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

Contents

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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 and Add.1 and A/68/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XII of the report of the International Law Commission on the work of its sixty-fifth session (A/68/10).

2. **Mr. Popkov** (Belarus) said that his delegation welcomed the focus on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, which reflected the objectives of the Study Group on Treaties over time. It also supported the Special Rapporteur's approach in his report on the topic (A/CN.4/660) and the adoption by the Commission of four draft conclusions. While the interpretation of international treaties was to some extent a creative process, the progressive development of guidelines, in particular those set out in the 1969 Vienna Convention on the Law of Treaties was also useful. In that respect, his delegation questioned the need to repeat article 31 of the Vienna Convention word for word in paragraph 2 of draft conclusion 1. Instead, the Commission should aim to better explore the meanings of phrases used in the Vienna Convention, such as "good faith" and "ordinary meaning [of] terms", within the draft conclusions and the commentaries thereto. His delegation would be interested in receiving the Commission's views on the nature of a treaty as a factor in its interpretation, which would be significant both from an academic and a practical standpoint.

3. The most difficult matter to be resolved in connection with draft conclusion 2 was the definition of the effect of subsequent practice on such questions as the interpretation of treaties, the tacit or implicit consent of the parties to a treaty to substantive changes to the treaty, and the violation of an international treaty by one of the parties in the absence of an objection by other parties to that treaty, as potential sources of departure from the subsequent practice originally intended by the parties to a treaty. Further study of such cases would contribute to work on the topic and to the question of treaty interpretation in general.

4. His delegation agreed that the outcome of the interpretation of an international treaty by its parties was not always legally binding. The question of additional obligations arising under international law should be addressed only when the intention of States parties could be clearly identified. The Commission had successfully explored the differences between subsequent agreement and subsequent practice in the draft conclusions, which would shed light on the relevant rules of the Vienna Convention. However, the topic still required further study. In particular, his delegation had doubts about the relevance of practice — which was not indicative of agreement — being used to determine the interpretation of a treaty as part of the process of establishing the agreed intention of States parties.

5. His delegation welcomed the Commission's work on draft conclusion 3, as it attached importance to the evolutive interpretation of treaties, not only in the context of disputes, but also in respect of the day-to-day practice of Governments. While it was not feasible to draft a text that could, a priori, categorize international treaties as being evolutive, a useful guideline that set out the inadmissibility of an interpretation that would lead to the amendment of a treaty would be useful. The question as to whether the rules of interpretation were applicable to subsequent agreements, as defined in draft conclusion 4, should also be explored.

6. His delegation supported the Special Rapporteur's view that the practice of lower and local authorities could be considered to be relevant State practice for the purpose of treaty interpretation. His delegation's position was based on the understanding that only the practice of the State could be applied to the interpretation of treaties. Furthermore, interpretations could only be regarded as authentic when they reflected the intentions of all States parties and not one or several parties to a treaty. Further work on the question would enrich the analysis of the articles on the responsibility of States for internationally wrongful acts.

7. The practice whereby international treaty-monitoring bodies placed themselves on equal footing with States in respect of the interpretation of treaties without having been so empowered by the States was a matter of concern. As those bodies were made up of experts from a limited number of parties to a treaty, their interpretations did not always correctly convey the agreed intention of the States, as reflected in the actual provisions of the treaty. At times, their

interpretation broadened the scope of obligations of States parties without the agreement of the parties. As a result, their interpretation did not enjoy sufficient legitimacy. In that regard, the interpretations of international judicial, quasi-judicial and monitoring bodies could be significant only to the extent that those bodies were acting within the context of the powers that were granted to them by the States parties. While the work of non-governmental organizations could provide useful information to support the analysis of the practice of States, their input must never replace the practice of States.

8. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he noted that States' positions, judicial practice and doctrines as well as the Special Rapporteur's views in her report on the topic (A/CN.4/661) constituted a solid foundation for discussion within the Commission and the Sixth Committee. His delegation believed that consideration of the topic must take into account respect for the rule of law and the prevention of impunity as well as respect for the principles of the sovereign equality of States and non-intervention in internal affairs. Ensuring respect for those principles could be promoted by developing clear and unambiguous legal rules to minimize the subjective element. Given the lack of clarity in international customs and practice, the issue of the immunity of State officials presented complex problems, particularly in determining the scope of immunity *ratione personae*. In that regard, his delegation requested the Commission to approach controversial issues by examining the effectiveness of a legal regime in ensuring the stability of international relations. It also requested the Commission to devote more attention to developing proposals *de lege ferenda*.

9. The rules of international law on special missions, including treaty rules, did not address all questions relating to the immunity of the various categories of officials, as those rules did not sufficiently take into account the need for the differentiated protection granted on the basis of the varying status and roles of the officials who implemented the foreign policy functions of the State. In light of the dynamic nature of international relations and the use of new, multi-channel models for interaction among States, his delegation believed that other high officials, in addition to Heads of State, Heads of Government and ministers for foreign affairs, should enjoy immunity *ratione personae*. While devising a definitive list of relevant officials was clearly not feasible, the Commission could determine the criteria whereby a person could enjoy immunity *ratione personae*. Such criteria might include the acquisition by officials, primarily members of Governments, of State functions in the political, economic and defence areas, where such functions were particularly important to defend the sovereignty and security of States or were related to developing broad international cooperation.

10. His delegation hoped that the Commission would thoroughly consider how the term "State officials", as used in draft article 1, paragraph 1, should be defined. It also had concerns about the definition of the term "military forces of a State" in paragraph 2. In particular, the term "persons connected with" was not specific enough and could be interpreted in many ways. In addition, military and armed forces, unlike diplomatic and consular officials or the staff of international organizations, were not governed by a single international legal regime; status-of-forces agreements and the mandates of peacekeeping operations were quite varied in nature.

11. His delegation agreed that, because of their status, high officials enjoyed absolute immunity *ratione personae*. In that regard, the draft articles should clarify that the immunity of high officials was in effect not only during official foreign visits, but also during their private visits abroad. High officials represented the State and, because of the significance of their role to their State's internal and foreign policy, they were carrying out their duties regardless of the nature, length or format of their visits abroad. Respect for the status of such officials by foreign States derived from the immunity granted to the officials' State and the principles of the sovereign equality of States and non-intervention in internal affairs. The draft articles should also reflect the understanding that immunity *ratione personae* continued to apply to actions carried out while such officials were in office, even after they had left office. Any other approach would not reflect the full scope of the concept of immunity *ratione personae*.

12. **Mr. Macleod** (United Kingdom) said that his delegation appreciated the excellent work of the Codification Division of the Secretariat, including its studies on the provisional application of treaties and on customary international law as well as its management

of the Commission's website, which served as an invaluable resource.

13. His delegation supported the Commission's approach to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, which had focused on producing draft conclusions and supporting commentaries. In particular, the commentaries provided valuable concrete examples of the principles underpinning the draft conclusions. The inclusion of additional examples of actual practice would be appreciated, for example in paragraph (4) of the commentary to draft conclusion 2.

14. The Commission's work should be firmly based on articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties; nothing in the draft conclusions or commentaries should detract from that. The Commission should give further consideration to streamlining the draft conclusions in order to reduce the overlap both between the various draft conclusions and between the draft conclusions and the Vienna Convention.

15. His delegation welcomed draft conclusion 1, in particular paragraph 5, which stressed that the interpretation of a treaty was a "single combined operation" and that different weight would need to be accorded to the different means of interpretation depending on the circumstances. Emphasis should remain on interpretation as a single combined operation; a flexible approach to the different means of interpretation should also be maintained. Paragraph (4) of the commentary to draft conclusion 1 noted that the Vienna Convention codified customary international law; in that regard, the concluding words of the commentary could reflect more clearly that the rules on interpretation applied, as a matter of customary international law, to those treaties predating the Vienna Convention.

16. The phrase "authentic means of interpretation" in draft conclusion 2 might not be appropriate, since in treaty terms, the word "authentic", which was often used when referring to different language versions of treaties, did not tend to have a particular technical meaning. His delegation would welcome the Commission's consideration of the use of a more appropriate term, such as "accepted" or "valid", which would fit the definition of "authentic means of interpretation" given in paragraphs (2) and (7) in the commentary to draft conclusion 2. The same concern should be noted in relation to the use of the phrase in draft conclusion 4.

17. His delegation welcomed paragraph (4) of the commentary to draft conclusion 3, which set out the Commission's general approach to the question of "contemporaneous" and "evolutive" interpretation. With regard to draft conclusion 4, his delegation welcomed the Commission's recognition, as expressed in paragraph (2) of the commentary, of the practical impact of subsequent practice occurring in respect of a treaty before the entry into force of that treaty. In addition, it looked forward to the results of the further work to be done on the nature of an agreement between parties to a treaty and the establishment of such an agreement, as outlined in paragraphs (6) and (20) of the commentary. The flexibility imparted by the word "may" in draft conclusion 5 was important, as it referred back to the concept set out in draft conclusion 1, to the effect that different means of interpretation would carry different weight depending on the circumstances, but that interpretation was a single operation.

