the extent that it voluntarily assumed a treaty obligation.

20. He noted the recommendations concerning the establishment of an "observatory" on reservations to treaties, which would presumably be similar to that established within the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), and of a reservations assistance mechanism. On the basis of his Government's participation as an observer in the work of CAHDI, he believed that additional focus on such issues in the Committee and in regional or subregional settings could be useful but that coordination would be needed in order to prevent unnecessary overlap in the work of such observatories. He would like to learn more about the proposed assistance mechanism, including the status of proposals emerging from it. He questioned, however, whether it

would be appropriate to inject an independent mechanism consisting of a limited number of experts into a process that essentially involved States and was concerned at the implication that the mechanism's proposals might be seen as compulsory for States requesting assistance.

21. The draft articles on the responsibility of international organizations were a significant contribution to international legal thinking. He was pleased by the inclusion of a general commentary introducing the draft articles, which indicated the scarcity of practice in the area and noted that much of their content fell into the category of progressive development rather than codification. In considering the cross-references to the articles on State responsibility and the question of whether the draft articles sufficiently reflected the differences between States and international organizations, it was important to bear in mind the Commission's assessment that the provisions of the draft articles did not necessarily yet have the same authority as the corresponding provisions on State responsibility.

22. In light of the diversity of the international organizations operating at various levels, the structural differences among them and their extraordinary range of functions, powers and capabilities, the principles set out in some of the draft articles, such as those on countermeasures and self-defence, probably did not apply to them in the same way that they applied to States. The *lex specialis* rule set out in draft article 64 was of great importance to all the draft articles and it might be necessary to give further thought to the manner in which principles of responsibility applied as between an international organization and its members. Lastly, he supported the recommendation that any discussion of whether the draft articles should be transformed into a convention should be deferred in order to allow time for the development of further practice of international organizations.

23. **Mr. Yee** (Singapore) said he hoped that the Commission's practice of inviting Member States to comment on specific issues would continue and that the list of issues would be as focused as possible.

24. He welcomed the overall approach taken in the Guide to Practice on Reservations to Treaties and the greater transparency that it sought to achieve. While he agreed with the Commission that pragmatic dialogue with the author of a reservation served a useful purpose and that all actors involved in the reservations dialogue should articulate their reasons, the proposed reservations assistance mechanism was an overly simplistic "one size fits all" solution. With some types of treaties, it would be more appropriate for differences in interpretation to be articulated through the reservations dialogue.

25. The draft articles on the responsibility of international organizations and the commentaries thereto had been received with great interest by the wider international law community, including international organizations, and while reactions had been mixed, the debate generated was an important one in which his delegation would participate actively. He welcomed the addition of an introductory general commentary, which made it clear that the draft articles covered States' responsibility for their acts within and in relation to international organizations; that several of the draft articles differed from the articles on State responsibility in that they fell within the scope of the progressive development of international law; and that since international organizations were governed by the "principle of speciality", the draft articles must be interpreted in that light. Concerning the changes requested by his delegation in 2009, he noted the new wording of draft articles 17 (Circumvention of international obligations through decisions and authorizations addressed to members) and 61 (Circumvention of international obligations of a State member of an international organization) and welcomed the clarification of the term "circumvention" in paragraph (4) of the commentary to draft article 17, although he would have preferred the inclusion of more specific guidance on the circumstances evidencing circumvention.

26. He was aware that the Commission had received several important reactions from international organizations and States shortly before the second reading of the draft articles and noted, in paragraph 85 of the Commission's report, its decision to recommend that the General Assembly should take note of them in a resolution and annex them thereto and should consider, at a later date, the elaboration of a convention. He would prefer to treat the draft articles in the same manner as the articles on State responsibility rather than using them as the basis of an international instrument. Certain aspects of the draft articles, which, in the Commission's words, were "more in the nature of progressive development",

especially those relating to countermeasures and the derived responsibility of States, were problematic and had no practical significance. He noted, moreover, a recent policy trend: the establishment of international organizations under national private law with sophisticated mixed membership structures and, in some cases, with mandates and operations comparable to those of traditional international organizations. It might therefore be useful to revisit the draft articles at an appropriate time in order to consider whether their scope should be extended to include such private law institutions.

