United Nations A/C.6/68/SR.19

General Assembly
Sixty-eighth session

Official Records

Distr.: General
13 November 2013

Original: English

Sixth Committee

Summary record of the 19th meeting
Held at Headquarters, New York, on Wednesday, 30 October 2013, at 10 a.m.

Chair: Mr. Kohona . . . . . (Sri Lanka)

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13-53820 (E)

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (continued) (A/66/10, A/66/l0/Add.1 and A/68/l0)

1. **Mr. Tiriticco** (Italy), referring to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that his delegation welcomed the Commission's decision to restrict the scope of its original study of the topic "Treaties over time" to that of subsequent agreements and subsequent practice in relation to the interpretation of treaties. That decision would lead to a more focused and effective treatment of one of the most critical issues relating to the law of treaties. Overall, the five draft conclusions provisionally adopted by the Commission seemed to meet the general aim of providing sufficient normative content while also preserving the flexibility inherent in the concept of subsequent practice. That approach was evident in draft conclusion 1 (General rule and means of treaty interpretation), which correctly reflected the dual role that subsequent practice could play as an authentic means of interpretation under the general rule enshrined in article 31, paragraphs 3 (a) and (b), of the Vienna Convention on the Law of Treaties and as a supplementary means of interpretation under the rule set out in its article 32. Paragraph 5 of the draft conclusion appropriately pointed out that the interpretation of a treaty consisted of a "single combined operation", as had also been noted by the Commission in its *travaux préparatoires* on articles 31 and 32 of the Vienna Convention, a view that had been further endorsed in the Commission's 2006 report on the fragmentation of international law (A/CN.4/L.682 and Corr.1).

2. His delegation supported the emphasis in draft conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation) on the objective character of subsequent agreements and subsequent practice as evidence of the parties' common understanding of the meaning of a treaty. The qualification of subsequent agreements and subsequent practice as authentic means of interpretation seemed to provide an appropriate complement to the contents of article 31, paragraphs 3 (a) and (b), of the Vienna Convention. Draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time) appeared to appropriately reflect the approach to the matter authoritatively developed in the case law of the International Court of Justice, in particular its 2009 judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. The definitions of subsequent agreements and subsequent practice in draft conclusion 4 appeared to be fine-tuned and consistent with the Commission's overall approach to the topic.

3. Draft conclusion 5 (Attribution of subsequent practice) addressed the delicate issues of attribution of subsequent practice relevant for purposes of treaty interpretation and determination of actors whose conduct was relevant as subsequent practice. With regard to attribution, while the commentary rightly explained that the expression "conduct [which is] attributable" was borrowed from the articles on the responsibility of States for internationally wrongful acts, one might wonder whether the principles on attribution under the law of State responsibility were fully applicable to the attribution of conduct relevant to treaty interpretation. As to the determination of actors whose conduct might be relevant as subsequent practice, it was not clear whether the important issue of institutional practice — i.e., the collective conduct of the organs of international organizations — and its bearing on the interpretation of the constitutive treaties of such organizations fell within the scope of the draft conclusion.

4. The commentary thereto suggested that statements or conduct of actors such as international organizations could reflect or initiate relevant subsequent practice of the parties to a treaty, but should not be conflated with such practice. Consequently, such statements or conduct could not, per se, be considered to be subsequent practice under articles 31 and 32 of the Vienna Convention, but could only be relevant for the purposes of assessing the subsequent practice of the parties to a treaty. However, it was worth noting in that connection that in the *Tadić* case the International Tribunal for the Former Yugoslavia had concluded that the Security Council's settled practice of considering internal armed conflicts as a threat to the peace reflected the "common understanding of the United Nations membership in general" manifested by the "subsequent practice" of the membership of the United Nations at large. His delegation was of the view that the issue deserved further consideration in the future work of the Commission, particular the possible interconnections between the topic and that of the formation and

evidence of customary international law, as subsequent practice for the purposes of treaty interpretation might prove relevant for the formation of customary rules modifying or derogating from treaty rules having the same content.

5. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, draft article 1 and the accompanying commentary referred to a number of important concepts that would deserve further consideration at a later stage, in particular that of the State officials who would enjoy immunity and that of criminal jurisdiction as it related to the scope of immunity. The commentary also underlined that the Commission had decided to confine the scope of the draft articles to immunity from foreign criminal jurisdiction, i.e., criminal jurisdiction of another State. Consequently, the current work on the topic would not concern proceedings before international criminal tribunals, while the subject of immunities before the so-called mixed or internationalized criminal tribunals would be addressed in due course.

6. In that regard, he wished to emphasize the importance in the current international legal order of judicial institutions such as the International Criminal Court and the other international criminal tribunals for the prevention and punishment of grave international crimes. The question of immunities and related exceptions in the context of those institutions was governed by a special regulatory framework, for example the provisions of article 27 of the Rome Statute of the International Criminal Court, as indicated by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*. The substantial body of case law that had emerged on the irrelevance of the official capacity of individuals accused of the most serious crimes appeared to be evidence of a more general consolidation of that principle, which should be taken into account in the exercise of national jurisdiction. Accordingly, in its future work the Commission should consider the overall development of international practice in relation to the impact of the nature of the crime on the question of immunity.

7. His delegation concurred with the view that immunity from foreign criminal jurisdiction was procedural in nature and did not exempt the person concerned from the applicable substantive rules of criminal law. In other words, individual responsibility for breaches of the substantive rules of criminal law remained intact, even though a State could not exercise jurisdiction in respect of a particular act owing to the immunity enjoyed by an official of another State. The International Court of Justice had repeatedly affirmed that principle, with regard both to immunity of foreign officials and to State immunity.

8. His delegation also supported the Commission's approach in paragraph 2 of draft article 1, which took account of the existence of several systems of special rules applicable to certain categories of individuals, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations being the most relevant examples. With regard to the regime of jurisdictional immunity of military forces, however, while the according of immunity under special rules, especially those contained in status-of-forces agreements, was well known in international practice, it was his delegation's understanding that such regimes did not exhaust the cases in which the military forces of a State enjoyed immunity from foreign criminal jurisdiction for acts performed in their official capacity. He was confident that, at the appropriate time, the Commission would deal comprehensively with the issue of immunity of military forces.

9. With regard to draft article 3, his delegation agreed that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae* from the exercise of foreign criminal jurisdiction, although there could be exceptions in cases of grave international crimes. His delegation also agreed with the Commission's view that there was insufficient practice in international and national jurisprudence to support the extension of immunity *ratione personae* to other high-ranking officials, without prejudice to the possible application of rules pertaining to immunity *ratione materiae*. As to draft article 4, it was his delegation's understanding that immunity would apply in respect of acts performed prior to an official's term of office only if the criminal jurisdiction of a third State was to be exercised during the term of office of the official concerned.

10. Turning to the Commission's programme of work, he said that the work on the topic "Protection of the atmosphere" should be limited in scope and should not interfere with ongoing political negotiations or existing treaty regimes on the subject matter concerned. Its outcome should be draft guidelines rather than legally binding norms. With regard to the topic "Crimes against

humanity", the paper prepared by Professor Sean D. Murphy and annexed to the Commission's report (A/68/10, annex B) would provide a solid basis for future discussion. Lastly, his delegation greatly appreciated the importance accorded in the Commission's report to General Assembly resolution 67/97 on the rule of law at the national and international levels, to the Declaration of the high-level meeting on the topic and to the role that the Commission was called to play in promoting the rule of law, which, as the report noted, constituted the essence of the Commission and its work for the progressive development and codification of international law.

11. **Mr. Sarkowicz** (Poland), noting that treaty interpretation was an ongoing task not only of courts and tribunals but also of governmental officials, said that his delegation fully supported the Commission's efforts with regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties and hoped that it would result in practical and useful guidelines based on well-established practice. The report of the Special Rapporteur (A/CN.4/660) focused only on decisions of international bodies, however, and while the number of decisions cited was remarkable, such an approach seemed insufficient because it did not take into account the decisions of national courts. It was worth recalling in that connection that in several cases the International Court of Justice made ample reference to national court decisions, the case concerning *Jurisdictional Immunities of the State: (Germany v. Italy: Greece intervening)* being one example.

12. His delegation welcomed the Commission's adoption of the five draft conclusions and supported its approach of situating them in the general framework of the Vienna Convention on the Law of Treaties. It also supported draft conclusion 1 as an expression of the unity of the interpretation process, which, in accordance with the Vienna Convention, avoided any categorization of treaties for purposes of interpretation. However, while agreeing, as a matter of form, that not every agreement was a treaty, his delegation found it difficult to agree, as a matter of substance, that subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions was not necessarily binding. Such agreements might be treated as inconclusive for an international tribunal, for example, but it was difficult to consider them as not binding for States that entered into them. With regard to draft conclusion 4, paragraph 3, his delegation would propose the use of the expression "conduct of one or some parties" to ensure that the provision was not construed as referring to the practice of all parties.