18. His delegation was grateful for the progress made on the topic of immunity of State officials from foreign criminal jurisdiction, as the issue was of genuine practical significance and extremely important in the conduct of foreign relations. The topic was also attracting more commentary and scrutiny from a variety of perspectives. A clear, accurate and well-documented statement of the law by the Commission would thus be valuable. His delegation had taken note of the text of the three draft articles that had been adopted by the Commission in 2013 and had reviewed the commentaries on them. It was broadly in agreement with draft article 1 on the scope of the project. With respect to paragraph 2 of that article, it was important to note, as the commentary to the article made clear, that the "special rules" referred to could derive from customary international law as well as from treaty provisions. The Commission had also stated that, while the list of the special rules described in paragraph 2 covered the main examples of regimes in which norms regulating immunity from foreign criminal jurisdiction had been identified, it was not exhaustive. That was the right approach, as there could be other forms of international contact and cooperation, such as conferences, commissions, and international judicial or arbitral proceedings that arose

on an ad hoc basis and required additional special rules of immunity.

19. In paragraph (6) of the commentary to draft article 1, the Commission explained that immunities before international criminal courts and tribunals were excluded from the scope of the draft articles. While his delegation fully agreed with the Commission, it noted that questions could arise about the applicability of immunities in relation to national legal processes, such as arrest or seizure of evidence in cooperation with an international court, and hoped that the Commission would give further thought to those matters.

20. The text of draft articles 3 and 4 appeared to limit the enjoyment of immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs. The primary basis for limiting immunity to those offices, according to the commentary to draft article 3, derived from the representative character of those offices in international law and practice. While the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v. Belgium)* (the *Arrest Warrant* case) offered clear authority that those officials enjoyed immunity *ratione personae*, it did not appear that the Court intended to limit such immunity to those three high offices of State, both in terms of the language used by the Court and by reference to the underlying functional basis for immunity. If immunity *ratione personae* attached to certain offices because of the necessity of their functions to the maintenance of international relations and international order, then certain high ranking office-holders, in addition to Heads of State, Heads of Government and ministers for foreign affairs, should enjoy such immunity. As mentioned in footnote 284 of the Commission's report (A/68/10) there were cases in the United Kingdom where such immunity had been extended to a visiting Minister of Defence and a visiting Minister for International Trade. Therefore, his delegation asked that the Commission should give the matter further consideration.

21. While he welcomed the understanding reached with the Special Rapporteur concerning the Commission's decision to include the topic of protection of the atmosphere in its current programme of work, he remained to be convinced that the topic was useful for the Commission to pursue, given that it was already well-served by established legal arrangements.

22. With respect to the Commission's decision to include the topic of crimes against humanity in its long-term programme of work, his delegation had considered the proposal set out in annex B to the report of the Commission (A/68/10) to develop draft articles for a convention on such crimes. As a party to the Rome Statute of the International Criminal Court, the United Kingdom was fully committed to combating crimes against humanity and had detailed prosecution and extradition processes in place for alleged crimes against humanity. Taking note of the relationship between a convention on such crimes and the Rome Statute, as analysed in the proposal, he stressed that any new conventions in that area must be consistent with and complementary to the Statute.

23. **Mr. Adsett** (Canada), referring to the draft articles on the expulsion of aliens adopted by the Commission on first reading at its sixty-fourth session (A/67/10, para. 45) and to the comments of the Special Rapporteur in paragraph 56 of his eighth report (A/CN.4/651), said that, while certain principles relating to the topic, such as non-refoulement, were well developed and widely accepted, the draft articles also contained standards drawn from international and regional instruments that did not enjoy universal acceptance, as well as from domestic legislation and regional jurisprudence. His delegation would continue to examine the draft articles and would provide written comments thereon. The careful balance struck in international law between promoting and protecting human rights, such as the right to seek asylum, and upholding States' sovereignty over their borders must be maintained.

24. **Mr. Meza-Cuadra** (Peru), speaking on the draft conclusions adopted in respect of the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that, as expressed in draft conclusion 1, articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. His delegation also believed that those rules, together with article 33 of the Vienna Convention, applied as international customary law. While recognizing that the interpretation of a treaty consisted of a single combined operation, which placed the appropriate emphasis on the various means of interpretation indicated in article 31 and 32 of the Vienna Convention, his delegation emphasized that the general

rule was article 31, and that the use of the supplementary means of interpretation under article 32 was discretionary in nature. In addition, an analysis of the object and purpose of a treaty could benefit from consideration of the nature of the treaty, in particular if its provisions were focused on economic matters.

25. With regard to draft conclusion 3, on interpretation of treaty terms as capable of evolving over time, his delegation attached importance to the question of so-called intertemporal law. In particular, it supported the interpretation of a treaty in the light of existing circumstances and law in respect of critical matters, such as questions relating to State borders, sovereignty rights and the exercise of jurisdiction in certain areas. However, in keeping with the Commission's reasoning, an evolutive approach could apply to treaties on economic matters in which definitions of specific concepts were not included, in order to allow the parties to remain flexible in their implementation. In any case, treaty interpretation must consider the text of the treaty as the authentic expression of the intentions of the parties.

26. While recognizing that the differences in the internal organization of State governance would make it difficult to include a reference to State organs in paragraph 1 of draft conclusion 5, his delegation believed that the analysis of the subsequent practice referred to in articles 31 and 32 of the Vienna Convention should articulate the significance of higher State organs.

27. The new topics of protection of the environment in relation to armed conflicts and protection of the atmosphere were welcome additions to the Commission's programme of work. Both topics responded to concrete needs within the international community and offered scope for the progressive development and codification of international law. Appropriate legal regimes were needed in order to consolidate the protection of the environment as a pillar of sustainable development, particularly in the context of the agreements made at the United Nations Conference on Sustainable Development (Rio+20), which would be reflected in the post-2015 development agenda.

28. The inclusion of the topic of crimes against humanity in the Commission's long-term programme of work was also important and would complement its work on other topics, including on the obligation to extradite or prosecute (*aut dedere aut judicare*) and immunity of State officials from foreign criminal jurisdiction.

29. **Ms. Lijnzaad** (Netherlands) said that the initial work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties demonstrated that the Commission's commentaries on the rules it formulated were perhaps even more important than the rules themselves. While the initial draft conclusions largely restated the existing provisions of the Vienna Convention on the Law of Treaties, the commentaries provided a rich and thoughtful analysis of the interpretation and application of the provisions. Given the international community's recent shift in focus from the development of norms to the implementation of those that had been internationally agreed, the Commission should concentrate on the implementation of and compliance with international law.

30. To that end, as an expert body of the General Assembly, the Commission could avail itself, through the Secretariat, of the necessary assistance of Member States to provide the materials required to analyse State practice and *opinio juris*. The collection, analysis and presentation of such materials provided valuable input to the international courts and tribunals. Her Government hoped, as work on the topic continued, that the Commission would be able to distil conclusions from State practice and *opinio juris* that went beyond restating existing provisions.

31. In setting out the scope of the draft articles on the topic of immunity of State officials from foreign criminal jurisdiction, the Commission had left open for later discussion and decision the important issue concerning the desirability of the term "State officials". Her delegation considered the term "representatives of the State acting in that capacity" as used in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property to be a more suitable wording, given that it covered the intention of the Commission and Member States to extend immunity from criminal jurisdiction to officials other than Heads of State, Heads of Government and ministers for foreign affairs, and to others falling under special immunity regimes. Her Government believed that, under customary international law, all members of official missions were entitled to immunity from criminal jurisdiction and must be regarded as temporary diplomats who required immunity in order

to perform their duties. The term “official mission” should be defined as a mission that was temporary in nature and represented a State. It should also be understood as referring to a mission to the Government of a receiving State that had consented to receiving the mission.

32. She recalled that the Commission had deliberately restricted the scope of the draft articles to immunity from the criminal jurisdiction “of another State”. The Commission’s assertion in the commentary to draft article 1 that “the immunities enjoyed before international criminal tribunals ... will remain outside the scope of the draft articles” could not imply that international criminal law was completely outside the scope of the draft articles, as many States had incorporated their obligations under international criminal law into their national criminal legislation. The Commission was not yet in a position to definitively address that issue, since diverse views had been expressed with regard to possible conflicting obligations. However, the matter was of great importance to her Government, as the Netherlands was host to the International Criminal Court and many other international criminal tribunals.

33. It should be recognized that functional immunities applied to those who enjoyed immunity *ratione personae*, even after they had left office. The Commission’s commentary to draft article 4 rightly noted that a Head of State, Head of Government or Minister for Foreign Affairs might have carried out acts in an official capacity which did not lose that quality merely because the term of office had ended and might accordingly enjoy immunity *ratione materiae*. However, her Government assumed that international law would be developed to exclude the functional immunities of State officials suspected of committing international crimes during the course of their duties. National courts could therefore, at times, not be precluded from exercising criminal jurisdiction over such persons.