27. **Mr. Serpa Soares** (Portugal) said that he welcomed the Commission's resumed consideration of the topic "Immunity of State officials from foreign criminal jurisdiction". The five new topics included in its long-term programme of work were part of a trend — the expansion of international law — that followed from the emergence of autonomous and specialized social domains. The Commission had the responsibility to codify and develop that law in a cohesive manner in order to prevent the fragmentation of legal knowledge and subsequent action that could result from such expansion. The compilation of State practice, while a relevant legal tool and a way for the Commission to protect its work from the sometimes conservative views of States, should not be overrated as a working method or prevent the Commission from making new and daring proposals; States should, moreover, release it from that concern.

28. He applauded the decision to make the Commission's provisional summary records available immediately on its website and expressed his appreciation to the Secretariat for making that possible. However, additional efforts were needed so that the Commission's report could be issued at an earlier date.

29. Turning to the topic of reservations to treaties, he drew attention to the comments and observations submitted to the Commission by his Government and contained in document A/CN.4/639. The Guide to Practice on Reservations to Treaties filled gaps and resolved ambiguities in the Vienna Conventions and would have a positive impact on the codification and progressive development of international law, improve the reservations dialogue and encourage wider accession to treaties. He welcomed the structural changes that had made the Guide to Practice more user-friendly and the addition of an annex on the reservations dialogue. That dialogue should be as inclusive as possible in order to prevent the formulation of reservations that were incompatible with international law and to ensure that a State or international organization which tacitly accepted a reservation did so knowingly. In the absence of a monitoring body, it might be interesting to consider the potential of depositaries to play a more active role in the reservations dialogue.

30. His delegation welcomed the proposal to establish a reservations assistance mechanism but stressed the distinction between such a mechanism and an "observatory" on reservations; Portugal's experience with the analogous observatories operated by CAHDI and the Working Party on Public International Law (COJUR) had been extremely positive. A United Nations observatory would, however, have to be somewhat different; since most reservations under review would relate to treaties deposited with the Secretary-General, the Secretariat would have an important role to play, perhaps by adding to the United Nations Treaty Collection website a separate page containing an updated list of reservations with their content, the time period within which reservations could be formulated and a link to the objections that had already been made. Such a development would be without prejudice to the Committee's role in discussing and clarifying specific reservations or to treaty law as it related to reservations. The Committee might even add a new annual agenda item entitled "Reservations to treaties". An in-depth study of the proposed reservations assistance mechanism should be conducted in order to avoid overlapping with existing dispute settlement procedures, including those set out in article 66 of the Vienna Conventions. It would be necessary to indicate the specific characteristics of the proposed mechanism and to establish working methods that would allow for the rapid, flexible provision of assistance.

31. On the topic of the responsibility of international organizations, he drew attention to the comments and observations submitted to the Commission by his Government and contained in document A/CN.4/636. While he welcomed the adoption of the draft articles, his delegation's views on some issues differed from that of the Commission. The draft articles were the logical counterpart of the articles on State responsibility but were based too closely on that model. Moreover, since the majority of the principles of State responsibility applied to international organizations, it would have been preferable to focus on specific

problems entailed by the latter's responsibility and to develop general and abstract rules that fitted the typical international organization. The Commission's analysis should have better reflected the differences between States and international organizations and the fact that the latter's competencies, powers and relations with their member States varied from organization to organization. For the time being, the General Assembly should take note of the draft articles through a resolution; at a later stage, it should consider the adoption of a convention, perhaps in conjunction with consideration of the final form of the articles on State responsibility.

32. **Mr. Popkov** (Belarus) said that the Guide to Practice on Reservations to Treaties, by bringing greater clarity to the use of reservations, would foster broad participation in multilateral treaties while preserving the integrity of their basic provisions. The Commission's proposals for a reservations dialogue, including through the establishment of assistance mechanisms, should be a substantive part of the Guide, without prejudice to the right to formulate reservations set out in article 19 of the Vienna Convention.

33. One shortcoming of the Guide was the absence, in guidelines 2.4.1 (Forum of interpretative declarations) and 2.9.5 (Form of approval, opposition and recharacterization), of a clear requirement that interpretative declarations and responses must be formulated in writing. Oral declarations, even if reflected in the final documents of drafting conferences for multilateral treaties, were insufficiently precise and could make it difficult in practice to establish the author's true intentions. Guideline 2.6.13 (Objections formulated late) should be redrafted to include an acceptance mechanism analogous to that set out in guidelines 2.3, 2.3.1 and 2.3.2 on reservations that were formulated late. Vague or general reservations (guideline 3.1.5.2) should be deemed to be null or invalid. With respect to guideline 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument), a mechanism should be established in order to place the reserving State and the objecting State on an equal legal footing. Guideline 4.3.8 (Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation) should state whether the author had a right not to comply with the treaty as a whole, or only with the articles to which it had made the reservation.