13. The topic "Immunity of State officials from foreign criminal jurisdiction" went to the core of international law. It not only combined the two major phenomena of jurisdiction and immunity, but it also related to crucial rules and norms of public international law. The importance of the work of the Commission and the Special Rapporteur on the topic could therefore hardly be overstated. His delegation appreciated the Special Rapporteur's efforts to define "criminal jurisdiction". The proposed definition, however, might prove both too narrow and too broad. For example, in some States the law regarding misdemeanours was applied by bodies other than courts. That had been the situation in Poland until recently. In such cases, the reference to courts in the definition might leave some criminal proceedings outside the scope of the immunity. There were also pecuniary sanctions not of a criminal nature applied by courts. Unquestionably, the definition of the term deserved the Commission's attention in the future work on the topic.

14. As to the efforts to define the scope of immunity *ratione personae*, his delegation would wait until both types of immunity, *ratione personae* and *ratione materiae*, had been discussed before expressing its definitive position. In fact, the two interacted, and that interaction determined the legal protection afforded to foreign officials of a given State in other States. The relationship between the immunities of foreign officials and the immunity of States should also be noted. Defining the scope of immunity *ratione personae* too narrowly might undermine the immunity of States and make it difficult for States to cooperate.

15. While his delegation understood and supported the Special Rapporteur's view that not every State official was entitled to immunity *ratione personae*, it believed that the question of whether it applied only to Heads of State, Heads of Government and ministers for foreign affairs required further analysis. The survey of practice in search of customary law would be helpful in finding a satisfactory answer to that fundamentally important question. His delegation supported the Special Rapporteur's focus on identifying positive norms of customary international law, as the norms relating to immunities, and indeed immunities

themselves, had developed over many years of practice. What was important in relation to officials other than the three mentioned in draft article 3 was not only the lack of rulings in which immunity had been established but also rulings in which immunity had been denied. It went without saying that those rulings and opinions must be considered in the light of contemporary developments.

16. Concerning the other decisions and conclusions of the Commission, his delegation supported a shift in the focus of work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" towards areas still not covered by that obligation, such as some crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflict.

17. **Ms. Chadha** (India), referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that her delegation agreed that the rules contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties reflected customary international law. Subsequent practice was an authentic means of interpretation that could be taken into account in interpreting the terms used in and the provisions of a treaty, but it could not be taken as conclusive or legally binding unless the parties agreed. Her delegation agreed with the Commission's view that a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ipso facto had the effect of constituting an authentic means of interpreting the treaty, whereas subsequent practice had that effect only if it showed the common understanding of the parties as to the meaning of the terms.

18. Similarly, the evolutive interpretation of a treaty could not be merely a matter of the presumption of the intent of parties, unless there was a clear acceptance by the parties of such interpretation, particularly in regard to treaties that laid down the specific rights of each party and where such an interpretation might alter the core rights of a party. Accordingly, her delegation believed that the nature of the treaty might be relevant for determining whether more or less weight should be given to certain means of interpretation.

19. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation agreed with the Commission's understanding, as reflected in paragraph (10) of the commentary to draft article 1, that the rules regulating the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations were treaty- and custom-based special rules. Although the Commission had decided not to include explicit reference to international conventions and instruments, identification of the regimes under which the special rules fell would provide greater clarity in understanding the nature and scope of immunity. It would also discourage unilateral expansion of the scope of immunity from foreign criminal jurisdiction beyond the realm of treaties and custom.

20. Regarding immunity *ratione personae*, it was now universally accepted that Heads of State, Heads of Government and ministers for foreign affairs were entitled to immunity from the criminal jurisdiction of foreign States by virtue of functional necessity and their capacity as representatives of the State abroad. If those criteria were applied, a few other high-ranking officials could also be considered State officials deserving immunity from the criminal jurisdiction of foreign States, especially ministers for defence or international trade. Her delegation requested the Special Rapporteur to consider and analyse the views of States on the matter as a basis for the formulation of appropriate proposals.

21. Her delegation welcomed the Commission's decision to include in its programme of work the topics "Protection of the environment in relation to armed conflict" and "Protection of the atmosphere", both of which were timely. It acknowledged the Commission's cautious approach to the latter topic, especially in relation to issues that should not be dealt with, and agreed that the outcome of the work should be draft guidelines, not a convention. Her delegation also noted with interest the proposal by Mr. Sean Murphy on the topic of crimes against humanity. In view of the existing international mechanisms already dealing with the matter, including the International Criminal Court, there should be an in-depth study and a thorough discussion on the Commission's need to undertake work on the topic.

22. Lastly, she wished to congratulate the Commission on the success of the forty-ninth session of the International Law Seminar. India had contributed to the trust fund for the Seminar, which had served to enhance the professional development of successive generations of young lawyers pursuing

careers in international law, academia, diplomacy or the civil service of their countries.

23. **Mr. Sinhaseni** (Thailand), speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that his delegation supported the view that a subsequent agreement was an authentic expression of the will of the parties. Such an agreement need not have the same title as the agreement being interpreted as long as it was an agreement regarding the interpretation of the treaty or the application of its provisions. Subsequent agreements could take whatever form the parties to the original treaty might choose.

24. His delegation reserved its position regarding the accuracy of the statements in paragraph (6) of the commentary to draft conclusion 3. The treaty terms mentioned in the accompanying footnotes 92 to 95 were those cited by Judge Guillaume in his Declaration in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, which represented the Judge's personal view and did not necessarily reflect the judgments of the courts or tribunals concerned. His delegation also reserved its position regarding the accuracy of the reference to the term "watershed", which the Commission had added in footnote 92, although it was not mentioned in the Judge's Declaration. With regard to paragraphs 2 and 3 of draft conclusion 4, his delegation looked forward to clarification at a later stage of the work on the topic of the reasons for the selection of the word "conduct" as part of the definition of subsequent practice. Regarding draft conclusion 5, paragraph 2, his delegation would appreciate further explanation regarding conduct by non-State actors that might be relevant when assessing the subsequent practice of parties to a treaty. In order for such conduct to be relevant, it would have to be demonstrated with a degree of certainty that it did not conflict with the manner in which States parties intended to interpret the treaty.

25. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he said that Thailand granted immunity from criminal jurisdiction to the persons indicated in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, to which it was a party. It also accorded immunity to persons covered by host country agreements between Thailand and intergovernmental organizations. Apart from that, Thai courts had no experience in dealing with the immunity of foreign State officials. Thailand was not a party to the Convention on Special Missions. Therefore, his delegation wished to reserve its position on the Commission's work on the topic until a later stage, when it could judge whether that work achieved the right balance between according immunity to State officials and preventing impunity of such officials from foreign criminal jurisdiction.

26. Given that the term "official" might be defined differently under the domestic law of different States, the Commission should take care to choose the right definition for the term, with due consideration of State practice. With regard to immunity *ratione personae*, his delegation was of the view that the immunity enjoyed by Heads of State, Heads of Government and ministers for foreign affairs, as stipulated in draft article 3, was not subject to dispute. Such immunity had long been recognized by the International Court of Justice and was necessary for such officials owing to their special situation of having a dual representational and functional link to the State in the ambit of international relations, as expressed in paragraph (2) of the commentary to draft article 4. As for immunity *ratione materiae*, his delegation wished to emphasize that international law must recognize the immunity granted by the domestic law of a State to government agents or law enforcement officials for acts undertaken to maintain law and order but without the intent to commit human rights violations.

27. Concerning the new topic "Protection of the atmosphere", given the conditions attached to its inclusion in the Commission's programme of work, his delegation wondered what would be left for the Commission to work on that might be of use to the international community. In recent months, however, the international community had raised concerns over the protection of personal data in transborder flow of information, an issue included in the Commission's long-term programme of work since 2006. His delegation would suggest that the Commission take up the latter topic at its next session.

28. **Ms. Bolaño Prada** (Cuba), referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties should be considered together in relation to the interpretation of international treaties. It was important not to alter the Vienna regime, which reflected customary law. Her

delegation believed that the interpretation of treaties must be done in an evolutive manner over time through a combination of means of interpretation, without giving more weight to any particular one over the others. An important consideration in the interpretation of treaties was the intention of the parties as to the treaty's application and interpretation. Indeed, it was impossible to study the interpretation of treaties without taking into account the spirit in which the parties had entered into them.