34. Even where the Dutch International Crimes Act did not distinguish between immunity *ratione personae* and immunity *ratione materiae*, the explanatory memorandum to that legislation indicated that, in general, the rules of international immunity law had gradually become less absolute and more relative. For example, it had been accepted that Heads of State and Government and ministers for foreign affairs would no longer enjoy immunity for private acts committed while in office after they had left office. That trend towards more limited immunity had continued in recent years. In a 2011 report on immunity of foreign State officials, the independent Dutch Independent Advisory Committee on Issues of Public International Law drew a clear distinction between immunity *ratione personae* and immunity *ratione materiae*. One of the findings in that report was that immunity *ratione materiae* did not extend to international crimes committed in the course of duty. Only persons enjoying immunity *ratione personae* were entitled to full immunity, including immunity for the exercise of jurisdiction over international crimes.

35. With regard to the proposal to include the topic of crimes against humanity in the Commission’s long-term programme, her delegation believed that the prevention and prosecution of such crimes was of the utmost importance and required the constant vigilance of the international community. It appreciated the Commission’s efforts to determine the desirability of formulating a specific instrument on crimes against humanity and, in that regard, stressed that the issue must be considered in the context of the Rome Statute and the need to ensure its universal implementation in the near future.

36. It was important to recall that the formulation of article 7 of the Rome Statute had greatly contributed to specifying and defining crimes against humanity and that the agreement to that provision, and indeed the establishment of the International Criminal Court, were major achievements. Her delegation suggested that the definition provided in that article should be applicable to both States parties to the Statute and to non-States parties. It should also be recalled that crimes against humanity were part of the jurisprudence of, among others, the International Tribunal for the Former Yugoslavia, and were thus a well-established part of customary international law. Therefore, at the present stage, what was most needed in order to prevent and prosecute crimes against humanity was a renewed focus on improving the capacity to prosecute such crimes at the domestic level. Given the importance of the principle of complementarity, States must also build on the system established by the Rome Statute and facilitate cooperation between their judicial authorities in order to strengthen the investigation and prosecution of crimes against humanity at the domestic level, while maintaining the integrity of the agreements enshrined in the Rome Statute.

37. The international community did not lack a definition of crimes against humanity; instead, it required the operational tools to ensure the prosecution of such crimes. In situations where crimes had taken place in a State other than the prosecuting State, and in cases with many international elements, it was of key importance to connect the relevant national judicial systems so as to promote inter-State cooperation to ensure prosecution. That required an international instrument on mutual legal cooperation that would cover all the major international crimes, including crimes against humanity, and could provide an operational approach to ensuring prosecution for abhorrent crimes. Together with the Governments of Argentina, Belgium and Slovenia, her Government had proposed the opening of negotiations for such an instrument within the Commission on Crime Prevention and Criminal Justice in Vienna and invited other States to join in that effort.

38. **Mr. Joyini** (South Africa) said that the rapid evolution and development of international law over the last century had led to changes in the interpretation of treaties, which at times gave rise to legal uncertainty. In that regard, the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties touched on a critical aspect of the work of international jurists. The interpretation of international instruments that set out the rights and obligations of States directly affected the conduct of relations between States. The Commission's consideration of the topic in the context of the doctrine of so-called intertemporal law also confirmed that international law was a dynamic legal system and not merely a static expression of rules.

39. Given that the Vienna Convention on the Law of Treaties was the primary source of the rules of treaty interpretation, the Commission's work on the topic should seek to clarify and support the rules set out in that Convention rather than create new or competing rules. Draft conclusions were therefore the appropriate product of the Commission's discussions on the topic, and indeed, it should be commended for the five draft conclusions it had adopted. Draft conclusion 1 confirmed the general approach with respect to the interpretation of treaties by providing that the rules on treaty interpretation were set out in articles 31 and 32 of the Vienna Convention. His delegation took particular interest in the fact that draft article 1 distinguished between subsequent agreements and subsequent practice as set out in article 31 and other subsequent practice as a supplementary means of interpretation under article 32. That was a reflection of the fact that each treaty should be dealt with on its own merits, and should be interpreted as such.

40. However, draft article 1 raised a question for his delegation concerning the interpretation of treaties over time. He recalled that States at times relied on a model treaty to negotiate and conclude all treaties of a specific type, such as, for example, bilateral air services agreements or double taxation treaties. All treaties concluded on the basis of the model were then referred to as first generation treaties. In cases when a specific provision of the model treaty created difficulties, that provision was refined. If the State then proceeded to conclude all further treaties of that specific type using the refined clause, with those treaties becoming so-called second generation treaties, what role, if any, would the refined clause play in interpreting the first generation treaties? At least one of the parties' intentions with that clause had been clarified through subsequent agreements with other States in the second generation treaties, although the text of the first generation treaties remained unchanged.

41. In the light of draft conclusion 3, one possible approach was to assert that the clause of the first generation treaties was capable of evolving over time; the refinement that took place in the second generation of treaties should be considered an indication of the parties' intention, provided that the second generation treaty text was compatible with the first generation treaty text.

42. With regard to draft conclusion 2, his delegation agreed with the Commission that subsequent agreements and subsequent practice in relation to a specific treaty constituted objective evidence of the parties' intention in concluding the treaty and should be taken as a guide to determining the ordinary meaning of the terms of a treaty in their context and in the light of the treaty's object and purpose.

43. There was a clear *pacta sunt servanda* argument to be made with regard to draft conclusion 3, which addressed the evolution of treaties of time. There were cases when the intention of the parties was to apply specific terms in the treaty as they were generally understood at the time of its conclusion; in such cases, subsequent agreements and subsequent practice in

relation to the treaty would clearly show whether that intention had changed. However, that did not mean that the parties could change the objective meaning of the treaty through subsequent practice. Therefore, a clear distinction needed to be made between amendment and interpretation in relation to treaties. On the other hand, there were also specific treaties and topics which, by their very nature, were capable of evolving over time. Human rights treaties, for example, were often referred to as "living instruments". His delegation believed that the question of whether treaties should be subject to evolutive interpretation should be considered on a case-by-case basis. Such an approach appeared to be the one favoured by the Commission when drafting the conclusion; the accompanying commentary should clarify that point.

44. His delegation had no substantive concerns with the definition of subsequent agreement and subsequent practice set out in draft conclusion 4. However, it suggested that the conclusion should be given greater importance and placed directly after the general rules set out in draft conclusion 1.

45. With regard to the reference in draft conclusion 5 to non-State actors, based on the Special Rapporteur's first report on the topic (A/CN.4/660), it appeared that the Commission intended the term to refer to international organizations, non-governmental organizations and organizations such as the International Committee of the Red Cross (ICRC). His delegation accepted the role that those actors played in international law and recognized the added value their work and conduct could bring to treaties. It also noted that draft conclusion 5 clearly stated that the conduct of such actors did not constitute subsequent practice in the sense intended in the Vienna Convention but might be relevant when assessing the subsequent practice of parties to a treaty. Nevertheless, in the commentary to the draft conclusion, the Commission should clarify what value the conduct of those organizations would bring to the assessment of subsequent practice. His delegation would reserve further comment on the issue until it had had sight of the commentary to the draft conclusion.

46. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he noted that the Commission's work was of great importance, as it touched on fundamental principles of international law and had far-reaching implications for the stability of relations between States. The Commission had the potential to make a significant contribution towards achieving greater legal certainty regarding existing principles of international law and to contribute to the development of legal rules which could greatly enhance the friendly relations between States.

47. A careful balance must be struck between the protection of the well-established norm of immunity of representatives of States from the jurisdiction of foreign States and the avoidance of impunity for serious crimes. While it was necessary to respect fundamental principles, including the sovereign equality of States, immunity and territorial integrity, the recent developments in international law concerning human rights protection obliged the international community to fight impunity, particularly for serious crimes of international concern. In order to strike that delicate balance, the state of the law must be thoroughly investigated and understood. Specifically, the existence of immunity in State law and practice, the extent of such immunity and available exceptions, if any, must be critically assessed. Determining the existing basis of the immunity of State officials was a complex task that touched on an array of other issues in international law, including State responsibility and immunity, implied or express waiver of immunity and the dynamic area of international criminal law and the development of universal jurisdiction for certain international crimes.

48. As the development of international law shifted from absolute immunity towards a more restrictive approach, the international community must be careful, sober and responsible in its approach. The fight against impunity was inextricably linked to the common aspiration to guarantee fundamental human rights and to ensure that justice was served, particularly for grave international crimes such as genocide, war crimes and crimes against humanity. In its efforts to fulfil those objectives, the international community must avoid the misuse of jurisdiction for political purposes, in particular in developing the rules for according immunity to State officials. The judgment of the International Court of Justice in the *Arrest Warrant* case provided a starting point to assess the current state of the law on the question of immunity of State officials. In its judgment, the Court recalled that immunities "are not granted [to State officials] for their own benefit, but to ensure the effective performance of their functions on behalf of their respective States".

49. With regard to the draft articles adopted by the Commission on the topic, his delegation considered the dual approach to the rules pertaining to immunity *ratione personae* and immunity *ratione materiae* to be appropriate. While it understood the Commission's decision to begin with salient aspects of immunity *ratione personae*, it noted that various aspects of immunity were intricately connected and that the Commission might reconsider certain issues in the future.