34. His delegation was in favour of recommending that the General Assembly should take note of the Guide to Practice and seek the views of States on the possibility of transforming it into a convention that would supplement the legal framework established by the 1969 and 1986 Vienna Conventions.

35. On the topic of the responsibility of international organizations, his delegation supported the recommendation that the General Assembly should take note of the draft articles, provided that it also invited Member States to submit written comments thereon. His Government would welcome the drafting of a convention based on the draft articles; however, because many of them went beyond the bounds of traditional international law and were thus *de lege ferenda*, they would first require thorough discussion by all stakeholders.

36. If invited to comment, his Government would propose a number of amendments to the draft articles. The reference in draft article 2 (b) to "established practice of the organization" constituted an unwarranted application of the principle of *opinio juris*. Any such practice would have legal weight only if it was set out in documents adopted under the organization's procedures or had otherwise been deemed legal by the member States. Since the right of international organizations to self-defence was not established in international law, article 21 should set out clear criteria for its permissibility, for example, during peacekeeping operations or in order to protect personnel implementing the organization's programmes. Draft article 30 (b) should clarify whether the need for assurances of non-repetition of an internationally wrongful act applied to preventive measures taken by an international organization.

37. With respect to paragraph 2 of draft article 45 (Admissibility of claims), his delegation welcomed the Commission's attempt to settle the question of States' exercise of diplomatic protection in respect of international organizations but considered that the traditional elements of diplomatic protection were not fully applicable in such cases. The rule of exhaustion of local remedies, for example, presumably covered all remedies offered by the international organization or the State and accessible to the injured party. However, the exhaustion of remedies would generally apply to persons who were employed by or otherwise under the responsibility of the organization or who had been harmed by an internationally unlawful act of an

organization and who had access to a body capable of adjudicating their claims, or in situations where a State did not offer immunity to an international organization. It would therefore be appropriate to specify in draft article 45 the cases in which local remedies must be exhausted, as well as exceptions to that rule, taking the applicable provisions on diplomatic protection into account.

38. Draft article 52, which set out restrictions on countermeasures taken by members of international organizations, should not refer to the "rules of the organization", but should establish stricter proportionality requirements to ensure that countermeasures did not impede the organization's functioning. It should also make the adoption of countermeasures conditional on the absence of effective dispute settlement mechanisms since consultations with international organizations or participation in their deliberations did not always lead to the proper settlement of claims.

39. **Mr. Mahmood** (Bangladesh) said that while the guidelines contained in section 4.2 of the Guide to Practice on Reservations to Treaties (Effects of an established reservation) were logical and based on State practice and interpretation, section 4.5 (Consequences of an invalid reservation), an area in which the Vienna Conventions were unclear, was even more useful. The guidelines contained therein had been prepared on the basis of research and analysis of State practice and the views of authoritative individuals and institutions; it was therefore understandable that, in accordance with the wishes of the overwhelming majority of States, the approach was not to exclude the authors of such reservations from treaty relations but to limit their role therein. However, the goal of maximum accession to multilateral treaties should not come at the cost of the establishment of impermissible or otherwise invalid reservations.

40. **Ms. Quezada** (Chile) said that the growing number of international organizations and the increase in the complexity of their structures and the diversity of their goals had led them to establish complex legal relations with their member States, individuals, and other States and international organizations. As subjects of international law, they must assume international responsibility for failure to comply with their obligations and the law must establish the legal consequences of their wrongful acts. The draft articles would strengthen and legitimize the work of those organizations. They were visionary in nature and anticipated new trends in an area of international law that was, thus far, limited and embryonic. Owing to that lack of practice, they fell primarily within the realm not of codification, but of progressive development. It was natural for their structure and content to be based in large part on the articles on State responsibility; they were, however, an autonomous document.

41. He welcomed the recognition and application of the *lex specialis* principle in draft article 64 and agreed with the Commission's recommendation, in paragraph 85 of its report, that the General Assembly should take note of the draft articles by means of a resolution, annexing them thereto, with a view to their consolidation over time, perhaps in the form of an international convention or customary rules reflecting practice generally accepted as law. He was, however, concerned that, over a decade after the Commission's adoption of the articles on State responsibility, they had yet to form the basis of a convention.