29. Her delegation welcomed the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction" and supported any initiative aimed at clarifying the content and preserving the sacred regime of immunity of State officials in accordance with international conventions and principles of international law. The work on the topic should serve to reinforce the principles enshrined in the Charter of the United Nations and other sources of international law, especially the principle of respect for the sovereignty of all States. The Commission should seek to codify existing rules of international law and avoid the dangerous inclusion in customary law of exceptions to immunity. In no way should the principle of universal jurisdiction or the obligation to extradite or prosecute be applied to officials who enjoyed immunity. As to which high-level officials should be accorded immunity, the Commission should give due regard to the provisions of domestic law on the matter.

30. Her delegation could not accept any alteration of the immunity regime established under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions, which, together with the principles of international law, constituted the rules governing the matter. Cuban laws ensured that there was no impunity for those responsible for violations of international law and for crimes against humanity. Both the existing rules of international law on the immunity of State officials and national legislation on the subject should be respected.

31. Her delegation welcomed the Commission's attention to the important topic of formation and evidence of customary international law and had provided information on the evidence existing in Cuban legislation. In that connection, she wished to draw attention to the importance of Article 38, paragraph 1, of the Statute of the International Court of Justice, which established the sources of international law, including, under subparagraph (b), international custom. The identification and study of custom as a source of international law should take into account two elements: State practice and *opinio juris*.

32. Over many years Cuba had demonstrated its full respect for international law and its support for the work of the International Law Commission. She called on Member States to ensure that the Commission's important work would bear fruit through the birth of new international conventions which would undoubtedly make a positive contribution to the ordering of current international relations, compliance with international obligations and respect among all Member States.

33. **Ms. Rahman** (Malaysia), noting that the proposed outcome of the Commission's future work on the topic of crimes against humanity was a set of draft articles, said that her delegation would like clarification regarding the urgency of concluding a convention on the matter, particularly as the Rome Statute of the International Criminal Court, to which 122 countries had become parties, also addressed crimes against humanity. The Commission's work on the topic should not undermine the intended universality of the Rome Statute, nor should it overlap with existing regimes, but rather seek to complement them. As to the topic "Protection of the atmosphere", she noted the limitations determined by the Commission for the work on the matter and wished to underscore the importance of adhering to those parameters. In particular, that work should not interfere with current negotiations on climate change, ozone depletion and long-range transboundary air pollution.

34. With regard to the topic of subsequent agreements and subsequent practice in relation to treaty interpretation, her delegation noted that draft conclusions 1 and 2 aimed to set out the general aspects of the legal framework in respect of treaty interpretation. Her delegation appreciated the importance of those draft conclusions in guiding treaty interpretation to the extent that they restated the rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties and affirmed the legal status of those rules. With regard to draft conclusion 3, given that support for an evolutive approach to treaty interpretation varied across international courts and tribunals, her delegation was of the view that caution must be exercised in determining the presumed intention of parties at the conclusion of a treaty in order to avoid distorting or

departing in any way from the letter and spirit of the treaty.

35. Concerning the definitions put forward in draft conclusion 4, the clear distinction between “subsequent practice” and “other subsequent practice” in the context of article 31, paragraph 3 (b), and article 32 of the Vienna Convention was certainly helpful. However, her delegation would like further clarification as to the rationale for accepting the conduct of one party as subsequent practice under article 32 and the adequacy of such subsequent practice as a supplementary means of treaty interpretation in support of article 31. With regard to draft conclusion 5, her delegation noted the affirmation that only conduct that was attributable to parties to a treaty could be accepted as subsequent practice relevant to treaty interpretation. On the understanding that the phrase “assessing the subsequent practice” in paragraph 2 was used in a broad sense as covering both identification of the existence of subsequent practice and determination of its legal significance, she had reservations about the inclusion of non-State actors, particularly where the conduct in question was not attributable to parties to the treaty.

36. Her delegation remained of the view that the work on the topic “Immunity of State officials from foreign criminal jurisdiction” should focus on the immunities accorded under international law, in particular customary international law, and not under domestic law. There was no need to re-examine previously codified matters such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations. Draft article 1 set the parameters for the topic and for the draft articles, taking into consideration issues that States commonly faced in practice when dealing with the question of the immunity of State officials from criminal jurisdiction. Her delegation fully supported the establishment of such parameters in order to clearly delimit the scope of the topic from the outset.

37. All State officials should be covered under the definition of the term “official”. A matter for consideration, particularly in the determination of immunity *ratione materiae*, would be whether officials who were employed on a contractual basis would be covered under the definition when they performed the functions of State officials. The definition should certainly not include diplomatic agents, consular officials, members of special missions, representatives of States to international organizations or any other category of official already covered by existing legal regimes. Similarly, with reference to draft article 1, paragraph 2, immunities from criminal jurisdiction granted in the context of diplomatic or consular relations or during or in connection with a special mission, immunities established in headquarters agreements or in treaties governing diplomatic representation to international organizations or establishing the privileges and immunities of international organizations and their officials or agents, and immunities established under other ad hoc international treaties should be excluded from the scope of the topic as they were settled areas of law and should therefore be dealt with separately. Any other immunities granted unilaterally by a State to the officials of another State, especially while they were in its territory, should also be excluded.

38. Her delegation had noted that the definitions of the terms “criminal jurisdiction”, “immunity from foreign criminal jurisdiction”, “immunity *ratione personae*” and “immunity *ratione materiae*” proposed by the Special Rapporteur in her second report (A/CN.4/661) had been deleted. In her view, the definitions of those terms might be reconsidered at a later stage. With regard to draft article 3, the possibility of expanding the list of the persons enjoying immunity *ratione personae* had been raised by some members in the light of the evolution of international relations, particularly the fact that high-ranking officials other than Heads of State, Heads of Government and ministers for foreign affairs were becoming increasingly involved in international forums. Some members had cited the *Arrest Warrant* case in support of the view that other high-ranking officials should be included under draft article 3. Her delegation’s position was that immunity *ratione personae* should be enjoyed only by the so-called “troika”, i.e., a country’s Head of State, Head of Government and Minister for Foreign Affairs. It could not support the extension of immunity to other officials without a strong basis. At the same time, the categories of persons considered to be Heads of State and Heads of Government should be defined. She suggested that the definition should include sovereign rulers who acted as Heads of State, such as, in Malaysia’s case, the King. Apart from the King, under the Federal Constitution of Malaysia State-level rulers were accorded immunity from criminal and civil actions.

39. With regard to the material scope of immunity *ratione personae*, the Special Rapporteur had affirmed in her second report (A/CN.4/661) that such immunity extended to all acts, whether carried out in a private or official capacity, only during the term of office of the official concerned. Accordingly, immunity *ratione personae* was configured as "full immunity" which applied to any act carried out by any of the officials mentioned in draft article 3. That configuration reflected State practice. In view of the Special Rapporteur's assertion that international jurisprudence referred to that type of immunity as "full", "total", "complete", "integral" or "absolute" immunity in order to show that it applied to any act performed by a person who enjoyed immunity, her delegation considered that an in-depth study of possible exceptions to such immunity should be undertaken. For instance, the immunity of Heads of States in cases involving the commission of international crimes, which had been a subject of debate in recent years, should be examined. There should also be further study of the relationship between immunity and impunity for heinous crimes under international law, such as torture and genocide. That was an important aspect of State immunity and should not be relegated to the background.

40. **Ms. Topf-Mazeh** (Israel), referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that, with respect to the attribution of treaty-related practice to a State and the scope of relevant State practice, her delegation favoured an approach under which conduct could be attributed to a State where it was undertaken or deemed to be acceptable by the organs of a State party that were regarded both internationally and nationally as being responsible for the application of a treaty. With regard to the practice of other actors as reflected in reports of international or non-governmental organizations, her delegation was of the view that the reliability of such organizations must be assessed and taken into account in a cautious manner.

41. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, her delegation understood the term "criminal jurisdiction" in Part One of the draft articles to include any act of authority which might hinder an official in the performance of his duties and any measures imposing obligations upon an official or a former official in connection with his official activity. As had been noted by the International Court of Justice, such acts of authority included acts that exposed the official to the mere risk of being subject to legal proceedings.

42. Regarding Part Two, the position of the International Court of Justice in the *Arrest Warrant* case was commonly recognized as reflecting the scope of immunity *ratione personae* under customary international law. Accordingly, the group of high-ranking State officials who enjoyed immunity *ratione personae* was not limited to the troika. Part Two should not be formulated in a manner that might inadvertently misrepresent or be interpreted as limiting the scope of personal immunity as it currently stood under customary international law. It would be more accurate if the inclusive language used by the Court was adopted, for example by adding, at the start of draft article 3, the phrase "high-ranking State officials such as". That approach would not only reflect current customary international law, but would also take into account developments in the conduct of international relations, notably the fact that senior State officials other than the troika frequently represented their countries in international forums in their respective fields of activity and were often required to travel abroad in discharging their duties. Lastly, in draft article 4, paragraph 2, although the term "acts" was understood to include omissions, there should be an explicit statement that immunity covered "all acts and omissions" so as to remove any doubt and help to harmonize the language of the draft article with other legal texts.