50. The draft articles addressed several aspects pertaining to immunity *ratione personae*. The most far-reaching decision of the Commission pertained to holders of immunity *ratione personae*. His delegation had taken note of the Commission's debate on the issue, in particular the views expressed by some members that ministers for foreign affairs did not enjoy immunity *ratione personae*. In that regard, it wished to clarify that, while in her second report on the topic (A/CN.4/661), the Special Rapporteur had asserted that South Africa had repeatedly made the case against granting immunity *ratione personae* to ministers for foreign affairs, his delegation had in fact simply called for greater clarification on the issue without expressing a view. It was important that the Commission should conduct an extensive survey of State practice on that crucial question and not rely simply on rhetoric and theory. To that end, the Commission should examine South Africa's domestic legislation, including the Diplomatic Immunities and Privileges Act of 2001 and the Foreign States Immunities Act 87 of 1981, and other States' legislation and cases relevant to the holders of immunity *ratione personae*.

51. His delegation thanked the Commission's Working Group on the Long-term Programme of Work for its consideration of the proposal prepared by Mr. Sean D. Murphy (A/68/10, annex B) on the topic of crimes against humanity, which had since been added to the Commission's long-term programme of work. According to the syllabus for the topic, the rationale for its consideration appeared to be a need to fill a gap in the existing legal framework. The proposal was thus to prepare draft articles that would serve as a convention on crimes against humanity. Specifically, it was argued in the syllabus that, although the 1949 Geneva Conventions and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) codified war crimes and genocide, there was no international treaty in existence that obliged States to criminalize and exert domestic jurisdiction over crimes against humanity.

52. In considering that purported gap, his delegation noted that, while the Rome Statute, unlike the Genocide Convention, did not specifically provide that States should enact the necessary legislation to give effect to it and provide for penalties for persons guilty of an offence, it was implicit in the Statute that States parties must criminalize the most serious crimes in order to give effect to their obligations under the instrument. Furthermore, the preamble to the Statute clearly stated that States parties must ensure the effective prosecution of crimes "by taking measures at the national level and by enhancing international cooperation". Therefore, in order to properly implement the Rome Statute, a State must criminalize the crimes set out therein and implement the provision made for the arrest and surrender of individuals sought by the International Criminal Court. The cornerstone of the Rome Statute system was complementarity; that meant that domestic jurisdiction took precedence over the International Criminal Court, which was utilized only as a court of last resort. The entire system created by the Rome Statute required States to be in a position to investigate and prosecute serious crimes, including crimes against humanity, which had been sufficiently and clearly defined in the Rome Statute.

53. South Africa had criminalized crimes against humanity, as defined in article 7 of the Rome Statute, in its legislation implementing the Statute. The provisions of that legislation also provided for limited extraterritorial application. A number of other parties to the Statute had similarly utilized it as a basis for the criminalization of crimes against humanity. His delegation therefore did not consider that the Rome Statute was deficient in creating the possibility for States to criminalize such offences. It would prefer to define the problem of domestic jurisdiction as a lack of political will or lack of capacity among Member States to draft implementing legislation that criminalized serious crimes. Administrative or bureaucratic issues could also be causing delays in the drafting of national legislation. A new convention on crimes against humanity therefore would not necessarily remedy the concern that an insufficient number of States had criminalized crimes against humanity.

54. Furthermore, there was a significant amount of international interest and attention in what was known as "positive complementarity", which referred to the

strengthening of the domestic capability to investigate and prosecute serious crimes. To that end, South Africa served as a co-focal point for complementarity within the Assembly of States Parties to the Rome Statute. There were a number of projects and mechanisms in place to assist States in giving practical effect to the Rome Statute, including by putting in place domestic legislation so as to ensure that the system created by the Rome Statute, which depended on complementarity, worked in practice.

55. The existence of the Rome Statute and the fact that an increasing number of States had become parties to the instrument made the focus on a new, parallel convention on crimes against humanity unnecessary. His delegation believed that the Rome Statute offered a sufficient legal basis for the criminalization of crimes against humanity and provided an adequate framework for Member States, including South Africa, to exercise criminal jurisdiction over crimes against humanity.

56. Another gap identified in the syllabus was the need for a robust inter-State cooperation mechanism on crimes against humanity. Indeed, although part 9 of the Rome Statute set out the obligation of States parties to cooperate with the International Criminal Court, it did not provide an obligation for States to cooperate with each other. While the Genocide Convention provided for the granting of extradition in accordance with laws and treaties, there was no specific provision that compelled States to provide each other with mutual legal assistance or that created a cooperation regime for serious crimes. Consequently, the deficiency identified in the Rome Statute concerning obligations relating to inter-State cooperation was not particular to crimes against humanity and applied to all the serious crimes.

57. The prosecutorial strategy of the International Criminal Court had focused on those most responsible for the most serious crimes. In order to ensure that there was no impunity and that all persons responsible for serious crimes were held accountable, more efforts needed to be made to promote domestic prosecutions through a system of inter-State cooperation. In that regard, the Court's role must be further examined in order to ensure that it delivered on its mandate for justice and accountability in a sustainable way.

58. The Commission should pursue with caution any topic that could undermine the Rome Statute system. States that had not ratified the Statute might deem it sufficient to only ratify the proposed convention on crimes against humanity and continue to remain outside of the Rome Statute system. If there were indeed gaps in the international criminal framework, the international community should consider how to address those issues while promoting universal adherence to the Statute. He urged the Commission to reconsider whether the topic, as proposed, was a priority, bearing in mind that the gaps identified in the syllabus were not relevant to all States, in particular to those that were parties to the Rome Statute. There might be other ways to address the issue of improving cooperation between States in respect of serious crimes, and in fact there were ongoing initiatives in that regard. His delegation therefore had reservations in accepting that the topic in its current form should be placed on the Commission's agenda.

59. **Mr. Pákozdi** (Hungary) said that, while his delegation welcomed the progress made in the Commission's work in 2013, it wished to emphasize the importance of finalizing the issues that had been on the Commission's agenda for too long with moderate success.

60. Concerning the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation supported the Commission's decision to include a separate draft conclusion concerning the interpretation of treaty terms as capable of evolving over time. In so doing, it had recognized the fact that changes in the legal environment or in other areas could affect the implementation of an international treaty. It was vital to provide the possibility, and not the obligation, to parties to a treaty to give a term used in the treaty a meaning which was capable of evolving over time through subsequent agreements or subsequent practice.

61. The Commission had taken critical steps in its consideration of the topic by providing the definition of "subsequent agreement" and "subsequent practice". In connection with the rise of subsequent practice by one or more but not all parties to a treaty as a supplementary means of interpretation under article 32 of the Vienna Convention, his delegation reiterated that the view or practice of one State did not constitute international law and could not be forced on the other States parties to a treaty. His delegation agreed with the Commission's assessment that the term "subsequent" included the period of time between the moment when the text of a treaty had been established as definite and

the entry into force of that treaty. In that context, it also should be highlighted that the phrase "made... in connection with the conclusion of the treaty", as used in paragraph 2 of article 31 of the Vienna Convention, should be understood as including agreements that were made in close historical proximity with the conclusion of the treaty. His Government looked forward to the Commission's upcoming discussion on the exact interpretation of the relevant articles of the Vienna Convention, which would examine the question concerning the circumstances by which "an agreement of the parties regarding the interpretation of a treaty" was actually "established".

62. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, his delegation was pleased that the Commission had found a way to appropriately define the scope of the draft articles. The fact that the draft articles referred to immunity from "foreign" criminal jurisdiction indicated that the rules governing immunity before international criminal tribunals would not be affected by the content of the draft articles. His delegation welcomed that approach and noted that the draft articles must not affect the various types of existing international obligations imposed on States to cooperate with international criminal tribunals.

63. With regard to the protection of persons in the event of disasters, he reiterated that his Government viewed the event of a disaster as being primarily a national issue. Providing protection was thus mainly the obligation of the Government of the affected country. Competent ministries, their subordinate organizations and citizens were also obligated to participate in protection and restoration efforts. However, his delegation supported the idea of including the duty to provide assistance when requested, although that concept must be carefully worded. For example, the obligation could be set out within a strong recommendation or could be defined as an example to follow; the text should also take into account the capacities of the State from which the assistance was requested. In that regard, draft article 5 *bis*, which further clarified article 5 on the duty to cooperate, was welcome. His delegation was also grateful that draft article 5 called on States to cooperate not only among themselves, but also with relevant international actors. The issue presented a delicate legal situation, as it was difficult to balance the need to safeguard the national sovereignty of an affected State with the need for international cooperation to protect persons in the event of disasters. The Commission's greatest challenge in future work on the topic would be to find the appropriate form for the relevant draft articles. His delegation would approach any relevant proposal with an open mind.

64. With regard to the topic of formation and evidence of customary international law, his delegation agreed with the view that *jus cogens* should be considered a relevant component, as it was closely linked to the issue. In that regard, he noted that paragraph 2, Article Q, of the Fundamental Law of Hungary clearly stipulated that "Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law", while paragraph 3 of the same article stated that "Hungary shall accept the generally recognized rules of international law".

