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Chair: Mr. Manongi . . . . . (United Republic of Tanzania)

Contents

Agenda item 76: Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session (*continued*)

Agenda item 77: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*)

Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session (*continued*)

14-63733 (E)

The meeting was called to order at 3.05 p.m.

Agenda item 76: Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session (A/C.6/69/L.5 and A/C.6/69/L.6) (*continued*)

Draft resolution A/C.6/69/L.5: Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session

1. *Draft resolution A/C.6/69/L.5 was adopted.*

Draft resolution A/C.6/69/L.6: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

2. *Draft resolution A/C.6/69/L.6 was adopted.*

Agenda item 77: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (A/C.6/69/L.7) (*continued*)

Draft resolution A/C.6/69/L.7: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law

3. **Mr. Korontzis** (Secretary of the Committee), speaking in accordance with rule 153 of the rules of procedure of the General Assembly, said it was anticipated that the regional courses in international law and the work on the United Nations Audiovisual Library of International Law envisaged in paragraph 7 of the draft resolution would be undertaken during the 2016-2017 biennium and would entail additional resource requirements amounting to approximately $1,816,000. That funding would be included in the proposed programme budget for 2016-2017, in accordance with established budgetary procedures. The adoption of draft resolution A/C.6/69/L.7 would therefore not entail any additional appropriation under the programme budget for the biennium 2014-2015.

4. *Draft resolution A/C.6/69/L.7 was adopted.*

Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session (A/69/10) (*continued*)

5. **The Chair** invited the Committee to continue its consideration of chapters VI to IX of the report of the International Law Commission on its sixty-sixth session (A/69/10).

6. **Mr. Stemmet** (South Africa) said that the obligation to extradite or prosecute was a key element in the quest to end impunity for international crimes such as genocide, crimes against humanity and war crimes and a useful tool in bridging the gap between domestic and international criminal justice systems. His delegation was of the view that in order to extradite a suspect to a State having jurisdiction over a case or instigate its own judicial proceedings, a State must have custody of the individual. It supported the Commission's approach to determining the scope of the obligation through analysis of relevant conventions on a case-by-case basis, and it agreed that some trends and common features could be found in the more recent conventions. It also believed that any meaningful consideration of the topic must be centred on universal jurisdiction. The obligation to extradite or prosecute was essentially a treaty-based obligation, which States undertook mainly on the basis of treaty provisions. However, if the crime to which the obligation was applied was a crime under customary international law, the obligation to extradite or prosecute might also become an obligation under customary international law.

7. In relation to effective fulfilment of the obligation to extradite or prosecute, it was notable that a number of States had provided for the obligation in their jurisdictions and that in recent years many, including South Africa, had provided for a third alternative by enacting legislation implementing the Rome Statute of the International Criminal Court or other criminal legislation. Sometimes such legislation provided clearly for the obligation to extradite or prosecute, while at other times it appeared to be optional, although it was a duty of States parties to the Rome Statute, not an alternative, to surrender persons.

8. Regarding the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Vienna Convention on the Law of Treaties was the primary source of the rules of treaty interpretation. As confirmed by the International Court of Justice in a number of cases, including those concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article 31 of the Vienna

Convention establishing that a treaty must be interpreted in good faith in accordance with the ordinary meaning of the terms thereof reflected customary international law. The Commission's work on the topic should serve to complement and supplement articles 31 and 32 of the Convention. The Commission should continue to acknowledge and promote the primacy of the Vienna Convention while at the same time contributing to the development of international law by identifying and codifying practical rules of treaty interpretation with regard to subsequent agreements and subsequent practice. His delegation therefore supported the decision to prepare draft conclusions aimed at assisting in treaty interpretation.