42. **Ms. Belliard** (France) expressed concern that the addition of five new topics to the Commission's long-term programme of work might cause a delay in completing the work already under way, which should remain the primary focus of attention.

43. On the topic of the immunity of State officials from foreign criminal jurisdiction, the most prudent approach to such a complex and sensitive subject would be to identify the *lex lata* rules before determining the extent to which the Commission should develop the law further. Since the immunity of State officials was based on State sovereignty, the interests of the State were more fully engaged than those of the individual. She agreed that none of the grounds invoked for exceptions to immunity could be considered established norms of international law. Moreover, in considering whether exceptions were founded in customary international law, the Commission should not lose sight of the distinction between jurisdiction — whether territorial, personal or universal — and immunity: the absence of one did not imply that the other came into play.

44. The fundamental distinction between immunity *ratione personae* and immunity *ratione materiae* must be maintained when considering the substantive and procedural aspects of immunity. In the case of immunity *ratione materiae*, the Commission should examine the criteria for determining whether a State official had acted in an official capacity and consider to

what extent an "act of an official as such" was different from an "act falling within official functions". In the case of immunity *ratione personae*, the Commission should identify, based on judgments of the International Court of Justice, the criteria for determining which officials, other than the so-called troika, might enjoy such immunity *de lege lata*.

45. The Special Rapporteur's conclusions as to the effect of immunity at the pretrial phase merited further development. Analysis of the procedural aspects of immunity was all the more essential in that the aim was to strike a balance between the interests of the State and the need to prevent impunity, on one hand, and the strengthening of cooperation between the State exercising jurisdiction and the State of the official, on the other. Lastly, the issue of the inviolability of State officials should be included in the study of immunity, given the close links between the two notions.

46. Her delegation had serious doubts that the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) should remain on the Commission's agenda, since, although it had been under consideration since 2005, no draft articles had been referred to the Drafting Committee as yet.

47. With respect to the five new topics proposed by the Commission, her delegation was of the view that the topic on the formation and evidence of customary international law was most in line with the Commission's mandate to promote the codification and progressive development of international law. The codification of rules in the working paper on the topic, contained in annex A to the Commission's report, would be particularly useful to national courts.

48. Her Government was opposed to the Commission taking up the highly technical topic of protection of the atmosphere, many aspects of which lay outside its areas of expertise. The topic of the provisional application of treaties was narrow and largely based on the constitutional law of States; her Government urged the Commission not to undertake a study that would necessarily be confined to observations on State practice. Given the number of existing rules and mechanisms governing the fair and equitable treatment standard in international investment law, a study of that topic by the Commission would also be inopportune.

49. Protection of the environment in relation to armed conflicts was an interesting but extremely technical subject. The existing rules in that area could, however, be interpreted in good faith so as to make them applicable to any situation. Her delegation therefore supported the ICRC and United Nations Environment Programme (UNEP) proposal that interpretative guidelines should be developed.

50. On the topic of reservations to treaties, she would confine her comments at present to the Commission's conclusions on the reservations dialogue and recommendation on the establishment of a reservations assistance mechanism. Since a reservation was a unilateral act that lay within the competence of a State, the periodic review of reservations, while desirable, was not compulsory for the reserving State. A reservations dialogue should be encouraged but not institutionalized; an informal dialogue would yield better results.

51. Her Government, which appreciated the work of the observatory established within CAHDI, supported the establishment of a similar tool in other regional or subregional organizations. She had doubts, however, about the need for a reservations assistance mechanism whose mandate would go beyond the letter and spirit of the reservations regime enshrined in the Vienna Convention. While it might be useful for States to be able to receive technical assistance if they so desired, a mechanism empowered to make binding proposals for the settlement of disputes between States would be difficult to accept.

52. Welcoming the draft articles on the responsibility of international organizations for internationally wrongful acts, she said that while the Commission's consideration of the topic should be based on the articles on State responsibility, some of those provisions required reformulation and others were entirely inapplicable to international organizations. For example, some of the provisions on circumstances precluding wrongfulness had required adaptation or rewording. The introduction and the commentary thereto partially responded to some of her delegation's concerns by specifying that the draft articles might not apply to certain international organizations owing to the latter's powers and functions.

53. 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 criterion of "effective control" was logical but caution was required in assessing such control; a case-by-case analysis was the best approach. Furthermore,

although that criterion had been applied to peacekeeping operations, further study was required in order to determine whether it was applicable to all acts of international organizations.