65. With respect to Hungary's practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in legislative and juridical proceedings, he noted that, in cases where the content of customary international law was in question before the courts or other authorities, they were obliged to request the advice of the respective Government ministries on the relevant rules of customary international law. The courts and authorities were then obligated to follow the determination of the ministries.

66. Turning to the topic of the provisional application of treaties, he recalled that the Commission had requested States to provide information on their national law and practice concerning the provisional application of treaties in relation to the decision to provisionally apply a treaty, the termination of such provisional application and the legal effects of provisional application. In Hungary, the relevant domestic law, Act 50 of 2005 on the conclusion of international treaties, contained detailed rules on the provisional application of international treaties. According to those rules, the provisional application must be decided by the same entity that was authorized to give State consent to be bound by a treaty. In Hungary, only the Parliament and the executive branch had the power to express that consent. The Parliament gave its authorization in the form of an act and the executive branch in the form of a decree.

67. Also under that legislation, if necessary, the Parliament or the executive branch could decide on the provisional application of the treaty. Termination of the provisional application was also effected through an act or decree. Since the laws by which the Parliament or executive branch agreed to the provisional application of a treaty also contained the text of the international treaty, the provisional application of a treaty had the same effect as the entry into force of the treaty, and the State was therefore bound to comply with the articles of the provisionally applied treaty.

68. With regard to the topic of protection of the environment in relation to armed conflicts, his delegation supported the Special Rapporteur's proposal to address the topic from a temporal perspective, rather than from the standpoint of various areas of international law, in order to make the topic more manageable. It also supported the proposal to focus the work on Phase I, which addressed obligations to a potential armed conflict, and Phase III, which focused on post-conflict measures.

69. **Mr. Ney** (Germany), speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that his delegation welcomed the Special Rapporteur's first report (A/CN.4/660), as well as the work undertaken by the Drafting Committee and the resulting draft conclusions, which provided excellent guidelines for the interpretation and application of treaty provisions. A well-balanced approach had been taken, as seen in the differentiation in draft conclusion 1, paragraphs 3 and 4, and draft conclusion 4 between "subsequent practice" under article 31 of the Vienna Convention on the Law of Treaties and "other subsequent practice". His delegation supported that approach, as it allowed non-consensual practice — in other words, practice shared by a large number of States but not all the States parties to a treaty — to be used in the interpretation of a treaty, while clarifying unequivocally that such non-consensual practice could serve only as a supplementary means of interpretation under article 32 of the Vienna Convention.

70. His delegation welcomed the formulation of draft conclusion 3, which took into account the possibility that treaty provisions could evolve over time, but also made it clear that subsequent agreements and practice might argue for a static interpretation. Draft conclusion 5, which touched on whether the conduct of non-State actors could play a role in the interpretation of a treaty, clarified that it was the subsequent practice of contracting States that counted under articles 31 and 32 of the Vienna Convention; however, it did not completely rule out the possibility that the conduct of non-State actors could also have relevance when assessing the subsequent practice of States. Further discussion of that question was needed.

71. With regard to the immunity of State officials from foreign criminal jurisdiction, his delegation welcomed the second report of the Special Rapporteur (A/CN.4/661) and supported the Commission's work on the draft articles. There were good reasons for the restrictive approach taken in draft article 3, which limited immunity *ratione personae* to the so-called "troika" of Heads of State and Government and ministers for foreign affairs; however, there might be a small number of other high-ranking officials who also enjoyed such immunity. While frequent travel would not be sufficient to include an official in that category, particular exposure to judicial challenge might carry weight. Furthermore, in order to ensure that States remained able to act, immunity *ratione personae* must be considered together with the immunity enjoyed by other high-ranking officials when on official visits, based on the rules of international law relating to special missions, as had been clarified in the commentary to draft article 3. His delegation also welcomed the distinction made between immunity from foreign civil jurisdiction and immunity from foreign criminal jurisdiction, and the project's focus on the latter.

72. While the Special Rapporteur had indicated in her second report that the topic should be approached from the perspective of both *lex lata* and *lex ferenda*, his delegation maintained its position that the Commission should base its work on *lex lata*. The rules of immunity were predominantly rooted in customary international law because, in the politically sensitive area of delimitation of and mutual respect for States' sovereign powers to which questions of immunity related, the sovereign rights of the States concerned must be finely balanced. The rules of *lex lata* had proven to meet those requisites.

73. His delegation underlined the importance of specifically identified *opinio juris* and relevant State practice in the analysis of the normative elements of immunity *ratione materiae* and the issue of exceptions to immunity, which would be considered in the Special Rapporteur's third report, and urged States to provide

the Commission with information on their practice with regard to the topic.

74. **Mr. Klanduch** (Slovakia), commending the Commission's decision to address the important topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that the Special Rapporteur's first report (A/CN.4/660) was well structured and balanced. While the provisions of the Vienna Convention on the Law of Treaties reflecting customary law provided a general framework for the complex process of interpreting an international treaty, his delegation expected the Commission to provide States with substantial guidance on that process, particularly on how to interpret and apply articles 31 and 32 of the Convention. One of the most difficult tasks facing an interpreter of a treaty was that of deciding how to place appropriate weight on the various means of interpretation indicated in the said articles. The Commission should therefore elaborate more on that issue.

75. As there was no doubt that subsequent agreements and subsequent practice constituted objective evidence of the parties' understanding as to the meaning of the treaty and were therefore authentic means of interpretation, it was essential to have a common understanding of the meaning of those terms. In that regard, the Commission's attempt to provide a narrow definition of the terms "subsequent agreements" and "subsequent practice" under article 31 of the Vienna Convention and a broader concept of subsequent practice under article 32 of the Convention was very helpful.

76. The Commission made a distinction between the mandatory nature of the primary means of interpretation and the discretionary nature of supplementary means of interpretation. His delegation would welcome further elaboration on the relationship between subsequent practice in a broader sense and other supplementary means of interpretation under article 32 of the Vienna Convention, in particular *travaux préparatoires*. While subsequent practice was generally understood to serve as a means of identifying the original intent of parties with respect to a treaty, the question arose as to whether or to what extent it might depart from or modify that original intent. In that regard, it was also crucial to ask whether the meaning of a term or provision in a treaty was capable of evolving over time.

77. Lastly, his delegation raised the question of whether the broader understanding of parties to a treaty leading to the establishment of "subsequent practice" could be quantified. References to the "vast majority of [European States]" in the case law of the European Court of Human Rights or "some examples... from the legislation of ... American countries" in the jurisprudence of the Inter-American Court of Human Rights did not clarify the issue.

78. **Mr. Salinas** (Chile), speaking on the topic of immunity of State officials from foreign criminal jurisdiction, said that, in addressing the topic, the Commission must clarify a number of key concepts, including "officials", "official act" and "jurisdiction". His delegation agreed with the approach taken by the Commission in draft article 1, paragraph 1 of which explained the cases to which the draft articles applied, while paragraph 2 contained a "without prejudice" clause listing the situations which, under international law, were governed by special regimes not affected by the draft articles, such as the special rules applying to persons connected with diplomatic missions.

79. The orientation of the draft articles must focus on State officials, whatever the term eventually used to refer to that concept. Bearing in mind that, according to the Commission, the terms used in the various language versions were not synonymous, it would be advisable to define the concept. That said, his delegation considered that, in the Spanish version, "funcionarios" was the best term to describe the beneficiaries of immunity to whom the draft articles applied.

80. His delegation also shared the Commission's opinion that the scope of the draft articles should be confined to immunity from criminal jurisdiction. While it understood the Commission's decision not to define that concept in draft article 1, it also noted that the draft definition formulated by the Special Rapporteur in her second report (A/CN.4/661, draft art. 3) had not been included in the text of draft article 3 provisionally adopted by the Commission. It was essential that the draft articles should include at least some elements of a definition of criminal jurisdiction, bearing in mind that the concepts of immunity and foreign criminal jurisdiction were closely interrelated. In that regard, the commentary stating that "foreign criminal jurisdiction should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual,

including coercive acts that can be carried out against persons enjoying immunity in this context", should, without prejudice to future developments, be incorporated in the draft articles.

81. His delegation also agreed that the scope of the draft articles should be confined to immunity from the criminal jurisdiction "of another State", thereby excluding immunities from the jurisdiction of international tribunals. It might be appropriate for the Commission to consider including that point in a specific draft article rather than merely noting it in the commentary. Furthermore, the draft articles should expressly state that immunity from foreign criminal jurisdiction was procedural, not substantive, in nature and therefore could not constitute a means of exempting the criminal responsibility of a person from the rules of criminal law.

82. Turning to draft article 3, he said that his delegation agreed with the Commission's restrictive approach in identifying the persons to whom immunity *ratione personae* applied, given that the concept unequivocally applied to Heads of State, Heads of Government and ministers for foreign affairs, while there was a lack of clarity on whether it also applied to other actors. In his delegation's opinion, that reflected the current state of international law. As the Commission had indicated, it had been amply demonstrated under the rules of international law, particularly with regard to the conclusion of treaties, that those three office-holders represented the State in its international relations simply by virtue of their office, with no need for specific powers to be granted by the State. As such, it was logical that all three office-holders should enjoy immunity *ratione personae* by virtue of their high-ranking office, as had also been recognized by the International Court of Justice. Although, with regard to ministers for foreign affairs, there was insufficient relevant practice and jurisprudence and, in the *Arrest Warrant* case, some judges of the International Court of Justice had expressed divergent opinions on the matter, the nature of those officials' functions justified their inclusion in the "troika".