9. His delegation was generally satisfied with the draft conclusions and commentaries provisionally adopted thus far, which made it clear that subsequent agreements and subsequent practice must relate specifically to the treaty being interpreted. Accordingly, if a State's treaty practice became more specific over time in subsequent treaties of the same type, such subsequent treaty practice would not have an impact on the interpretation of earlier, less specific treaties of that type. Whether or not the subsequent agreement or practice truly related to the treaty being interpreted would have to be determined on a case-by-case basis. However, what would happen if a State's practice concerning a specific treaty changed over time? At what point would the State's prior or initial practice become irrelevant and a new practice take precedence? It might be argued that the weight to be given to new practice should depend on the criteria identified in draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation). Accordingly, new practice would only supersede initial practice when it was clear, specific and repeated a sufficient number of times to establish it as the new practice. It was likely, however, that the States involved would argue that the new practice had immediately superseded the initial practice, regardless of any other criteria.

10. The inclusion of a specific draft conclusion dealing with decisions adopted by a conference of States parties, while interesting, raised the question of whether the same principles would apply to meetings or large groups of States in other forums, such as the United Nations General Assembly or Human Rights Committee or the Organisation for Economic Co-operation and Development, which might, in some specific circumstances, make pronouncements that related to the interpretation of a treaty. With regard to the Commission's request for examples of practice, pronouncements or other actions of international bodies relating to treaty interpretation, he suggested that one would be the North American Free Trade Agreement. While it did not fall strictly within the scope of the questions posed in chapter III of the Commission's report, it was an example of a treaty providing States with the opportunity to agree to a binding interpretation of some of the norms contained therein.

11. The Agreement established a Free Trade Commission that had the power to supervise its implementation, oversee its further elaboration and resolve disputes regarding its interpretation or application; such interpretations would be binding on any arbitral tribunals established in accordance with the Agreement. The Commission had made use of those powers on two occasions. A similar mechanism existed under numerous foreign investment protection treaties and under the Agreement Establishing the World Trade Organization and the Articles of Agreement of the International Monetary Fund. It might be of value to the Commission in its work on the topic to consider the practice of having committees made up of political stakeholders who had the power to limit or expand the scope of protections or standards provided for in a treaty.

12. Bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights provided another example. They issued general comments clarifying the obligations of States under the International Covenant on Civil and Political Rights in the case of the former and the International Covenant on Economic, Social and Cultural Rights in the case of the latter. The International Labour Organization also had a committee of experts that advised on the application of relevant conventions and recommendations. Although that committee did not necessarily provide interpretations of any of the Organization's conventions, it was reasonable to expect that its observations would have an impact on how States parties interpreted them.

13. The work done to date on the topic of immunity of State officials from foreign criminal jurisdiction provided much food for thought. His delegation agreed that the definition of "State official" should encompass persons who enjoyed immunity *ratione personae* as well as those who enjoyed immunity *ratione materiae*.

It also agreed with the Commission's use of an open-ended definition with respect to State officials enjoying immunity *ratione personae*, rather than a definition that identified such officials *eo nomine*.

14. He had noted the Commission's view that the linkage between the State and the official for the purpose of establishing immunity *ratione materiae* could be twofold, encompassing both the concept of representation of the State and that of the exercise of State functions. All definitions were fraught with danger (*omnis definitio periculosa est*) and uncertainty, however, and his delegation therefore welcomed the commentary's elaboration of those two concepts. Nevertheless, work remained to be done on the definition.

15. It had been submitted that there were two related policies underlying the conferment of immunity *ratione materiae*. First, it provided a substantive defence for ensuring that State officials would not be held liable for acts that were in essence those of the State and for which State responsibility must arise. Second, on a procedural level, the immunity of State officials from the jurisdiction of foreign courts prevented circumvention of the responsibility of the State through proceedings against those who acted on behalf of the State.

16. The clarification in draft article 1 (Scope of the present draft articles), paragraph 2, regarding immunity from criminal jurisdiction under special rules of international law was welcome. It was clear that the question of immunity from the jurisdiction of international criminal tribunals, whether established by a treaty or a binding resolution of the United Nations Security Council, fell outside the scope of the draft articles. It was less clear whether State officials could rely on immunity *ratione personae* or immunity *ratione materiae* from the jurisdiction of foreign domestic courts if the alleged crime was generally regarded as an international crime. It had been argued that such immunity should not apply because it was accorded only in respect of sovereign acts, and international crimes, as violations of *jus cogens* norms of international law, could not constitute sovereign acts.