43. **Ms. Zabolotskaya** (Russian Federation) said that "Immunity of State officials from foreign criminal jurisdiction" was one of the key topics currently on the Commission's agenda. The preliminary adoption of the four draft articles with commentary was a small but important step forward. The work on the topic should not be rushed. It was complex and controversial, and the Commission needed to be extremely meticulous in developing it. The Commission should proceed on the basis of the previous work of the Secretariat and the former Special Rapporteur. That was the approach being taken by the current Special Rapporteur, which her delegation supported.

44. A carefully measured approach was required in considering whether to examine the topic from the viewpoint of codification or progressive development. Any development of the topic *de lege ferenda* should

be undertaken with extreme caution and should start with codification of existing norms of international law; then, as grey areas and insufficiently settled issues were encountered, progressive development could proceed on the basis of consensus. Her delegation believed that such an approach already enjoyed significant support within the Sixth Committee. Areas in which progressive development might be desirable included procedural aspects of invoking or waiving immunity and related issues. Her delegation was of the view that conditions were not yet ripe for the progressive development of law on substantive matters of immunity. For example, it did not see any grounds in international law for concluding that there were exceptions to the immunities of State officials.

45. In that connection, the Special Rapporteur's comments in her second report (A/CN.4/661) regarding the principles and values of international law that were relevant to the topic raised some concerns. Drawing parallels to such principles and values would only complicate the Commission's efforts to elaborate a clear document on the topic. The issue of immunity from international criminal jurisdiction should not be covered under the topic. There were fundamental differences of principle involved. Immunity from foreign jurisdiction derived from the principle of sovereignty of States, and the exercise of such jurisdiction as a general rule required the consent of the official's State. In the case of international jurisdiction, States voluntarily agreed, generally by means of an international treaty, to accept such jurisdiction and abide by the relevant rules pertaining to immunity. Those rules might vary depending on the case. In some instances, it would involve the implementation of Security Council decisions, a matter which was hardly related to the institution of immunity as such. Her delegation did agree with the idea of distinguishing between immunity *ratione personae* and immunity *ratione materiae*. The distinction was widely recognized in doctrine and reflected in judicial practice.

46. With regard to the draft articles, her delegation agreed in principle with the content of draft article 1. Concerning the term "official", which the Commission had indicated would be subject to further consideration, it was particularly important to define what was meant by "State official" in the context of immunity *ratione materiae*, but her delegation believed that such a definition was also needed in the context of immunity *ratione personae*, especially if it was decided not to draw up a limited list of persons who enjoyed such immunity, which would seem to be the right approach. It might makes sense in that regard to stress official representation ex officio of the interests of a State. Paragraph 2 of draft article 1 went, on the whole, in the right direction. The definition of foreign criminal jurisdiction put forward in paragraph (5) of the commentary to draft article 1, however, was too restrictive and should encompass measures of a coercive nature.

47. It would also be useful for the Commission to cite specific examples of legal acts that could be regarded as violating immunity. Her delegation agreed with the view expressed in paragraph (8) of the commentary to article 1 that immunity from foreign criminal jurisdiction was strictly a procedural obstacle to the exercise of a State's criminal jurisdiction against an official of another State but could not exempt that person from responsibility. It would also be worth mentioning in the commentary the position taken by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, namely that the absence of an alternative remedy should not be an impediment to the exercise of immunity.

48. With regard to draft article 3, it would be important not to reject the idea of studying whether personal immunity might apply to persons other than the troika, a view consistent with the opinion of the International Court of Justice in the *Arrest Warrant* case and with the practice of States. Approaching the matter from that perspective would allow the Commission to respond appropriately to the current world situation, recognizing that essential international functions, including representation of a State in international relations, were not necessarily performed only by the troika. That being the case, rather than drawing up a restricted list, criteria should be established for identifying a narrow circle of persons in addition to the troika who would enjoy immunity *ratione personae*.

49. Her delegation had carefully studied the commentary to draft article 3, especially paragraphs (8) to (12), and was inclined to believe that the phrase "such as" as applied to persons included in the troika in the *Arrest Warrant* case meant that there should be an unrestricted list under international law. Based inter alia on that case and the more recent decision by the International Court of Justice in *Certain Questions of*

Mutual Assistance in Criminal Matters (Djibouti v. France), international law attributed immunity *ratione personae* at least to members of the troika but not only to them. Other high-ranking officials, depending on circumstances, might also meet the criteria for immunity. The commentary cited examples from national practice, which confirmed that the extension of immunity to other officials would be possible and indeed appropriate. Immunity had been extended to ministers of defence, for example, in the case *Re General Shaul Mofaz* in the United Kingdom. The practice cited as a counter-argument in footnote 285 did not, in her delegation's view, prove that the list of officials enjoying immunity was closed or restricted because the cases mentioned in that footnote related to civil jurisdiction, unrecognized Heads of State or the heads of constituent territories of Federal States — matters that did not relate to the topic.

50. In the 2005 *Evgeny Adamov v. Federal Office of Justice* case in Switzerland, also mentioned in footnote 285, the Government of the Russian Federation had attempted to prove that a former Minister for Atomic Energy enjoyed immunity from former criminal jurisdiction. However, the issue of immunity *ratione personae* within the meaning of draft article 3 had not been considered because, at the time of litigation, Mr. Adamov had ceased to be the Minister, and immunity *ratione personae* could be extended only to active State officials. The Federal Tribunal of Switzerland in its judgment of 22 December 2005 did not draw any conclusion on the existence or absence of immunity in Mr. Adamov's case, leaving the issue open. The case had been decided on the basis of the priority of the Russian Federation's extradition request, not the norms of immunity, and Mr. Adamov had neither been granted nor denied immunity. In that light, her delegation was unconvinced that the conclusion in paragraph (12) of the commentary to the draft article was justified, namely that other high-ranking officials did not enjoy immunity *ratione personae* for purposes of the draft articles. She would suggest that the Commission look again at that issue.

51. In general, her delegation supported draft article 4. The Commission had made good progress in developing the topic during its 2013 session. It should proceed with the remaining draft articles based on the practice of States and the International Court of Justice, making the fullest possible use of the work of earlier Special Rapporteurs.

52. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that it was of utmost importance that any recommendations prepared by the Commission follow the letter and the spirit of the Vienna Convention on the Law of Treaties. The Commission's conclusions should reflect the main goal of treaty interpretation, which was, according to the commentary on the draft articles on the law of treaties, to elucidate the meaning of the text. As the International Court of Justice had said in its 1950 advisory opinion on the competence of the General Assembly regarding admission to the United Nations, "if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter." Moreover, a clearer distinction should be drawn between the general and supplementary rules of interpretation reflected in articles 31 and 32 of the Vienna Convention.

53. Draft conclusion 3 was of great practical value. It called for a cautious approach to the evolutive interpretation of treaty terms in order to avoid the risk of going beyond the letter and spirit of the treaty or the original intent of the States parties. Her delegation fully endorsed that approach. It also agreed with the Commission's conclusion that subsequent practice as envisaged in articles 31 and 32 of the Vienna Convention could only arise from conduct that was attributable to a State party under international law. With regard to the relevance of the conduct of non-State actors, her delegation would suggest more restrictive wording. In that context, if a non-governmental or international organization reported on the practice of States in certain areas, it was the reaction of States to such reports that mattered, not the reports themselves.

54. Although the Commission had decided, for the time being, not to address the provisions of article 33 of the Vienna Convention concerning the interpretation of treaties authenticated in more than one language, that article should not be forgotten. Questions could arise regarding the relationship of a subsequent agreement to different language versions of the treaty. Moreover, a subsequent agreement or subsequent practice as envisaged in article 31, paragraph 3, of the Vienna Convention might be the result of the elimination of differences in the meaning of the treaty in different languages which had been expressly or tacitly agreed to by the parties.

55. With regard to the new topics included in the Commission's programme of work, her delegation continued to have doubts about the idea of developing the topic "Protection of the atmosphere". On the one hand, the restrictions placed on the scope of the topic would not alleviate the problems that might arise in its consideration and, on the other hand, those restrictions narrowed the subject matter to such an extent that there might not be any point in studying the topic. The problem of protection of atmosphere was complex and encompassed norms of international environmental law and other areas of international law. Work was under way in each of those areas to eliminate gaps and create flexible legal norms, including some that the Commission had identified as not being appropriate for consideration under the topic. Codification attempts in those areas would inevitably interfere with the processes under way and undermine their integrity. Her delegation therefore considered that it would not be worthwhile to continue work on the topic.