83. However, his delegation did not agree with the Commission that it was irrelevant whether they were nationals of the State in which they held the office of Head of State, Head of Government or Minister for Foreign Affairs. Nationality was one of the crucial factors for determining that those individuals should enjoy immunity *ratione personae*; in that regard, the Vienna Convention on Diplomatic Relations expressly stated that diplomatic agents who were nationals of the receiving State enjoyed immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. Further consideration should therefore be given to that point.

84. International law had not advanced to the point where the scope of immunity *ratione personae* could be understood to include other high-ranking officials per se. However, bearing in mind the evolution of international relations, and the fact that States were no longer represented by the "troika" alone, the Commission should explore, through consultation with States, whether such immunity was indeed limited to the "troika" or could be extended to other senior officials.

85. Concerning draft article 4, his delegation agreed with the Commission's approach in seeking to deal with the scope of immunity *ratione personae* from both the temporal and material standpoints; however, it would be clearer if those two aspects were also reflected in the title of the draft article. Although paragraph 1 covered the temporal aspect and paragraph 2 the material aspect, the latter also had a temporal component. With regard to the temporal scope, it might therefore appear that paragraph 1 of draft article 4, which stated that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae* only during their term of office, was contradicted by paragraph 2, according to which such immunity covered all acts performed by those officials during or prior to their term of office. The wording of draft article 4, particularly paragraph 2 thereof, could therefore be better drafted in order to make it clear that the two ideas were conceptually distinct.

86. Some elements of international law made it advisable for immunity *ratione personae* to be applied to acts performed prior to the term of office of the official concerned, mainly because of the need to ensure that such officials were able to exercise their official functions unimpeded. However, even when explained as merely a suspension of the exercise of jurisdiction, that approach should be analysed by the Commission in greater detail, particularly with regard to its implications for serious international crimes. In effect, while the Commission had based the rule on the judgment of the International Court of Justice in the *Arrest Warrant* case, it should be noted that the Rome

Statute of the International Criminal Court, which recognized no immunities from the Court's jurisdiction for serious international crimes, had not entered into force as of the date of that judgment. Hence, the issue should primarily be analysed in light of the fact that the States parties to the Rome Statute, in accordance with rules on complementarity and cooperation, were obliged to comply with arrest warrants issued by the Court, whatever the rank of the person subject to the warrant. Consideration should also be given to the issue in relation to the principle *aut dedere aut judicare*, which was contained in some conventions relating to serious international crimes. In that regard, the analysis should also cover acts performed during the officials' term of office.

87. **Ms. Telalian** (Greece), speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that her delegation fully supported the Commission's decision to base its examination of the topic on the Vienna Convention on the Law of Treaties and, in particular, articles 31 and 32 thereof, which were generally considered to reflect customary international law, as well as on the Commission's previous work on the law of treaties, including relevant excerpts from its reports to the General Assembly and the reports of Special Rapporteurs concerning rules on treaty interpretation. Those texts were important not only for understanding how the rules on treaty interpretation had been drafted but also for identifying possible lacunae in the existing rules embodied in the Convention that had been deliberately left open and could require further analysis and clarification. The role of subsequent agreements and subsequent practice in relation to the interpretation of treaties was one such issue that needed to be explored.

88. The text of draft conclusion 1 was therefore a valuable reaffirmation of the existing rules on treaty interpretation that should underpin and guide the Commission's work on the topic. As stated in the commentary to draft conclusion 1, article 31 of the Vienna Convention, as a whole, was *the* "general rule" of treaty interpretation, which, together with article 32, constituted an integrated framework for the interpretation of treaties. Within that framework, subsequent agreements and subsequent practice meeting the criteria of article 31, paragraph 3, of the Vienna Convention formed an integral part of the general rule of interpretation. In other words, they were placed on the same footing as other primary means of treaty interpretation, which, unlike the supplementary means referred to in article 32 of that Convention, not only could, but must, be taken into account in the interpretation process. As stated by the Commission in its 1966 report to the General Assembly (A/6309/Rev.1), it was only logic that suggested that, because they were extrinsic to the text, the elements in paragraph 3 of article 31 should follow and not precede the elements in the previous paragraphs. However, all of those elements were of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which preceded them.

89. Accordingly, it was not clear why the Commission, in its report on its sixty-fifth session (A/68/10), seemed to draw a distinction between the term "authentic means of interpretation", as used in draft conclusion 2 to describe the not necessarily conclusive, but more or less authoritative, character of subsequent agreements and subsequent practice under article 31, paragraphs 3 (a) and (b), and the term "authentic interpretation", which, according to the Commission, was often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty. The proposed criterion for that distinction was not operative. If the parties to a treaty could collectively agree to modify or terminate it, they could, a fortiori, interpret it by means of a subsequent agreement regarding its interpretation or the application of its provisions, and such interpretative agreement between them should necessarily have a binding effect. From that perspective, interpretative agreements that met all the criteria of article 31, paragraph 3 (a), of the Vienna Convention should represent an authentic interpretation binding upon the parties. The same applied with regard to subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation. The binding effect of such means of authentic interpretation derived from the legal nature of the agreement itself, of which the subsequent practice under article 31, paragraph 3 (b), seemed to be nothing more than the factual proof.

90. For the same reason, regarding the definition of "subsequent agreement" in paragraph 1 of draft conclusion 4 as an authentic means of interpretation, her delegation agreed with the Commission that the use of the term "subsequent agreement" instead of

"subsequent treaty" in article 31, paragraph 3 (a), of the Vienna Convention was intended to signify that, for the purposes of treaty interpretation, there were no requirements regarding the form of the agreement to be taken into account, provided that it was a legally binding agreement governed by international law. In other words, in her delegation's view, there were insufficient grounds to suggest that a subsequent agreement under article 31, paragraph 3 (a), was not necessarily binding.

91. The assumption contained therein could also give rise to misleading conclusions with regard to other provisions of the Vienna Convention, such as article 39, where the term "agreement" was similarly used to indicate that there were no requirements regarding the form of the agreement, whether written or not, but where there was no doubt that an instrument must be legally binding in order to be qualified as an "agreement". In that regard, it should be pointed out that any difficulties in the application of informal agreements, in particular verbal ones, should not affect their validity. The same applied in respect of constitutional requirements regarding the entry into force of international agreements, which could in some cases function as a barrier to the modification of a treaty by an informal agreement.

92. Her delegation strongly supported the distinction proposed by the Commission in paragraphs 2 and 3 of draft conclusion 4, which defined "subsequent practice" as an authentic means of interpretation and "other subsequent practice" as a supplementary means of interpretation, since only subsequent practice that met all the criteria contained in article 31, paragraph 3 (a), qualified as an authentic means of interpretation that should be taken into account in the interpretation process. The proposed distinction was useful not only for terminological but also for practical reasons, as international courts and tribunals did not always sufficiently explore the elements of subsequent practice in treaty interpretation and thus tended to give it a subsidiary, confirmative role.

93. Her delegation had some doubts, however, as to whether it was appropriate to include draft conclusion 3, on the interpretation of treaty terms as capable of evolving over time, in the text of the very first set of draft conclusions, which were general in nature. Attempts to identify the presumed intention of the parties upon the conclusion of the treaty by applying the various means of interpretation recognized in articles 31 and 32 could lead to misleading conclusions. It would be artificial to conclude that it had been the parties' initial intention to give a term used in the treaty, even a generic one, an evolving meaning, when such an evolution was usually linked to further developments in international law that the parties had not envisaged at the time of conclusion of the treaty. Furthermore, the possibility that the intention of the parties, rather than the meaning of a given term, might evolve over time should also be explored. Her delegation suggested that the Commission should, at a later stage of its work on the topic, examine whether subsequent agreements or subsequent practice, under article 31, paragraphs 3 (a) and (b), of the Vienna Convention, might result in a departure from the original intent of the parties, as stated by the International Court of Justice in its judgment on the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. In the same vein, the Commission should examine the little explored question of whether, and under which circumstances, such a departure from the original intent of the parties, on the basis of a subsequent interpretative agreement or subsequent practice that established the agreement of the parties to a treaty's interpretation, could amount to an informal modification of the treaty. In that regard, it should be recalled that the Commission, as part of its previous work on the law of treaties, had proposed draft article 38 (Modification of treaties by subsequent practice), which had been rejected by a majority of States at the United Nations Conference on the Law of Treaties, 1968-1969.

94. Turning to draft conclusion 5 on the attribution of subsequent practice, she said that paragraph 1 thereof, and the clarifications contained in the commentary, were particularly useful because, as stated therein, it was the subsequent practice attributable to the parties to a treaty that could be taken into account for the purpose of interpretation. Consequently, the reference to other conduct, including by non-State actors, did not fit in the text of the actual draft conclusion, and would be better placed in the commentary dealing with other relevant forms of conduct, such as social practice not attributable to the parties.