54. In draft article 8 (Excess of authority or countervention of instructions), the last sentence should be reworded to clarify that it was not the conduct itself, but the organ or agent that, through its conduct, exceeded its authority or contravened instructions. Furthermore, as stated in the commentary, the authority exceeded was not only that of the organ or agent, but also that of the international organization represented.

55. There was some overlap in the provisions of chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization); draft article 17 (Circumvention of international obligations through decisions and authorizations addressed to members) appeared redundant.

56. In chapter V (Circumstances precluding wrongfulness), the transposition of the articles on State responsibility with regard to self-defence (draft article 21), countermeasures (draft article 22) and necessity (draft article 25) was unwise given the lack of practice of international organizations in those areas. Draft article 21, in particular, would lead to controversy: as a well-known concept in international relations, enshrined in Article 51 of the Charter of the United Nations, self-defence was an attribute of the State that could not apply to international organizations owing to their fundamentally different nature in international law. Draft article 25 would have limited practical application as necessity had been rarely and only indirectly invoked, for example, where the United Nations had admitted responsibility in the context of peacekeeping operations but had limited it to damage resulting from violations not justified by military imperatives. In any event, necessity could never be invoked to justify the violation of obligations applicable during armed conflicts.

57. The wording of draft article 32 (Relevance of the rules of the organization) could cause difficulties since an international organization that acted in violation of international law but in compliance with its statute would be held responsible even though it was unable to amend the relevant provision of that instrument.

58. As legal persons, international organizations should be obligated to compensate for any damage that they caused, as set out in draft article 36 (Compensation). That article should, however, be read in parallel with draft article 40 (Ensuring the fulfilment of the obligation to make reparation); the obligation in question was solely that of the organization and member States should not be required to indemnify the injured party directly. Instead, as suggested by the new wording of paragraph 1, international organizations must make provision in their budgets to ensure that they could make reparation for any damages they caused and cover the costs of related disputes.

59. Concerning the provisions on countermeasures set out in draft articles 22 and 51 to 57, the lack of practice suggested that a prudent approach should be adopted in order to limit recourse to such measures to exceptional cases. She reiterated her Government's doubts as to whether a State or international organization could take countermeasures against an organization of which it was a member and whether an organization could take countermeasures against one or more of its members.

60. Part Five of the draft articles (Responsibility of a State in connection with the conduct of an international organization), was useful in that the subject was not covered by the articles on the responsibility of States. It also appeared to be in line with the jurisprudence of the International Court of Justice. Each draft article should take into account the organization's operations and the rules defining its relationship with its members. She welcomed the emphasis, in the second paragraphs of draft articles 58 and 59, on the fact that a State's participation in an organization's decision-making and implementation of the organization's binding decisions did not, in principle, engage its responsibility.

61. The wording of draft article 61 (Circumvention of international obligations of a State member of an international organization) was acceptable insofar as its scope was severely restricted. The new wording was less satisfactory than that of 2009 (A/64/10, former draft article 60) which had emphasized that the State must be seeking to avoid complying with one of its international obligations. The argument that the verb "circumvent" implied intention, in paragraph 2 of the commentary, was insufficient; it would be preferable to state the principle explicitly in the draft article.

62. The amendment to draft article 62 did not allay her delegation's concern as to its lack of clarity. Although the new wording of paragraph 1 (b) was clearer than that of the previous version, the provision was not needed since paragraph 1 (a) already provided for a State's tacit acceptance of responsibility. It was difficult to imagine a case in which a State could be held responsible when it had not explicitly or implicitly accepted such responsibility. In the case envisaged by paragraph 1 (b), the fact that the State had led an injured party to rely on its responsibility seemed to imply that it had incurred responsibility.

63. **Mr. Szpunar** (Poland) said that he welcomed the modifications that had brought the final text of the Guide to Practice on Reservations to Treaties closer to the views and suggestions of States. He was also pleased by the removal of the most controversial guidelines, including the former text of guideline 3.3.3 (Effect of collective acceptance of an impermissible reservation), which had maintained that an impermissible reservation could become permissible through the unanimous absence of objection by contracting States and contracting organizations, and of former draft guideline 2.1.8 (Procedure in case of manifestly impermissible reservations). He stressed his delegation's position on the crucial issue of the reservations regime — the objective character of the invalidity of reservations — and, in that connection, drew attention to the new wording of guidelines 4.5.2 (Reactions to a reservation considered invalid) and 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) concerning the legal effects of reservations; he was, however, aware that in practice, it was difficult to assess the validity of a reservation. He therefore supported the recommendation that the General Assembly should take note of the Guide to Practice and ensure its widest possible dissemination.