17. Various international treaties provided for extraterritorial jurisdiction by domestic courts over the acts they aimed to criminalize. Two examples were the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide. The latter provided that any persons committing acts of genocide, including constitutionally responsible rulers and public officials, must be punished and could be charged in the State in which the act was committed. Those provisions could be interpreted as allowing State officials to be charged with genocide extraterritorially, in the domestic courts of the State concerned, and as excluding any procedural defence based on immunity *ratione personae* or *ratione materiae*. The Commission should undertake a careful study on the possible limits to be set in the draft articles with respect to immunity *ratione personae* and immunity *ratione materiae*. In the case of treaty-based international crimes, where an obligation to prosecute might be imposed on States parties, any situation in which such immunities might be used as procedural defences against the jurisdiction of foreign domestic courts would be contrary to the object and purpose of the relevant treaties.

18. Like many other States, South Africa had incorporated obligations to prosecute international crimes in its domestic law. For example, it had legislation providing for extraterritorial jurisdiction by South African courts over non-nationals who committed grave breaches of the Geneva Conventions. While it could be argued that its Diplomatic Immunities and Privileges Act would preserve immunity *ratione personae* for Heads of State, it appeared that immunity *ratione materiae* and immunity *ratione personae* for Heads of Government, Ministers for Foreign Affairs and other State officials would not apply. A careful balance must be struck between 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. In his statement he had focused on easily identifiable treaty-based crimes and their relationship to State functions, but a broader investigation of State practice might be necessary to establish which acts constituted international crimes, their relationship with the concept of State acts and the possible exclusion of immunity *ratione materiae*, and also of immunity *ratione personae*, in prosecutions for such crimes in foreign domestic courts.

19. **Mr. Martín y Pérez de Nanclares** (Spain), referring to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", said that the fight

against impunity for the perpetration of the most serious crimes against humanity was an irrevocable obligation of the international community. His delegation welcomed the Commission's adoption of the final report on the obligation to extradite or prosecute and its decision to conclude its consideration of the topic. Nevertheless, it continued to have serious doubts with respect to the topic and the issues that needed to be addressed in relation to it. The obligation operated differently under the various treaty regimes and therefore was difficult to systematize. In addition, there was still enormous uncertainty regarding key aspects of the matter, which did not make it easy to establish a clear position. There was also considerable disagreement as to whether the obligation to extradite or prosecute had become a rule of customary international law, either generally or regionally. In his delegation's view, no meaningful conclusions in that regard could be drawn from the oft-cited judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The work on the topic, more than on any other, illustrated why the International Law Commission should always do its utmost to make it clear whether its conclusions or guidelines represented the codification or the progressive development of international law in a specific area.

20. The most recent work of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to interpretation of treaties represented an excellent contribution to the study of the matter. However, although the Drafting Committee established by the Commission had improved the wording of draft conclusions 6 to 10, they remained too general; they should be made more precise and given, if possible, greater normative content. A good example of the lack of precision was draft conclusion 6 (Identification of subsequent agreements and subsequent practice), which was clearly descriptive in nature. Draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) could be more detailed, especially in its paragraph 3. The provision regarding silence in paragraph 2 of draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty) should also be examined in greater depth, as tacit agreements depended greatly on the specific circumstances of each case. Nevertheless, his delegation did not intend to prompt a fruitless debate about whether the Commission's work should be descriptive or prescriptive because, as the Special Rapporteur had rightly stated, it should be both. Above all, however, it should be useful for practice.

21. The Commission should carry out a more in-depth study in order to arrive at a suitable definition of the term "interpretative agreement". Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties clearly distinguished between interpretation and application of a treaty. The word "agreement" in that article referred to a well-established concept of international law, which should be clearly distinguished from the non-binding instruments that could be used as means of interpretation according to article 32. In general, a much clearer distinction should be drawn between the provisions of article 31, paragraph 3, and those of article 32.