95. Referring to the topic of immunity of State officials from foreign criminal jurisdiction, she said that her delegation welcomed the Special Rapporteur's second report (A/CN.4/661), which took account of

discussions in both the Commission and the Sixth Committee in 2012, as well as new developments over the last year, particularly with regard to international and national jurisprudence. With regard to draft article 1, which indicated concisely and clearly that the draft articles related only to immunity from foreign criminal jurisdiction, her delegation agreed with the Commission that immunity from foreign criminal jurisdiction was strictly procedural and did not relieve a foreign official who enjoyed such immunity from his or her individual criminal responsibility under the substantive rules of criminal law. The same conclusion had been drawn by the International Court of Justice in the *Arrest Warrant* case.

96. Her delegation agreed with the approach taken in article 1, paragraph 1, which made it clear that the scope of the draft articles did not cover the immunities enjoyed by an official before international criminal tribunals. The text had been further improved by the Commission's deletion of the phrase "without prejudice to the provisions of draft article 2" from the wording originally proposed by the Special Rapporteur. Concerning the "without prejudice" clause in paragraph 2 of draft article 1, it was important to clarify further that the list of special immunity regimes was not exclusive. In that regard, her delegation wondered whether the clarifications in the commentary on the use of "in particular" were sufficient.

97. With regard to draft article 3, her delegation concurred with the Commission that the enjoyment of immunity *ratione personae* by Heads of State, Heads of Government and ministers for foreign affairs was justified for representational and functional reasons and sufficiently supported by State practice and international law. Furthermore, it fully agreed with those delegations that opposed the extension of immunity *ratione personae* from foreign criminal jurisdiction to other high-ranking officials. As the Special Rapporteur and the Commission had rightly emphasized, State practice in that regard was neither widespread nor consistent, and was not conclusive enough to justify extending such immunity to include senior State officials other than the "troika", though, as the Commission had stated, that was without prejudice to the rules pertaining to immunity *ratione materiae*. Her delegation supported the use of the words "from the exercise of" in draft article 3, as that formulation better illustrated the procedural nature of the immunity and the relationship between immunity and foreign criminal jurisdiction.

98. With regard to the issue of possible exceptions to immunity, her delegation firmly believed that in the face of the most serious crimes of international concern, such as genocide, crimes against humanity and serious war crimes, immunity should be set aside and the draft articles should properly reflect current trends in international law. The Commission should further consider the issue in its future deliberations, taking account of important international treaties and jurisprudence in that field.

99. **Mr. Válek** (Czech Republic), speaking on the topic of immunity of State officials from foreign criminal jurisdiction, said that his delegation generally welcomed both the structure and the content of the three draft articles provisionally adopted by the Commission at its sixty-fifth session, and considered that they properly captured the scope of the whole topic, the basic characteristics of the immunity of State officials and the scope of immunity *ratione personae*. With regard to the special regimes that were not affected by the draft articles, it might be useful, either in the text of the appropriate draft article or in a commentary to it, to clarify the distinction between the "absolute" immunity *ratione personae* dealt with in the draft articles and the immunity *ratione personae* enjoyed by State officials, including high-ranking officials, while on special missions abroad. Even though only a relatively small number of States had become parties to the Convention on Special Missions, the customary law regime reflecting the rules of the Convention was relevant for the vast majority of official visits to foreign States, including visits by high-ranking State officials.

100. In that regard, it should be noted that the "full" or "absolute" immunity *ratione personae* dealt with in the draft articles should also protect Heads of State and Government and ministers for foreign affairs when they were on private visits abroad and even provide them with immunity from the exercise of universal jurisdiction when they were in their home State. In contrast, the special regime of immunity *ratione personae* provided for under the regime of special missions protected State officials only when they represented their State abroad in the framework of their substantive duties, as mentioned in the commentary to draft article 3. With regard to that draft article, which seemed to strike an appropriate balance between the

sovereign equality of States and respect for the rule of law at the international level, his delegation shared the Commission's view that high-ranking officials other than Heads of State and Government and ministers for foreign affairs did not enjoy immunity *ratione personae* for purposes of the present draft articles; those other officials enjoyed immunity from foreign criminal jurisdiction based on the rules relating to special missions, when they were on official visits abroad.

101. Turning to the Commission's work programme, he recalled that the Commission had decided at its fifth-eighth session to include the topic "Jurisdictional immunity of international organizations" in its long-term programme of work. That topic was becoming increasingly important and practically relevant in view of the more intense economic and other activities of international organizations and the more frequent cases brought unsuccessfully against international organizations in national courts, among other reasons. It also appeared that, in comparison with other areas of immunities provided under international law, there was a relative scarcity of materials on the immunities of international organizations, including commentaries or *travaux préparatoires* to existing conventions. As mentioned in the report of the Commission on its fifty-eighth session (A/61/10), the topic could cover issues concerning the existence of rules of general international law on the immunities of international organizations, the role of alternative means of settling disputes and avoidance of denial of justice, and aspects of the immunities of international organizations provided for in existing international conventions. The Commission should therefore consider the appropriateness of including that topic in its programme of work.

102. His delegation appreciated the inclusion of the new topic "Protection of the atmosphere", subject to a number of limiting conditions, in particular that the work on the topic should not interfere with relevant political negotiations in various forums. It also welcomed the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work and recommended that the Commission should proceed with the topic at its sixty-sixth session, on the basis of the proposal prepared by Mr. Sean D. Murphy.

103. **Mr. Kim** In-chul (Republic of Korea) said that the Commission's work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties deserved particular attention, in view of the practical difficulties associated with articles 31 and 32 of the Vienna Convention on the Law of Treaties. By identifying and clarifying the scope and role of various agreements and practices related to the interpretation of treaties, the Commission would be able to provide States with appropriate guidelines in that regard.

104. The Commission's commentary to draft conclusion 1, stating that all means of interpretation in article 31 were part of a single integrated rule, affirmed the absence of any hierarchy among the means of interpretation provided for in article 31 of the Vienna Convention and thereby resolved a long-standing question. His delegation took particular note of the commentary indicating that the obligation to place appropriate emphasis on the various means of interpretation was not to suggest that a court or any other interpreter was more or less free to choose how to use and apply the different means of interpretation but to require the interpreter to carry out an evaluation that consisted in identifying the relevance of different means of interpretation in a specific case and in determining their interaction. At the same time, he recalled that interpretation of a treaty fell to each State's own authority, in the first instance, and that individual States were therefore responsible for identifying the different means of interpretation.

105. Draft conclusion 2 and the commentary thereto would play an important role in clarifying the meaning of the term "authentic". According to the commentary, subsequent agreements included non-binding agreements of all States parties to a treaty after its conclusion; in that regard, further discussion of cases where most, but not all, parties agreed on a decision would be helpful.

106. With regard to draft conclusion 3, his delegation agreed with the Commission that subsequent agreements and subsequent practice could be used to apply evolutive interpretation, since there was little doubt that such interpretation was needed in line with social and other developments. However, it was also clear that it should not be forced beyond the extent intended by the original drafters of a treaty. Lastly, with regard to the attribution of subsequent practice, his delegation shared the Commission's opinion that only the practice of States parties to treaties constituted subsequent practice that must or could be taken into account. While interpretation by dispute settlement

bodies was helpful in identifying subsequent practice, it did not ipso facto constitute subsequent practice under the Vienna Convention.

107. Referring to the topic of immunity of State officials from foreign criminal jurisdiction, which was directly related to major issues such as the sovereign equality of States and the fight against impunity, he said that his delegation concurred with the three parameters formulated in draft article 1, though it hoped that the Commission would continue to work on them, particularly with regard to the definition of State officials and the scope of criminal jurisdiction. His delegation also supported the Commission's view that immunity from foreign criminal jurisdiction was strictly procedural in nature, as had been affirmed by the International Court of Justice in the *Arrest Warrant* case.

108. With regard to draft article 3, he recalled that, at the sixty-seventh session of the General Assembly, his delegation had expressed doubt about broadening the scope of immunity *ratione personae* to include other high-ranking officials, because it would make it difficult to determine exactly who was entitled to it. Restricting the scope of such immunity to the "troika" should bring greater clarity to the immunity regime.

109. His delegation agreed with the scope of immunity *ratione personae*, as set out in draft article 4. Since immunity *ratione personae* covered all acts of its beneficiaries, differences in the terminology used to refer to acts performed in an official capacity would not pose any practical problem with regard to that type of immunity. However, the distinction between "official acts" and "acts performed in an official capacity" would have consequences for the scope of immunity *ratione materiae*. His delegation therefore hoped that the Commission would discuss that terminological issue in depth when it addressed the question of immunity *ratione materiae*. With regard to the Commission's decision not to concern itself at the present stage with the issue of possible exceptions to immunity, he recalled the existence of concerns that all-encompassing immunity could hinder international efforts against impunity. Although immunity was a well-established system under international law, exceptions might exist in the case of international crimes that threatened the common values of the international community. His delegation hoped that the Commission would help to identify such possible exceptions and that the Special Rapporteur's third report, which would focus on immunity *ratione materiae* and possible exceptions to immunity, would provide clear guidelines in that regard.