56. Concerning the topic of crimes against humanity, customary international law provided a sufficiently clear understanding of what constituted such a crime. That understanding was reflected in the Charter and in the Judgment of the Nuremberg Tribunal and had been confirmed by the General Assembly in its resolution 95 (I). Crimes against humanity were also crimes under international humanitarian law, as referred to in Additional Protocol I to the Geneva Conventions. Moreover, the Statute of the International Criminal Court contained a definition of such crimes. Her delegation wondered, therefore, what purpose would be served by drawing up a new document on crimes against humanity and how it would relate to existing norms of customary and treaty law.

57. **Mr. Huang** Huikang (China) said that his delegation was pleased with the progress achieved during the Commission's very fruitful sixty-fifth session and would provide information on State practice in relation to the various items under consideration. It encouraged the Commission to strengthen communication and cooperation with other bodies in the field of international law and to optimize its working methods and improve its efficiency. In the selection of new topics, the Commission should give more consideration to the needs of the international community, pay close attention to the Sixth Committee's views on its work, prioritize topics that would provide practical guidance to the international community, treat the inclusion of highly academic and technical topics with caution and continue to play an important role in the codification and progressive development of international law.

58. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur had addressed the development of proposals *de lege ferenda* with caution and had undertaken an in-depth analysis of general issues such as methodology and concepts as well as of the important dimension of immunity *ratione personae*. The draft articles proposed were succinct and characterized by clear logic and impartiality. The Special Rapporteur had rightly defined the scope of the topic as immunity of State officials from the criminal jurisdiction of another State, thus excluding immunity of State officials from the jurisdiction of international criminal tribunals and immunity of officials such as diplomatic agents and consular officials covered under special rules.

59. While there was a general understanding in the international community that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae*, international practice did not exclude the possibility of personal immunity for other high-level officials. In its judgment in the *Arrest Warrant* case, the International Court of Justice had not in any way restricted immunity *ratione personae* to the so-called troika. In some domestic jurisdictions such immunity was granted to other high-level officials, including trade and defence ministers, and statements by Committee members during the sixty-seventh session had indicated that many Governments were open-minded on the question of whether officials other than the troika should enjoy personal immunity.

60. His delegation had pointed out during the previous session that since the topic "Protection of the atmosphere" was highly technical and many applicable conventions already existed, it was not suitable for inclusion in the Commission's programme of work. In order to accommodate the concerns of various States, it had been added under the conditions set out in paragraph 168 of the Commission's report (A/68/10). His delegation remained cautious about the inclusion of the topic in the programme of work and would follow its development.

61. As to the new topic "Crimes against humanity", given its complexity and sensitivity, the Commission

should deal with it in a prudent manner and avoid any predetermined results before wide consensus had been reached by States.

62. **Mr. Alimudin** (Indonesia) said that the Commission's work on the topic "Subsequent agreements and subsequent practice in relation to treaty interpretation" would provide valuable guidelines and reference points for treaty interpretation. His delegation agreed with the general thrust of the five draft conclusions provisionally adopted by the Commission. With regard to draft conclusion 1, it wished to emphasize the importance of articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which provided general rules and supplementary means of treaty interpretation. It supported the notion that the interpretation of a treaty was a single combined operation with no hierarchical order among the means of interpretation. Indeed, the decisions of various international courts and tribunals did not reveal any established and consistent pattern of use of different means or elements of treaty interpretation.

63. His delegation welcomed draft conclusion 3 and agreed that subsequent agreement and subsequent practice as a means of treaty interpretation might assist in determining whether or not an evolutive interpretation of a particular term of a treaty was appropriate. However, evolutive interpretation must be treated with caution. International courts and tribunals had recognized that a treaty was concluded to serve the interests of the parties both at the moment of its conclusion and over time.

64. His delegation was of the view that three principles must be adhered to in the evolutive interpretation of treaties. The first was the need to preserve the stability of the treaty. Evolutive interpretation of the provisions of a treaty should not be so broad as to undermine or contradict the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Second, there must be express agreement of the parties in the case of subsequent agreements and tacit understanding in the case of subsequent practice. Third, with respect to multilateral treaties, evolutive interpretation must be grounded in the agreement or common understanding of all States parties.

65. Concerning draft conclusion 5, his delegation agreed that subsequent practice by non-State actors should be understood in a broad sense. It served only as a contributing factor in the assessment by State parties of whether subsequent practice existed among the States parties concerned.

66. Turning to the top of immunity of State officials from foreign criminal jurisdiction, he said that his delegation understood that certain issues were sensitive, in particular those concerning exceptions to immunity. Before discussing exceptions, however, there was a need to address and understand the basic concept, principles and rules of immunity to which exceptions might apply. His delegation looked forward to further study and deliberations on the matter by the Commission, but wished to caution that those deliberations should not be carried out in a manner that might pre-judge the outcome of the Committee's ongoing discussion of the scope and application of the principle of universal jurisdiction.

67. The issue of immunity *ratione personae* was one of the most important parts of the draft articles. As reflected in customary international law, only Heads of State, Heads of Government and ministers for foreign affairs enjoyed such immunity. At the current stage, his delegation was of the view that there were insufficient grounds in practice and in international law for extending immunity *ratione personae* to high-ranking officials other than the troika. Furthermore, to do so would not be beneficial for the advancement of deliberations on the issue as the focus would shift to the criteria for determining which high-ranking officials should be entitled to such immunity, rather than remaining on more important substantive matters. Another consideration was that the extent of the power and authority granted to individual high-ranking officials would vary depending on each country's organizational structure and decisions at the national level.

68. His delegation supported draft article 4, which provided that personal immunity would be enjoyed by Heads of State, Heads of Government and ministers for foreign affairs only during their time in office. Therefore, any acts of such persons committed before assuming office or after completing their term would be their personal responsibility and they would no longer be entitled to the protections of immunity *ratione personae*.

69. His delegation welcomed the inclusion of the new topics "Protection of the environment in relation to

armed conflicts” and “Protection of the atmosphere” in the Commission’s programme of work, noting that the scope of work on the latter topic had been determined. In order to contribute to the Commission’s work on international law, it was imperative that even stronger and more intensive engagement between the Commission and the Sixth Committee should continue to be fostered.

70. **Mr. Gharibi** (Islamic Republic of Iran) said that the Special Rapporteur’s first report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties seemed to reveal a conceptual metamorphosis over the years since the inception of the topic as “Treaties over time” in 2008. Originally intended as a study of the subsequent practice of States parties to a treaty aimed at determining the criteria for discerning such practice, the work had increasingly shifted towards interpretation of treaties. The draft conclusions presented by the Special Rapporteur were visible evidence of that trend. The current approach could be described as “dynamic” or “evolutionary” interpretation of treaties, rather than static interpretation — i.e., applying the methods set out under articles 31 and 32 of the 1969 Vienna Convention to determine the intention of the parties at the time of the treaty’s conclusion. In such an approach, the temporal element prevailed.

71. Despite the references in the draft conclusions to the interpretation of treaties in accordance with the Vienna Convention, however, the Commission appeared to have failed to include the temporal element. What the Commission should do, in his delegation’s opinion, was to seek to discover the intention of the States parties that might underlie or go beyond the actual provisions of the treaty. The question was not only to determine what factors might have played a role in bringing some States parties to ignore or modify certain provisions of a treaty. That was called “subsequent practice” and should not be confused with interpretation of treaties. The Commission’s mandate was to determine under what conditions such subsequent practice by some States parties could be considered as having acquired the consent of the other parties to a treaty, thus making a provision of the treaty obsolete or changing it profoundly. That was different from the interpretation of a treaty when the meaning and scope were unclear or could be interpreted in different ways, leading to different results.

72. The commentaries to the draft conclusions contained many references to non-State actors, and there seemed to be some confusion about the role that such actors could play in the formation of customary international law through the influence they might have on the practice of some States and their decision to apply the treaty in a narrow or broad manner. That was a question that went beyond the scope of the topic.

73. A State party might be directed to comply with the subsequent practice of non-State actors, including the “social practice”, contrary to the clear provisions of a treaty. Expecting that such subsequent practice could, as a matter of course, secure the agreement of other States parties to the treaty was undoubtedly a violation of the treaty obligations of that State vis-à-vis other States parties. One could hardly rule out the possibility that the policy, not the practice, of some non-State actors might influence some States and lead them to apply the provisions of certain treaties in a way other than that envisaged under the treaty itself. The key question in such cases was under what circumstances a new practice that was clearly incompatible with the provisions of a treaty could be imposed on other States parties. His delegation’s strong preference, therefore, would be for the Commission to stick to its original mandate and avoid stretching the topic beyond what had been the original intention of both the Commission and the general membership of the Organization.