64. The Commission had recommended that the General Assembly should take note of the draft articles on the responsibility of international organizations and the draft articles on the effects of armed conflicts on treaties in appropriate resolutions, annexing them thereto, with a view to subsequent consideration of the elaboration of conventions on those topics; he hoped that they would soon enrich the catalogue of international instruments adopted on the basis of the Commission's codification work. He also supported the inclusion of the five new topics in the Commission's long-term agenda.

65. Owing to the lack of sufficient practice confirming the draft articles on the responsibility of international organizations, they should be regarded as falling primarily within the scope of the development of international law and as a continuation of the Commission's work on the topic of State responsibility, which they reflected to a great extent. His delegation therefore considered that separate codification was not desirable. It also believed that Part Two, Chapter IV, and Part Five of the draft articles, which dealt, respectively, with the responsibility of an international organization in connection with the act of a State or another international organization and the responsibility of a State in connection with the conduct of an international organization, were sufficiently similar to be combined in a single chapter. Draft article 1 (Scope of the present draft articles) was unnecessary; in particular, the question of the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization was covered by the articles on State responsibility.

66. The Commission's proposed definition of "international organization" (draft article 2 (a)) was overly complicated; the notion of "intergovernmental organization" would better serve the purposes of the draft articles since it covered organizations established by subjects of public law. He welcomed, however, the definition of "agent of an international organization" (draft article 2 (d)), which covered all subjects acting for an international organization in an official capacity. Draft article 7 was crucial to the question of the potential responsibility of member States for the acts of international organizations, an area in which practice was relatively scarce. His delegation was reluctant to endorse the criterion of "effective control" and believed that the responsibility of an international organization for acts or omissions by organs or agents placed at its disposal arose from the mere fact of the transfer. If, however, a division of responsibility between the organization and the member State was maintained, the "effective control" test proposed by the Commission was consistent with current international practice. On the other hand, the criterion of "direction and control" in draft article 15 should be qualified in order to take the element of effectiveness into account in considering the attribution of an act to an international organization or to a State or States. The addition of a provision corresponding to article 8 of the articles on State responsibility (Conduct directed or

controlled by a State) would be desirable in order to cover situations in which a group of individuals acted on behalf and under the instructions of an international organization.

67. Draft article 17 (Circumvention of international obligations through decisions and authorizations addressed to members) should be retained even if it was decided to codify the international responsibility of States and that of international organizations in a single instrument. While draft article 23 (*Force majeure*) would be rarely applicable in practice, the idea of a special regulation governing the administration of a territory, suggested in several places in the draft articles, seemed to reflect current and emerging practice and merited a separate provision.

68. His delegation endorsed the Commission's approach to the responsibility of international organizations for *jus cogens* violations (Article 40: Ensuring the fulfilment of the obligation to make reparation) even though that approach raised questions regarding the binding force of peremptory norms in respect of such organizations. Although there was not enough practice in that area to constitute customary law within the meaning of article 38 of the Statute of the International Court of Justice, there was an apparent consensus among States and international organizations, amounting to *opinio juris*, that *jus cogens* norms were binding on international organizations. The matter required further study.

69. Lastly, with respect to paragraph 3 of draft article 48 (Responsibility of an international organization and one or more States or international organizations), his delegation considered that the right of an international organization to invoke the responsibility of another State or international organization in connection with a violation of an obligation owed to the international community as a whole should be limited by the organization's powers under its founding instrument, following the principle of conferred powers.

70. **Mr. Cristea** (Romania) said that the introduction to the Guide to Practice on Reservations to Treaties and the annex on the reservations dialogue were particularly useful. On the subject of the reservations dialogue, he noted that the exchange of views between members of CAHDI and COJUR and the dialogue between those bodies and the authors of reservations were highly productive. In that context, his delegation acknowledged the significance of the guidelines relating to the statement of reasons for and reactions to invalid reservations and welcomed the references to those matters in the conclusions on the reservations dialogue, annexed to the guidelines. The proposal to establish a reservations assistance mechanism, and particularly any attempt to make such a mechanism compulsory, required further reflection.