22. With regard to the interesting and inevitable debate concerning the difference between interpretation and modification of a treaty, his delegation agreed with the Special Rapporteur's view, expressed in paragraph 116 of his second report (A/CN.4/671), that the dividing line between the two was often difficult, if not impossible, to fix. General international law did not preclude the parties to a treaty from creating customary law through subsequent practice if the relevant *opinio juris* existed; in fact, the absence of a hierarchy of norms in international law would support such a possibility. However, a systematic effort should be made to keep the two processes separate, as their legal consequences were different. Indeed, there was some question about the interplay between article 31, paragraph 3, and article 39 (General rules regarding the amendment of treaties) of the Vienna Convention. Although there had been arbitral awards that raised some doubts, his delegation believed that the International Court of Justice had maintained a clear and cautious position in that regard.

23. On the extraordinarily complex issue of protection of the atmosphere, it was worth remembering that the Commission had expressed serious doubts about the topic and had included it in its programme of work with the understanding, inter alia, that the work would proceed in a manner that did not interfere with relevant political negotiations and would exclude questions relating to outer space. It was also important to recall that that understanding had allowed for a certain amount of flexibility. Nevertheless, given the problems associated with the topic and the

constraints imposed on the Special Rapporteur, there was reason to question whether a viable outcome would be possible and, moreover, whether consideration of the topic really fit within the functions of the Commission, in view of the insufficiency of international consensus on undertaking the legal development of the topic. On the other hand, it was true that the fragmentation resulting from the existence of different regimes might leave room for the identification and systematization of common principles.

24. In the first report on the topic (A/CN.4/667), the Special Rapporteur had put forward the concept of a "common concern of humankind", which was attractive from an academic standpoint; however, unlike the well-established concept of "common heritage", it was vague and lacking in precise legal content. It was also subject to widely varying legal interpretations. Moreover, it might be concluded that the concept would give rise to substantive legal obligations for States to protect the atmosphere beyond the obvious obligation of international cooperation. A more in-depth and detailed study would be needed to justify such a conclusion. His delegation therefore looked forward to an exploration, in the second report, of the responsibilities of States with respect to protection of the atmosphere, although it recommended a cautious approach.

25. The definition of "State official" proposed by the Special Rapporteur in draft article 2 (Definitions), subparagraph (e), of the draft articles on immunity of State officials from foreign criminal jurisdiction illustrated the complexity of the topic. It was difficult but essential to define the concept in order to delimit the scope of immunity. The first problem was finding equivalents for the term "State official" in the various other languages. Indeed, his delegation had doubts about the proposed terms in both Spanish (*funcionario del Estado*) and French (*représentant de l'État*). The problem probably stemmed partly from the fact that States had differing definitions of the term "official" (*funcionario*) and that the concept did not exist as such in international law.

26. In addition, the definition combined representative ("individual who represents the States") and functional ("or exercises State functions") elements. He did not wish to enter into a debate about whether the most important element was the act or the person who performed it, although the question deserved consideration. Greater clarity might be needed, however, with regard to the specific link between the individual and the State. Certainly, the phrase "who represents the State" could be understood in a broad sense, but the link between the individual and the State could by no means be interpreted so broadly as to encompass all de facto officials. Likewise, the reference to the exercise of "State functions" was far too imprecise and open-ended and raised many doubts. It was unclear, for example, whether it would apply to officials of federal entities who represented their regional governments abroad or to employees of private entities in the service of the State. It should also be asked whether there was not sufficient practice, at least in some States, to consider the immunity of legal persons on a case-by-case basis.

27. The wording of draft article 5 (Persons enjoying immunity *ratione materiae*) could also be improved. His delegation agreed that it was not possible to draw up a list of persons enjoying such immunity and that they must be identified on a case-by-case basis by applying the criteria set out in draft article 2. However, the imprecision of those criteria rendered draft article 5 similarly imprecise.