74. The topic “Immunity of State officials from foreign criminal jurisdiction” should not be considered solely in terms of codification. It was appropriate from both a legal and a practical standpoint to formulate provisions *de lege ferenda* taking due account of the requirements of international relations of States. A key point deserving the attention of the international community was that of the beneficiaries of immunity *ratione personae*. It was well established and undisputed and that under international law Heads of State, Heads of Government and ministers for foreign affairs were deemed to represent the State by the sole fact of the functions they exercised, without it being necessary for the relevant State to confer special powers on them. Their enjoyment of such immunity was both justified and justifiable on the grounds that when they were outside the territory of their respective States they must be able to perform their functions free from any impediment. In the current context, however, senior State officials other than those comprising the so-called troika were regularly commissioned to

represent their States in inter-State relations and to participate in international forums held outside their national territory. That relatively new but burgeoning model of international diplomacy merited special attention by the international community and deserved to be safeguarded under international law.

75. The legal practice and jurisprudence of a growing number of States indicated that immunity *ratione personae* was consistently granted to such State representatives while on official mission. Many States had spoken in favour of that broader approach, citing the *Arrest Warrant* case, among others. It therefore seemed that a clear trend was emerging in favour of the extension of immunity to government officials, attorneys-general and presidents of national parliaments when they performed functions similar to those of the troika during official missions abroad, although such immunity was temporary and limited to the duration of the exercise of their official functions. The Commission's work on the topic should be guided by existing rules of international law and by the jurisprudence of the International Court of Justice and should also take into account the requirements for effective and stable international relations.

76. **Mr. Och** (Mongolia) said that, with the variety of legal systems across the world, the codification of international law through systematization of State practice, precedent and doctrine was a formidable task, as had been evident in the Commission's work over the previous 65 years. That work had had a notable impact on the legal affairs of States, with the successful application of draft articles, conclusions and conventions on numerous important issues by national and international courts.

77. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, international courts and tribunals had shown flexibility in interpreting treaty terms and provisions in the light of subsequent practice. His delegation believed that the draft conclusions, with further study on specific points, would contribute to the application of the relevant provisions of the Vienna Convention on the Law of Treaties, thus providing a useful guide to treaty interpretation. The draft conclusions must not, however, deviate from the general rules of the Vienna Convention.

78. The topic "Immunity of State officials from foreign criminal jurisdiction" was important and complex, encompassing such issues as the scope of immunity *ratione personae*, the definition of foreign criminal jurisdiction, the nature of the acts of State officials and the gravity of crimes. His delegation therefore supported a careful and thorough approach to the topic, taking into account the purpose of the fight against impunity and the principle of universal jurisdiction.

79. His delegation supported the inclusion of the new topic of crimes against humanity in the Commission's long-term programme of work. It also welcomed efforts to improve the Commission's working methods His Government stood ready to increase its collaboration with the Commission, particularly with respect to topics of relevance to Mongolia, and strengthen its active cooperation with Member States for the progressive development of international law.

80. **Ms. O'Brien** (Australia) said that the work of the Commission on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties was of great utility and guidance to States and international organizations. Her delegation encouraged the Commission to give further consideration to issues raised by the adoption of subsequent agreements as well as subsequent State practice relating to multilateral conventions. In particular, consideration of the procedural requirements for the adoption of interpretative resolutions would be of great utility, given the range of divergent views on the issue.

81. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation wished to emphasize the procedural nature of immunity and underscore the need for immunity not to be equated with impunity. She was encouraged by the Commission's effort to achieve the right balance in limiting the temporal and material scope of personal immunity. Such a balance should be a key consideration in the future development of draft articles on both immunity *ratione personae* and immunity *ratione materiae*. States had differing views on the categories of State officials entitled to immunity from foreign criminal jurisdiction and the scope of that immunity, and her delegation therefore welcomed the Commission's commitment to give further consideration to the meaning of specific terms, including "officials" and "acts performed in an official capacity". Such consideration would help to ensure greater clarity and remove confusion. The Commission

should explore the possibility of defining the term "officials" within the draft articles.

82. Given the political sensitivities surrounding the topic, new principles should be developed in a conscious and considered fashion. Issues to be considered in the future work on this topic included the continuing need to balance the protections afforded by immunity with the prevention of impunity for the most serious crimes and human rights abuses; the link between State responsibility and immunity; and express or implicit waiver of immunity, with due regard for the arguments occasionally advanced for interpreting provisions of human rights treaties as implied waivers of immunity. The legal basis of such arguments should be examined carefully as a question of treaty interpretation.

83. **Mr. Nolte** (Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties) said that the comments on the topic of subsequent agreements and subsequent practice had been constructive and, in his view, generally supportive, including those that had contained some specific critical observations. He had been impressed by the high quality of the statements and by the many incisive observations, which would be helpful for future work on the topic. As he saw it, the richness of the debate had demonstrated that the decision to change the format of the work on the topic, so that States could follow and influence the work, had been right. He hoped that, as the work proceeded, all delegations would become convinced that the change in format did not imply a broadening of the topic but rather a focusing of the approach on what had been the original plan.

84. It was not the appropriate moment to react to the specific points raised, but it might be useful to make a few general observations. It was true that the aim of the work on the topic was not to change the rules of the Vienna Convention, but rather to elaborate on them. It was also true that the first five draft conclusions were rather general in nature. More specific conclusions, however, should follow, in particular, for example, on the role of the practice of international organizations and treaty bodies and on the conditions under which an agreement on the interpretation of a treaty provision became established as subsequent practice. His sense was that most delegations accepted that the outcome of the work should be draft conclusions with commentaries, and he hoped that the usefulness of that approach would become more apparent to those who had expressed scepticism in that regard.

85. The debate on the Commission's report had demonstrated once again the soundness of the procedures for interaction between the Commission and the Sixth Committee. While those procedures might appear cumbersome, they served to ensure that the Commission's products were well founded. The Commission was a body designed to serve the international community by drawing up draft articles and conclusions in relative — but not absolute — independence, with input and feedback from the Sixth Committee. The feedback from the current debate would serve as a guide for future deliberations and give the Special Rapporteurs and the Commission a general sense of direction, which they would try to translate into specific texts. The debate would thus also be a basis for future reports and debates within the Commission.

86. **Ms. Escobar Hernández** (Special Rapporteur on immunity of State officials from foreign criminal jurisdiction) said that it was indeed important for the Commission to hear the opinions of the members of the Sixth Committee on its work and to ensure ongoing interaction between the Commission and the Committee. She had taken careful note of the Committee's comments on the topic of immunity of State officials from foreign criminal jurisdiction, all of which had shown the importance that States attached to the matter owing to its practical impact in the context of international relations. Her approach to the topic reflected that practical aspect.

87. She had noted with satisfaction that the distinction between immunity *ratione personae* and immunity *ratione materiae* had been generally accepted, including in respect of the establishment of a differentiated treatment of its normative elements. Some speakers had noted that the two categories of immunity shared common features, in particular the fact that both were related to the preservation of State sovereignty and the maintenance of stable international relations, but also the fact that both had a strong functional component. That common element had been present in her two reports and would continue to be taken into account. Issues such as limits and exceptions to immunity would be dealt with once the normative elements characterizing the two categories of immunity from foreign criminal jurisdiction had been identified. It could be affirmed at the current stage, however, that

there were obvious differences between the positions of the highest-level State representatives — namely Heads of State, Heads of Government and ministers for foreign affairs — and those of other State officials or representatives, both at the domestic level and in terms of international relations, and they should therefore be subject to different regimes of immunity from criminal jurisdiction.

88. In that connection, a significant number of speakers had rightly noted the need for a precise definition of the term "official". She shared that concern and intended to address it in her third report in the context of determining the normative elements of immunity *ratione materiae*, as it was in that context that the concept of "official" was especially relevant. The definition of the concept was also directly related to the definition of "official act" or "act performed in an official capacity", the only acts covered by immunity *ratione materiae*. While it would not be appropriate to enter into a terminological debate at the present time, the issue of terminology, as had been noted by a number of speakers, was not a minor one.

89. She had also noted with satisfaction that recognition of the immunity *ratione personae* of Heads of State, Heads of Government and ministers for foreign affairs had not been opposed by any delegation. In that regard, she appreciated the clarification provided by the South African delegation on its position. Some speakers had expressed the view that the Commission should consider the possibility of including other high-level State officials, in particular other cabinet members, under the regime of immunity *ratione personae* by reason of their participation in international relations. On the other hand, a significant number of speakers had expressed support for limiting personal immunity to members of the so-called troika in order not to further extend the institution of immunity from foreign criminal jurisdiction, which constituted a limitation on the powers of a State.

90. The Commission had taken into account those divergent positions and had considered that draft article 3 adequately reflected the status of contemporary international law. The Commission had also considered that the text of draft article 3 did not imply the exclusion of immunity from foreign criminal jurisdiction for other high-level State officials, who could be covered by the rules governing immunity *ratione materiae* or, when travelling in an official capacity, by the rules applicable to special missions.