110. **Ms. Orosan** (Romania), speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that the draft conclusions provisionally adopted by the Commission, which were general in nature, established a framework for analysis and anticipated the issues to be further explored. Her delegation shared the view, expressed in draft conclusion 1, that articles 31 and 32 of the Vienna Convention reflected customary international law and considered that the same was true of article 33. Furthermore, it agreed with the distinction made by the Commission between subsequent State practice under article 31 of the Vienna Convention and subsequent practice under article 32. It considered that the former was more relevant to treaty interpretation than the latter, which was merely a supplementary, and therefore not an authentic, means of interpretation. While, as stated in draft conclusion 1, paragraph 5, the various means of interpretation of a treaty were to be applied by way of a single combined operation, without any predetermined hierarchical order, the emphasis placed by the interpreter on a certain means of interpretation did not signify a departure from the provisions of the Vienna Convention, or lead to arbitrariness, but was part of the complex interpretation process that required the circumstances of each specific case to be taken into account. However, paragraph 5 of draft conclusion 1 would be better placed immediately after paragraph 1 of the same draft conclusion, given that it was general in nature. Furthermore, while the "nature" of a treaty might be relevant to its interpretation, it could not be used per se to establish an abstract rule on the weight to be given to certain means of interpretation, owing to the impossibility of anticipating an exhaustive list of situations that gave rise to the need for treaty interpretation.

111. With regard to draft conclusion 3, the Commission's arguments for maintaining a balanced approach between contemporaneous and evolutive interpretation were justified and expressed in appropriate language. Her delegation considered that either approach was relevant, depending on the circumstances that gave rise to the need for treaty interpretation.

112. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, she said that, thanks to the Special Rapporteur's outstanding work, significant progress had been made in the Commission's consideration of that topic. Concerning draft article 1, her delegation strongly believed that the term "officials" should be carefully analysed, not only because the term and its equivalents in other language versions were not synonymous, but also because of its very wide scope in national systems. Given that the Commission had rightly limited the scope of immunity *ratione personae* to the immunity from foreign criminal jurisdiction of Heads of State, Heads of Government and ministers for foreign affairs, it might be useful, for the sake of clarity and unambiguity, to consider changing the title of the draft articles to indicate that their scope covered the immunity both *ratione personae* and *ratione materiae* of a very limited number of State officials, without prejudice to the fact that the Commission's future consideration of immunity *ratione materiae* could widen the scope of the draft articles. However, it was her delegation's view that the acts of other officials of a State fell within the "without prejudice" clause of draft article 1, paragraph 2.

113. Bearing in mind that foreign criminal jurisdiction could be understood to mean any jurisdiction other than that of the State concerned, including the jurisdiction of international courts and tribunals, which was in fact excluded from the scope of the topic, there would be merit in replacing the phrase "foreign criminal jurisdiction" throughout the draft articles with "criminal jurisdiction of another State", as used in draft article 1, paragraph 1. Lastly, although the Commission considered that the conditions under which a person acquired the status of Head of State, Head of Government or Minister for Foreign Affairs were irrelevant for the purposes of the draft articles, those conditions should nonetheless be discussed, for example, in the case of extraordinary events leading to the permanent or temporary replacement of one of those officials.

114. In relation to draft article 4, her delegation noted that the text did not emphasize the temporal scope of immunity, although it implicitly included it through the use of the word "only" in paragraph 1 of the draft article. As the International Court of Justice had shown in the *Arrest Warrant* case, a person who was no longer Head of State, Head of Government or Minister for Foreign Affairs no longer benefited from the procedural stay of exercise of the criminal jurisdiction of another State that was attached to immunity *ratione personae*. However, that was without prejudice to the immunity *ratione materiae* that remained attached to acts performed by those individuals during their term of office.

115. The Commission's work on the topic to date was generally very accurate, reflecting the status of the issue under international law and international and national practice. Her delegation particularly looked forward to the Commission's future consideration of limitations to the immunity *ratione personae* of State officials in view of the scope of application of international criminal law, especially with regard to the commission of serious crimes of international concern, such as crimes against humanity, genocide and war crimes. In that regard, it also invited the Commission to consider whether the exercise of criminal jurisdiction by a State over another State's officials included the arrest of those officials in order to surrender them to an international criminal court, on the basis of the former State's duty to cooperate with that court.

116. Her delegation welcomed the Commission's decision to include the topic "Protection of the atmosphere" in its programme of work. It appreciated the Commission's work on issues related to the protection of the environment and encouraged it to include more such topics. While it also appreciated the Commission's decision to add the topic "Crimes against humanity" to its long-term programme of work, more consideration should be given to the proposed outcome of its inclusion, in view of other related initiatives.

117. **Mr. Kingston** (Ireland), speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that, with regard to draft conclusion 1, his delegation supported the decision to reproduce, in paragraph 2, the text of article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, given its overall importance to the topic and the fact that it reflected customary international law. His delegation also welcomed the principle that the interpretation of a treaty consisted of a single combined operation, as expressed in paragraph 5, and considered that there was no need to include a reference to the nature of the treaty, because article 31, paragraph 1, of the Vienna Convention required treaty

terms to be interpreted in their context and in the light of the treaty's object and purpose. Such a reference could lead to an unwelcome categorization of treaties and weaken the unity of the approach to treaty interpretation.

118. His delegation agreed with the inclusion in draft conclusion 2 of the phrase "being objective evidence of the understanding of the parties as to the meaning of the treaty", based on paragraph (15) of the 1966 commentary to draft article 27 on the law of treaties, since it neatly encapsulated the significance of subsequent agreements and subsequent practice within the meaning of article 31, paragraphs 3 (a) and (b), of the Vienna Convention. Paragraph (4) of the commentary to draft conclusion 3 contained a useful explanation on the inclusion of the term "whether or not".

119. His delegation particularly welcomed draft conclusion 4, and paragraphs (9), (10) and (11) of the commentary thereto, which provided an instructive explanation of the relationship between article 31, paragraphs 3 (a) and (b), and article 32. It looked forward to further work by the Commission on the circumstances under which a subsequent agreement between the parties was binding and the circumstances under which it was merely a means of interpretation among several others. While the distinction between agreed subsequent practice under article 31, paragraph 3 (b), as an authentic means of interpretation, and other subsequent practice, in a broad sense, under article 32, implied that a greater interpretative value should be attributed to the former, it was important to maintain the flexibility currently exercised by international courts and tribunals in interpreting treaty terms or provisions in the light of subsequent practice, in the broad sense, where that was deemed appropriate or necessary. His delegation therefore welcomed the decision not to limit the scope of the relevant conduct in draft conclusion 5 to conduct attributable to a State "for the purpose of treaty interpretation".

120. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, and recalling that his delegation had urged the Committee to give continued priority to the topic, he welcomed the considerable progress that had been made in starting to address the topic over the last year. His delegation supported the methodical, step-by-step approach favoured by the Special Rapporteur and agreed with her decision to defer consideration of sections 1.2 and 1.3 of her workplan for future reports.

121. With regard to draft article 1, his delegation considered that the immunity of foreign State officials was solely procedural in nature, not substantive or material, in that it did not absolve an official from the obligation to respect the laws of a foreign State in which he or she was present. The words "the exercise of", which had appeared in the version of draft article 1 originally presented by the Special Rapporteur, should therefore be included in paragraph 1 of draft article 1 on the scope of the draft articles, in order to make clear that the draft articles referred only to immunity from the exercise of jurisdiction, and not to immunity from a State's prescriptive jurisdiction. His delegation welcomed the Commission's express intention to give further consideration to the term "officials" in the context of immunity *ratione materiae*. It supported the drafting of the scope of the draft articles in both its positive and negative dimensions, in draft article 1, and concurred with the omission of the reference to "other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory" contained in the version of draft article 2 originally presented by the Special Rapporteur.

122. His delegation welcomed the statement in draft article 3 to the effect that immunity *ratione personae* applied to Heads of State, Heads of Government and ministers for foreign affairs. It concurred with the Special Rapporteur that any expansion of immunity *ratione personae* beyond the "troika" would constitute progressive development, but was open to considering carefully the possibility of such development. Furthermore, it tended to agree with the Drafting Committee that, as the "troika" did not enjoy immunity *ratione personae* as a function of nationality, it was better to omit the phrase "of which they are not nationals" from the draft article.

123. His delegation commended the clarity of each of the three paragraphs of draft article 4, dealing with the temporal and material scope of immunity *ratione personae*, as well as the commentary thereto, and supported the decision to adopt the language of the International Court of Justice in the *Arrest Warrant* case, by using the phrase "whether in a private or official capacity".

124. With regard to the additional draft article on definitions presented by the Special Rapporteur in her

report (A/CN.4/661), although his delegation supported the inclusion of procedural aspects of asserting the immunity of foreign officials and the significance of the pre-trial stage in the Commission's work on the topic, it understood concerns about the necessity or usefulness of defining some of those terms. It looked forward to further discussion on that matter during the Committee's work on the topic.

The meeting rose at 12.55 p.m.