28. **Mr. Wan Jantan** (Malaysia) said that in identifying and interpreting subsequent agreements and subsequent practice in relation to the interpretation of treaties it was necessary to ask, as indicated in draft conclusion 6 (Identification of subsequent agreements and subsequent practice), whether the parties had taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations. Subsequent agreements and practice should be a basis for interpretation only if they were motivated by the treaty and not by other external considerations. With regard to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), his delegation noted the opposing views of the World Trade Organization Appellate Body and the European Court of Human Rights.

29. While his delegation agreed that the determination of whether a subsequent practice had a modifying effect should be made on the basis of the treaty provisions, it was concerned by the notion that subsequent practice of the parties could not be wholly precluded as a possibility in law. Modification or amendment of a treaty should only be done in line with articles 39 to 41 of the Vienna Convention on the Law of Treaties. His delegation was also concerned that certain general comments or general recommendations

of a human rights treaty body might have the effect of altering the provisions of a treaty or providing an overly broad interpretation of treaty provisions. Such possible effects should be explored by the Special Rapporteur in a future report.

30. Draft conclusion 8 identified some criteria that might be useful for determining the interpretative value or weight of a subsequent agreement or subsequent practice. Those criteria, however, should be subject to other rules on treaty interpretation contained in the Vienna Convention, in particular those in article 31, paragraph 1. With regard to draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), his delegation was of the view that extreme caution should be exercised in dealing with the question of silence as acceptance and believed that the provisions of paragraph 2 should be carefully scrutinized in the light of the views of various adjudicatory bodies. As to draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties), his delegation agreed that when there existed an objection by a State, the adoption of a decision by consensus could not represent a subsequent agreement under article 31, paragraph 3(a), of the Vienna Convention; it was not sure, however, that paragraph 3 of the draft conclusion clearly translated the Special Rapporteur's intention to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance.

31. With regard to the topic of protection of the atmosphere, his Government was conducting internal consultations with scientific experts to assess the acceptability of the definition of "atmosphere" put forward in draft guideline 1 (Use of terms). Concerning draft guideline 2 (Scope of the guidelines), his delegation was hopeful that the Special Rapporteur would elucidate the specific types of human activities to be covered under the draft guidelines with an eye to ensuring that they would not overlap with the activities covered under the existing international regime on environmental protection. It would also welcome clarification of the terms "deleterious substances" and "energy" and an explanation of how their meaning differed from that of common terms such as "hazardous substances", "pollutants" and "waste". His delegation was not prepared to comment on the legal status of the atmosphere, as it was still analysing the five concepts highlighted in the Special Rapporteur's first report (A/CN.4/667), namely "airspace", "shared or common natural resources", "common property", "common heritage" and "common concern".

32. Regarding the topic of immunity of State officials from foreign criminal jurisdiction, the Commission's focus should be on the immunities accorded under international law, particularly customary international law, not under domestic law. There was no need to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations; those categories of persons should be excluded from any definition of "State officials". His delegation noted that the definition in draft article 2, subparagraph (e), included any individual who represented the State or who exercised State functions, including those employed on a contract basis. While it welcomed the effort to establish parameters for determining which individuals would enjoy immunity, it found the language of the draft article ambiguous and considered the acceptability of the definition subject to further clarification by the Special Rapporteur in a future report.

33. With regard to draft article 5 (Persons enjoying immunity *ratione materiae*), no reason had been given for the deletion of the definition of "immunity *ratione materiae*". It was imperative to define the term in order to determine the circumstances in which State officials would be granted immunity from foreign criminal jurisdiction. His delegation agreed with the view that the basic feature of immunity *ratione materiae* was that it was granted to all State officials for acts performed in an official capacity and was not limited in time. Indeed, such immunity might continue even after an individual was no longer a State official.