91. A number of delegations had raised the question of limits and/or exceptions to immunity from foreign criminal jurisdiction, including both immunity *ratione personae* and immunity *ratione materiae*, particularly in relation to international crimes and the fight against impunity and to the evolution of international criminal law. She would address that issue in future reports, after the normative elements of the two categories of immunity had been identified in the relevant draft articles. For the time being, she would point out that, as noted in the commentary, the draft articles adopted thus far did not put forward any position on the issue of limits and exceptions to immunity.

92. Lastly, with respect to the role of international criminal courts and their possible relationship with domestic criminal courts in the treatment of the topic, as had been clearly established in the work of the Commission, the scope of the topic and the draft articles did not include immunity from the jurisdiction of international criminal courts. However, as had been correctly pointed out by various members of the Commission and also by several delegations in the Committee, there were links between the topic and international criminal jurisdiction which must be addressed in order to avoid inconsistencies in the exercise of the Commission's function of codification and progressive development of international law.

93. Her next report would be devoted mainly to the analysis of immunity *ratione materiae*, and she looked forward to receiving any information that Member States might wish to provide in that regard in response to the request contained in chapter III of the Commission's report.

94. **Mr. Niehaus** (Chairman of the International Law Commission), introducing chapter IV of the Commission's report on the work of its sixty-third session (A/66/10 and A/66/10/Add.1), said that the Commission had completed its work on the topic of reservations to treaties during its sixty-third session in 2011, adopting the final version of the Guide to Practice on Reservations to Treaties (A/66/10/Add.1) and also submitting to the General Assembly a recommendation on mechanisms of assistance in relation to reservations to treaties. The adoption of the Guide to Practice had marked the culmination of a lengthy process, during which 17 reports and a note had been produced by the Special Rapporteur on the topic, Mr. Alain Pellet, to whom the Commission had paid tribute for his dedication and tireless efforts in the

development of the Guide. The Commission had decided to recommend to the General Assembly that it take note of the Guide to Practice and ensure its widest possible dissemination. The Guide had been finalized by a working group, chaired by Mr. Marcelo Vázquez-Bermúdez, which had reviewed the text provisionally adopted in 2010 on the basis of the changes proposed by the Special Rapporteur in the light of the oral and written observations made by States on the topic since 1995. The working group had also finalized the conclusions on the reservations dialogue contained in the annex to the Guide on the basis of the draft in the addendum to the Special Rapporteur's seventeenth report (A/CN.4/647/Add.1).

95. As stated in the introduction to the Guide, its purpose was to provide assistance to practitioners of international law, who were often faced with sensitive problems concerning reservations and interpretative declarations. It was intended not only to offer the reader a guide to past practice but also to direct the user towards solutions that were consistent with existing rules or to the solutions that seemed most appropriate for the progressive development of such rules. The Guide comprised five parts and an annex on the reservations dialogue. Part 1 of the Guide set out definitions, which, as indicated in guideline 1.8 (Scope of definitions), were without prejudice to the validity and legal effects of such statements under the rules applicable to them. While some revisions of a linguistic or technical nature had been made, the final text of the definitions remained essentially the same as the version provisionally adopted in 2010.

96. The definition in guideline 1.1 was a composite of the definitions included in the Vienna Conventions of 1969, 1978 and 1986, but also encompassed, in its paragraph 2, across-the-board reservations, which were a well-established practice and which purported to exclude or to modify the legal effect of certain provisions of a treaty as a whole with respect to certain specific aspects in their application to the author of the reservation. Guideline 1.1 was accompanied by additional guidelines providing examples of unilateral statements that constituted reservations. Part 1 of the Guide also defined the term "interpretative declaration" (guidelines 1.2 and 1.2.1) and set out the criteria for distinguishing between reservations and interpretative declarations (guidelines 1.3 and 1.3.3). Guideline 1.4 defined a conditional interpretative declaration as a unilateral statement whereby its author subjected its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof. That guideline reflected the Commission's conclusion that conditional interpretative declarations were subject to the rules applicable to reservations. Consequently, all the other guidelines in the 2010 version which dealt specifically with such declarations had been deleted. Guideline 1.5 provided that unilateral statements constituting neither reservations nor interpretative declarations fell outside the scope of the Guide.

97. The guidelines in section 1.6 dealt with unilateral statements in respect of bilateral treaties. Guideline 1.6.1 ("Reservations" to bilateral treaties) indicated that a unilateral statement made before the entry into force of a bilateral treaty with a view to obtaining from the other party a modification of the provisions of the treaty did not constitute a reservation within the meaning of the Guide to Practice, while guideline 1.6.2 (Interpretative declarations in respect of bilateral treaties) stated that guidelines 1.2 and 1.4 were applicable to interpretative declarations in respect of both multilateral and bilateral treaties. Guideline 1.6.3 stipulated that the interpretation resulting from an interpretative declaration in respect of a bilateral treaty formulated by one party and accepted by the other constituted an authentic interpretation of that treaty. The guidelines in section 1.7 dealt with possible alternatives to reservations and interpretative declarations.

98. The guidelines in part 2 (Procedure) covered the form of reservations and interpretative declarations and the procedures to be followed in relation to them, their withdrawal or modification and reactions to them. They were largely the same as those contained in the provisional version of the Guide adopted in 2010, apart from some editorial and technical changes and the deletion of some guidelines and model clauses, the essential elements of which were reflected in the commentaries. In particular, the Commission had deleted former guideline 2.1.8, on the procedure in case of manifestly impermissible reservations, owing to objections from some Governments that it would have had the effect of assigning to the depositary functions that went beyond those recognized by the Vienna Convention. The Commission had also decided to add guideline 2.3.2, which provided that an objection to a reservation that was formulated late must be made within twelve months of the acceptance, in

accordance with guideline 2.3.1, of the late formulation of the reservation. In addition, it had revised 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.

99. Part 3 of the Guide was devoted to permissibility of reservations and interpretative declarations. In that regard, it would be recalled that the Commission had agreed 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. Permissibility of reservations was covered under guidelines 3.1 to 3.1.5.7. Guideline 3.1, reflected the conditions set out in article 19 of the Vienna Conventions of 1969 and 1986. The rest explained the criteria for assessing the permissibility of reservations and provided examples of the types of reservations about whose permissibility States most frequently had differing views. Guideline 3.1.5.6, entitled "Reservations to treaties containing numerous interdependent rights and obligations", had been reformulated and now incorporated the substance of former guideline 3.1.12, on reservations to general human rights treaties, although it did not refer specifically to such treaties, but rather took a more general approach to determining the compatibility of a reservation with the object and purpose of a treaty, recognizing the interdependence that might exist between the numerous rights and obligations contained in the treaty. Guidelines 3.2 to 3.2.5 dealt with assessment of the permissibility of reservations by contracting States or contracting organizations, dispute settlement bodies and treaty monitoring bodies.

100. Section 3.3 covered the consequences of the non-permissibility of a reservation. Guideline 3.3.1 stated that the consequences were the same, regardless of the grounds for non-permissibility. Guideline 3.3.2 provided that the formulation of an impermissible reservation produced its consequences pursuant to the law of treaties and did not engage the international responsibility of the State or international organization which had formulated it, while guideline 3.3.3 stipulated that acceptance of an impermissible reservation by a contracting State or by a contracting organization would not affect the impermissibility of the reservation. 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.

101. Section 3.4 dealt with permissibility of reactions to reservations. Guideline 3.4.1 stated that the acceptance of a reservation was not subject to any condition of permissibility. Regarding objections to reservations, guideline 3.4.2 established conditions of permissibility only in relation to a very specific category of objections, those with intermediate effect, through which the author of the objection sought to exclude, in its relations with the author of the reservation, the application of provisions of the treaty to which the reservation did not relate. In the Commission's view, such objections were permissible only if the excluded provisions had a sufficient link with the provisions to which the reservation related and if the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection. Bearing in mind that guideline 3.4.2 was probably more in the nature of progressive development than codification in the strict sense, the Commission had decided that the term "sufficient link" had the merit of leaving room for clarification that might come from future practice.

102. Guideline 3.5 established prohibition under the treaty as the sole reason that an interpretative declaration would not be permissible, while guideline 3.5.1 provided that if a unilateral statement purported to be an interpretative declaration but was in fact a reservation, its permissibility must be assessed in the light of the guidelines on permissibility of reservations. Guideline 3.6 established that reactions to interpretative declarations were not subject to any conditions for permissibility.