71. The complexity of the topic of the responsibility of international organizations was illustrated by the scarcity of practice, the diversity of those organizations and their specific nature as subjects of international law, and by the views expressed in the comments received from governments and international organizations, which ranged from concern to strong support. Two of the most common criticisms related to the difficulty of reflecting the specificities of each international organization and to the excessive alignment of the draft articles with the articles on State responsibility. His delegation agreed with the Special Rapporteur that some of those parallels were justified and that the diversity of international organizations should not prevent the development of general rules governing their responsibility. In short, the draft articles were satisfactory and offered a good starting point for future work on the topic.

72. **Mr. Nguyen** Huu Phu (Viet Nam) said that while the Commission should be commended for adopting the Guide to Practice on Reservations to Treaties and the draft guidelines on the responsibility of international organizations, it could have been more efficient in studying and analysing the complex issues under its purview and proposing solutions to the Committee in a timely manner. In the short term, it should request the Committee to review the work that it had completed, such as the articles on State responsibility for internationally wrongful acts, and to determine whether further steps towards codification were feasible.

73. The late issuance of the report of the Commission (A/66/10) had also made it difficult for Member States, to study the report adequately, particularly if no member of the Commission was of their nationality. For future sessions, his delegation hoped that the Commission would make every effort to give delegations a reasonable time to study the report and prepare their comments.

74. On the topic “Reservations to treaties”, Viet Nam still held the view that the Guide to Practice was meant to provide guidelines for State practice, not to alter universally accepted norms of treaty law. Guidelines 2.1.2 (Statement of reasons for reservations) and 2.6.9 (Statement of reasons for objections) notwithstanding, reservations and objections did not generally indicate the reasons why they were being formulated. Moreover, acceptance of the late formulation of a reservation (guideline 2.3.1) did not reflect current practice. The Commission should conduct a further review of State practice concerning the formulation of reservations, interpretative declarations and objections to reservations, and submit recommendations to the Committee for the benefit of Member States. He welcomed the Commission’s recommendations concerning a reservations dialogue and a reservations assistance mechanism with a view to safeguarding the integrity of multilateral treaties and securing the widest possible participation therein.

75. He also supported the recommendation that the General Assembly should take note of the draft articles on the responsibility of international organizations in a resolution. However, the possibility of elaborating a convention should be examined further; the draft articles still needed improvement in four areas.

76. First, the analogy with the articles on State responsibility was not convincing because, even though States and international organizations had international legal personality, they had quite different characteristics and resources. Consequently, many of the provisions of the draft articles, such as those pertaining to direction and control exercised over the commission of an internationally wrongful act, coercion of a State or another international organization and direction, control or coercion by international organizations, were inapplicable.

77. Second, the draft articles did not contemplate the consequences of the dissolution of an international organization, a possibility that made such organizations similar to corporate bodies at the national level and required third parties to assume certain risks in dealing with them. Third, draft article 62 (Responsibility of a State member of an international organization for an internationally wrongful act of that organization) did not explain how responsibility would be shared among States that assumed collective responsibility for the internationally wrongful acts of an international organization of which they were members.

78. Lastly, draft articles 14 (Aid or assistance in the commission of an internationally wrongful act) and 58 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization) could be expanded to include “omission” among the grounds on which States or international organizations could be held responsible for the commission of an internationally wrongful act.

79. **Mr. Rowe** (Australia) said that the Commission had provided valuable guidance to States by highlighting areas where consensus existed and areas where further discussion was necessary. While his delegation saw value in all the new topics included in the Commission’s long-term programme of work, it was most interested in the topics on the formation and evidence of customary international law and the provisional application of treaties.

80. On the topic of reservations to treaties, the refinements made to the Guide to Practice following comments and observations received from States were commendable. Particularly noteworthy was the shift from the positive presumption that an author of an invalid reservation became a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State could be identified, to a neutral stance whereby the intention of the reserving State determined whether it became a party to a treaty.

81. It was important for States to communicate with one another regarding perceived invalid reservations in order to assess the validity of those reservations and to withdraw them or reduce their scope where appropriate. In that connection, his delegation would give careful consideration to the recommendation that States and international organizations should engage in a reservations dialogue.

82. Lastly, he took note of the recommendation concerning a reservations assistance mechanism, which, in his delegation’s understanding, would be a flexible, optional and non-binding dispute settlement mechanism for reservations and objections. However, more details were required before the establishment of such a mechanism could be considered by the General Assembly.