34. **Mr. Dancs** (Hungary) said that while his delegation welcomed the progress made in the Commission's work during the previous year, it wished to underline the importance of finalizing topics that had remained on its agenda for too long with only moderate success. It would be advisable to suspend work on topics on which little progress had been made in recent years, thereby enabling the Commission to introduce new topics on which new rules were needed or existing rules required amendment in order to adjust to changing realities.

35. With regard to the topic of expulsion of aliens, the goal of codification in that area of law was to find

the delicate balance between protection of human rights and State sovereignty. Therefore, the Commission should have focused on codifying the minimum rules on the expulsion of aliens rather than on further development of existing customary law. Draft article 19 (Detention of an alien for the purpose of expulsion) reflected the relevant European Union law and Hungarian legislation on the matter. However, the formulation "cannot be carried out" in paragraph 3, subparagraph (b), was too general; the wording "reasonable prospect of forcible implementation of the expulsion no longer exists" would have been less ambiguous. Paragraph 2 of draft article 21 (Departure to the State of destination) should have specifically reaffirmed the right of States to use coercive measures in cases of forcible implementation of the expulsion, provided such measures were in line with international human rights obligations and respect for human dignity.

36. His delegation was delighted to see that draft article 29 (Readmission to the expelling State) had been modified in accordance with its previous comments. However, the current wording was still too broad and the draft article lacked clarity regarding the interpretation of the word "unlawful", as it provided that the right to readmission into the expelling State would apply in cases in which the expulsion had been unlawful solely on the basis of substantive law. Mere procedural errors did not make the expulsion unlawful.

37. Part five of the draft articles (Legal consequences of expulsion) should contain a separate provision regarding States' obligation to readmit their nationals. The inalienable right of a person to return to his or her own country was part of customary international law and was also clearly stipulated in article 13 of the Universal Declaration of Human Rights and in article 12 of the International Covenant on Civil and Political Rights. The obligation of States to readmit their own nationals was the reverse aspect of that principle of customary law, which his delegation regretted to find missing from the draft articles. The highly debated issue of diplomatic protection, on the other hand, was not closely related to the subject of the draft articles and should therefore have been omitted from the text. Lastly, in order to prevent conflicts in respect of different international obligations and *lex specialis* regimes such as European Union law, the draft articles should contain a provision stating that they were without prejudice to other international obligations of States in so far as they contained more preferable treatment for the persons concerned.

38. With regard to the Commission's request for information on national practice and legislation on the topic of protection of the environment in relation to armed conflicts, Hungary, as a State committed to environmental protection, was a party to several international treaties that directly or indirectly ensured protection of the environment during armed conflicts, including the first Protocol Additional to the Geneva Conventions, the Convention concerning the Protection of the World Cultural and Natural Heritage and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. It was also a party to the Rome Statute of the International Criminal Court. Its primary applicable laws were those treaties and the relevant standards of the North Atlantic Treaty Organization. In order to comply with the principles and requirements laid down in those instruments in the execution of defence-related tasks, the Ministry of Defence of Hungary had developed an environmental protection doctrine creating a comprehensive system of tasks related to environmental protection, based on domestic and European Union laws, as well as North Atlantic Treaty Organization standards.

39. By adopting on first reading the set of draft articles on protection of persons in the event of disasters, the Commission had made substantial progress on the topic. His delegation recognized the fundamental difficulty involved in the work on the issue, namely finding the right balance between the need to safeguard the national sovereignty of affected States and the need for international cooperation for the protection of persons in the event of disasters. It would submit additional detailed comments in due course.

40. **Mr. Otto** (Palau), referring to the topic of protection of the atmosphere, said that for Palau, as a small island nation, protection of the natural environment was a key priority. The atmosphere was a fundamentally important natural resource, the integrity of which was inextricably linked with the health of all its other natural resources, including its oceans. The country was committed to exploring ways to alleviate further degradation of the atmosphere that led to climate change, depletion of the ozone layer and transboundary air pollution. His Government therefore welcomed the Commission's work on the topic. Indeed, the country's

senate had adopted a resolution urging the President of Palau to express strong support for that work.