103. Part 4, on the legal effects of reservations and interpretative declarations, was based on a fundamental distinction between, on the one hand, reservations deemed valid in accordance with the guidelines in part 2 of the Guide and permissible in accordance with those in part 3 and, on the other hand, reservations that were impermissible, which were covered under section 4.5 of the Guide. Guideline 4.1 dealt with the "establishment" of a reservation, a concept found in the *chapeau* of article 21, paragraph 1, of the Vienna Conventions of 1969 and 1986, which was considered relevant for purposes of determining the effects of a reservation. That guideline set out the general conditions for the establishment of a reservation formulated in respect of a contracting State or

organization, namely that it must be permissible and formulated in accordance with the required form and procedures and that the contracting State or organization must have accepted it. Guidelines 4.1.1 to 4.1.3 dealt with three specific cases: establishment of a reservation expressly authorized by a treaty, establishment of a reservation to a treaty which had to be applied in its entirety and establishment of a reservation to treaty that was the constituent instrument of an international organization.

104. Section 4.2 explained the effects of reservations that had been established within the meaning of section 4.1. Guidelines 4.2.1 to 4.2.3 dealt with the effect of the establishment of a reservation on the status of the author as a contracting State or contracting organization or as a party to the treaty. Guideline 4.2.2 concerned the effect of the establishment of a reservation on the treaty's entry into force. The first paragraph was based on the rule laid down in article 20, paragraph 4 (c), of the Vienna Conventions of 1969 and 1986 and stipulated that when a treaty had not yet entered into force, the author of a reservation would be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation had been established, while the second paragraph provided that the author might be included before the reservation was established, provided no contracting State or contracting organization were opposed. The aim of the latter paragraph was to take into account — without passing judgement on its merits — what appeared to be the predominant practice of depositaries, including the Secretary-General of the United Nations.

105. The first paragraph of guideline 4.2.4 reflected the rule contained in article 21, paragraph 1 (a), of the Vienna Conventions of 1969 and 1986; the second and third paragraphs established the effects of established reservations on treaty relations, drawing a distinction between reservations that excluded and reservations that modified the legal effect of treaty provisions. Guideline 4.2.4 also established the principle of reciprocity in the application of the reservation, although it was subject to the exceptions envisaged in guideline 4.2.5. Those exceptions could stem either from the nature of the obligations to which the reservation related or the object and purpose of the treaty or from the content of the reservation itself. Guideline 4.2.6, which had had no counterpart in the provisional version of the Guide adopted in 2010, set out the criteria for interpreting reservations.

106. Guideline 4.3 was worded in very general terms and should be understood in the light of guidelines 4.3.1 to 4.3.7. The effect of an objection to a valid reservation was approached from the standpoint of both the entry into force of the treaty and the content of the treaty relations between the author of the reservation and the author of the objection. The effect on the entry into force of the treaty was covered in guidelines 4.3.1 to 4.3.5. Guideline 4.3.1 provided that an objection to a valid reservation would not preclude the entry into force of the treaty between the author of the objection and the author of the reservation, expect in the case mentioned in guideline 4.3.5, which reproduced paragraph 4 (b) of article 20 of the Vienna Conventions of 1969 and 1986, according to which the entry into force of the treaty would not be precluded unless the author of the objection had definitely expressed an intention to that effect. Guideline 4.3.6 concerned the effects of an objection on treaty relations. Paragraph 1 thereof reproduced the rule set out in article 21, paragraph 3, of the Vienna Conventions, indicating that the provisions to which the reservation related did not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation. Paragraphs 2 and 3 clarified that general rule and explained the effects of an objection to a reservation that was intended to exclude or modify the legal effect of certain treaty provisions, with examples provided in the commentary. Paragraph 4 established that all the provisions of the treaty other than those to which the reservation related would remain applicable as between the reserving State or organization and the objecting State or organization.

107. Under guideline 4.3.8, which was based on the principle of mutual consent, the author of a valid reservation was not required to comply with the provisions of the treaty without the benefit of its reservation. That guideline thus excluded, in the case of a valid reservation, the possibility that an objection could have "super-maximum" effect, thereby compelling the author of the reservation to comply with the treaty without being able to benefit from its reservation.

108. Section 4.4 dealt with the absence of effect of a reservation on rights and obligations independent of the treaty, namely those under other treaties, those under a rule of customary international law; and a peremptory norm of general international law (*jus cogens*). Section 4.5

addressed the consequences of an invalid reservation — i.e., one that did not meet the conditions of permissibility and formal validity set out in parts 2 and 3 of the Guide. Guideline 4.5.1 established that an invalid reservation was null and void. Paragraph 1 of guideline 4.5.2 clarified that that nullity did not depend on the objection or acceptance of a contracting State or organization, while paragraph 2 recommended that a State or an international organization that considered a reservation invalid should formulate a reasoned objection to it.

109. Guideline 4.5.3, which dealt with the delicate question of the status of the author of an invalid reservation in relation to the treaty, had been reworded in the final version of the Guide in an effort to reconcile the differing views expressed by Governments in respect of guideline 4.5.2 as contained in the 2010 version. Paragraph 1 of the new version stated that it was the intention of the author of the reservation that determined its status with respect to the treaty — i.e., whether or not the author of an invalid reservation considered itself bound by the treaty without the benefit of the reservation. Paragraph 2 established the presumption that unless the author had expressed a contrary intention or such an intention was otherwise established, it would be considered a contracting State or a contracting organization without the benefit of the reservation, while paragraph 3 provided that, notwithstanding paragraphs 1 and 2, the author might express at any time its intention not to be bound by the treaty without the benefit of the reservation. Paragraph 4 recommended that if a treaty monitoring body expressed the view that a reservation was invalid and the author of the reservation intended not to be bound by the treaty without the benefit of the reservation, it should express its intention within a period of twelve months from the date on which the treaty monitoring body made its assessment. Guideline 4.6 recalled that a reservation did not modify the provisions of the treaty for other parties *inter se*.

110. Section 4.7 addressed the effects of interpretative declarations. Its aim was to fill a gap in the Vienna Conventions while remaining faithful to the logic of those Conventions, particularly articles 31 and 32, on the interpretation of treaties. Guideline 4.7.1 established the function of an interpretative declaration in clarifying the terms of a treaty and stipulated that account must be taken in interpreting the treaty of reactions (approval or opposition) to an interpretative declaration. The effects of modification or withdrawal of such a declaration were dealt with in guideline 4.7.2, which was based on the idea that although the declaration did not, in itself, create rights or obligations for its author and other parties to the treaty, it could prevent the author from subsequently taking a position contrary to that expressed in the declaration, at least if the other parties had relied on the author's initial position. Guideline 4.7.3 stipulated that an interpretative declaration that had been approved by all contracting States and organizations could constitute an agreement regarding the interpretation of the treaty.

111. The text in part 5 (Reservations, acceptance of reservations, objections to reservations, and interpretative declarations in cases of succession of States) was largely the same as in the provisional version of 2010. The guidelines in part 5 were based on the hypothesis that matters relating to the succession of States were governed by the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties. Article 20 of that Convention — the only one that dealt with reservations in relation to the succession of States — established a presumption that a newly independent State would maintain the reservations formulated by the predecessor State, while at the same time recognizing that the new State could formulate its own reservations when making notification of succession. Guideline 5.1.1 (Newly independent States) reproduced the language of article 20 of the 1978 Convention.

112. Guideline 5.1.2 dealt with the case of successor States that were not newly independent but rather were the product of the unification or separation of States. The Commission had been of the view that, while the presumption in favour of the maintenance of reservations would apply in such cases, the right of a new State arising from the unification or separation of States to formulate reservations should be recognized only if that State's succession to the treaty was voluntary in nature. That was not the case, however, under the Vienna Convention of 1978 in respect of treaties which at the date of the succession of States were in force for the predecessor State and which, under articles 31 and 34 of the 1978 Convention, remained in force for the successor State. Part 5 of the Guide also addressed many other matters that were not covered under article 20 of the 1978 Convention, including reactions to reservations (objections and acceptances) in cases of succession (sections 5.2 and 5.3), and specific issues relating to the relevance of certain reservations or objections, the

territorial scope of reservations (guidelines 5.1.3, 5.1.5 and 5.2.2) and the fate of interpretative declarations in cases of succession of States (guideline 5.5).

113. 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, found in paragraph 73 of its 2011 report (A/66/10), 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 had 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.

Agenda item 110: Measures to eliminate international terrorism (*continued*) (A/C.6/68/L.13)

Draft resolution A/C.6/68/L.13: Measures to eliminate international terrorism

114. **Mr. Norman** (Canada), introducing the draft resolution on behalf of the Bureau, said that the text incorporated technical updates reflecting developments arising from the April 2013 meeting of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, as well as some non-substantive changes suggested by several delegations, to which no objections had been raised. It was therefore his understanding that there was consensus both on the text and on the importance of international cooperation in the fight against the global scourge of terrorism.

The meeting rose at 1.10 p.m.