83. **Mr. Adoke** (Nigeria) said that his delegation was pleased with the progress made by the Commission on the topics of the responsibility of international organizations, the effects of armed conflicts on treaties and reservations to treaties. Completion of the work on

the responsibility of international organizations was a significant achievement and the new rules pertaining to attribution, circumstances precluding wrongfulness, effects of a breach of an international obligation, and the principle of reparation made a significant contribution to the progressive development of international law; combined with the draft articles on State responsibility, they established a regime on international responsibility and safeguarded the application of special rules of international law and the provisions of the Charter of the United Nations.

84. His delegation commended the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution, annexing them to a resolution, and should consider, at a later stage, the elaboration of a convention. It also applauded the completion of the Guide to Practice on Reservations to Treaties; however, it reserved the right to comment on the recommendations concerning the reservations dialogue and reservations assistance mechanism at a later stage.

85. While his delegation welcomed all the new topics endorsed by the Commission for inclusion in its long-term programme of work, it found the topics on the formation and evidence of customary international law and the fair and equitable treatment standard in international investment law of particular interest.

86. **Archbishop Chullikatt** (Observer for the Holy See) said that the work of the Commission provided a valuable resource for the further development of the rule of law at the national and international levels. On the topic of reservations to treaties, his delegation was concerned about draft guidelines 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5 and 4.5.3 of the Guide to Practice, which would give treaty monitoring bodies the authority to assess the permissibility and scope of reservations formulated by States. The competencies, functions and authority of such bodies were determined by their constituent instruments and could not be modified or extended by the Commission, the General Assembly or any body other than the States parties to the treaty.

87. The negotiation, adoption and ratification of a treaty were governed by carefully weighted political, social and legal considerations, particularly in the case of human rights treaties, which must be taken into account. The ability to formulate reservations allowed States to work together to address major challenges; it was therefore important for the guidelines to recognize that States, not treaty monitoring bodies, had the primary responsibility for determining the permissibility and scope of reservations. To entrust those bodies with new competencies might jeopardize the very nature of multilateral treaties.

88. **Mr. Beejadhur** (World Bank), speaking also on behalf of the African Development Bank (AFDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD), the International Criminal Police Organization (INTERPOL), the International Development Association (IDA), the International Fund for Agricultural Development (IFAD), the International Labour Organization (ILO), the International Maritime Organization (IMO), the International Monetary Fund (IMF), the International Telecommunication Union (ITU), the Organisation for Economic Co-operation and Development (OECD), the Organization for the Prohibition of Chemical Weapons (OPCW), the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the World Meteorological Organization (WMO) and the World Tourism Organization (UNWTO), said that the organizations he represented were grateful that, during the second reading of the draft articles, the Commission had taken into account a number of the concerns that they had raised during the first reading.

89. He welcomed the general commentary to the draft articles on the responsibility of international organizations, which contained several clarifications that showed the importance and necessary limitation of the Commission's work on the topic and should serve as important guiding principles for the interpretation of the draft articles.

90. The Commission acknowledged, in paragraph (7) of the general commentary, that international organizations were quite different from States and presented great diversity. Draft article 64 (*Lex specialis*) was therefore important as it highlighted the fact that the general rules on responsibility set out in the draft articles had only a residual character in relation to the applicable special rules, particularly the

rules of the organization in question, some of which might also be relevant for non-members.

91. The Commission also acknowledged, in paragraph (5) of the general commentary, that the limited practice on which a number of the draft articles were based pointed in the direction of progressive development rather than codification. Lastly, the Commission acknowledged, in paragraph (3) of the general commentary, that since the draft articles expressed secondary rules, not primary rules, nothing in them should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.

92. **Ms. Bilello** (United Nations Educational, Scientific and Cultural Organization), speaking also on behalf of the International Civil Aviation Organization (ICAO), IFAD, ICO, IMO, IOM, ITU, the Organization for the Prohibition of Chemical Weapons (OPCW), the Preparatory Commission for CTBTO, UNIDO, UNTWO, WHO, WIPO, WMO and WTO, said that, while those organizations noted with appreciation the efforts of the Commission in preparing the draft articles on the responsibility of international organizations, the concerns that they had raised continuously during that process had not been sufficiently taken into account. Endorsement of the draft articles by the General Assembly might give rise to jurisprudence that would not be based on sufficient international practice or *opinio juris* and would lead to legal solutions that could be detrimental to the interests of both international organizations and their member States.

93. She therefore appealed to the General Assembly not to take a decision on the draft articles at the current session and to request the Commission to pursue its dialogue with international organizations in order to refine them for submission at a subsequent session.

The meeting rose at 6.05 p.m.