41. It was clear that protection of the atmosphere raised myriad complex legal issues. Precisely for that reason, the Commission, with its undisputed legal expertise, was justified in continuing to explore the issues in further detail. It should perhaps even consider drafting an international convention that would organize all the piecemeal efforts undertaken thus far into a meaningful framework that could provide practical guidelines for protection of a most important global public good. Issues relating to obligations should not constrain the collective desire and responsibility to protect the planet and render it safe and healthy for present and future generations.

42. From a legal perspective, the topic required an integrated approach that treated the atmosphere as a single global unit, since it was a dynamic and fluid substance moving constantly across national boundaries. The condition of the oceans and of the atmosphere were also intricately connected, and it would therefore be important to ensure interlinkages with the law of the sea. He wished to stress his delegation's view that the protection of the atmosphere should be recognized as a common concern of humankind. The air connected all at the most elemental level, and international cooperation had a fundamental role to play in combating atmospheric degradation.

43. **Mr. Kingston** (Ireland), noting that a more detailed version of his statement would be made available on the Committee's PaperSmart portal, said that his delegation welcomed the five draft articles and commentaries provisionally adopted by the Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties. As explained in the commentary, the final sentence in paragraph 1 of draft conclusion 6 (Identification of subsequent agreements and subsequent practice) was merely illustrative. His delegation would suggest that adding the words "for example" after the words "this is not normally the case" would make the illustrative nature of the text clearer. Further consideration should be given to the idea in draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) that amending or modifying a treaty by subsequent practice had not been generally recognized. As noted in the commentary, the case law of the European Court of Human Rights suggested that a treaty might permit the subsequent practice of the parties to have a modifying effect, depending on the treaty provisions concerned. In that regard, his delegation wondered whether the conclusion summarized in paragraph (35) of the commentary was fully reflected in the third paragraph of the draft conclusion.

44. As to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation welcomed draft article 2 (Definitions), subparagraph (e), and agreed with the use of the term "State official" rather than other possible options, in particular "State organ", which would be more naturally applicable to inanimate entities than to human persons. However, while the definition of "State official" needed to be broad in order to cover the wide range of individuals who might enjoy immunity, the proposed definition might be overly so. The terms "represents the State" and "State functions" were themselves very broad and might need to be further defined. His delegation was satisfied that draft article 5 provided an accurate general statement on the subjective scope of immunity *ratione materiae* and looked forward to further discussion on the topic.

45. Lastly, the Commission's very useful final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" would undoubtedly serve as a valuable resource for any future consideration of the matter by national authorities and others.

46. **Mr. Troncoso** (Chile), referring to the topic of protection of persons in the event of disasters, said that he would confine his remarks to the last two of the draft articles adopted by the Commission on first reading. The full text of his statement on the topic would be made available on the PaperSmart portal. Draft article 20, which provided that the draft articles were without prejudice to applicable special or other rules of international law, reflected the principle of *lex specialis* and other well-established principles concerning the interpretation of different texts on the same subject. His delegation failed to understand why the same principles had been excluded from draft article 21 (Relationship to international humanitarian law). The two systems embodied in the draft articles and in international humanitarian law could easily coexist. Although the rules of international humanitarian law should apply preferentially in a situation of armed conflict, some of the rules in the draft article could well be applicable when a disaster occurred as a result of an armed conflict, especially in view of the broad definition of

"disaster" in draft article 3 (Definition of disaster) and the inclusion of principles such as those in draft article 7 (Humanitarian principles), according to which assistance and relief in response to a disaster should be provided in accordance with the principles of humanity, neutrality and impartiality.

47. With regard to the topic of subsequent agreements and subsequent practice in relation to treaty interpretation, which was simply a development of subparagraphs (a) and (b) of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties, the Special Rapporteur's treatment of the matter had been meticulous and appropriate. He had used significant current examples of State practice and the case law of international tribunals — particularly the International Court of Justice — but also of other jurisdictional bodies. In general, the five draft conclusions provisionally adopted by the Commission were satisfactory, and for the moment his delegation had no problem in accepting them in principle. In his view, draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) was the most important one. Its third paragraph, however, could have been worded more forcefully in order to make it clear that subsequent practice served to interpret a treaty, but not to amend or modify it. The United Nations Conference on the Law of Treaties had rejected, by an overwhelming majority, the possibility that a treaty could be modified by subsequent practice. It had been pointed out that modification by subsequent practice would circumvent constitutional control, which would undermine the stability of treaties and the very principle of *pacta sunt servanda*. Moreover, as confirmed by the Special Rapporteur's detailed analysis, in the almost half a century since the adoption of the Vienna Convention, there had been no judgments of the International Court of Justice stating that subsequent practice could modify or amend a treaty. Under existing international law, therefore, subsequent practices of States parties to a treaty, although they constituted an important element for its interpretation, could not be considered sufficient to modify the treaty.

48. Several premises underlay the complex topic of immunity of State officials from foreign criminal jurisdiction. Such immunity had several complementary and interrelated sources, including the principles of international law concerning the sovereign equality of States and non-interference in internal affairs, as well as the need to ensure the stability of international relations and the interdependence of States in the conduct of their activities. Although immunity from jurisdiction was normally an impediment to the enforcement of criminal responsibility, it must not lead to impunity for those responsible for serious crimes under international law.

49. His delegation fully supported the two draft articles proposed by the Special Rapporteur in her third report (A/CN.4/673) , which were admirably clear and precise and could have a major influence on the subsequent treatment of the topic. The determining factor in the definition of "State official" in draft article 2, subparagraph (e), was the existence of a link between the person and the State, which might be either that the official represented the State or that he or she exercised State functions. Draft article 5 addressed the question of which State officials would enjoy immunity *ratione materiae* in a similarly simple, precise and satisfactory manner: when a State official acted as such, either representing the State or exercising State functions, that official would enjoy immunity from foreign criminal jurisdiction. Of course, as indicated in the commentaries, that provision did not prejudge the question of which acts could be covered by the immunity.

50. Concerning the topic of identification of customary international law, the Special Rapporteur's study and conclusions were, in general, appropriate and well argued. His delegation agreed that the final outcome of the work on the topic should be a practical guide to assist practitioners in identifying customary international law. The terms used by the Special Rapporteur in relation to his two-element approach, "a general practice" and "accepted as law", which were taken from Article 38 of the Statute of the International Court of Justice, were more forceful and precise than those usually employed, as they affirmed that custom consisted of a material element — general, consistent and uniform practice — and a subjective element — *opinio juris*. As stated in draft conclusion 5 (Role of practice),the requirement, as an element of customary international law, of a general practice meant that the practice of States contributed to the creation of rules of customary international law. Such practice might take a wide variety of forms, as indicated in draft conclusion 7 (Forms of practice), including replies to questionnaires of the International Law Commission. Inaction, as a manifestation of the conduct of a State, might also

serve as practice. However, in view of its negative character, the Special Rapporteur should delve further in his next report into the question of inaction as a form of practice, including some examples in his commentaries. Other issues such as the creation of customary rules might also be included in the next report.

51. With regard to the topic "Provisional application of treaties", his delegation endorsed the broad agreement expressed by the Commission that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State that had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State. It was important to mention in that connection that aspects of domestic law could, in practice, limit the provisional application of certain provisions of treaties in cases where those provisions required prior approval by the national legislature.

52. Crimes against humanity, one of the new topics to be included in the Commission's programme of work, was an issue on which both the Commission and the General Assembly had already made significant progress. The concept of crimes against humanity was well defined in the Rome Statute of the International Criminal Court, and several States, including Chile, had modified their domestic criminal legislation to bring it into line with the Rome Statute. The Commission's future work on the topic should therefore not aim to redefine the concept, but rather to regulate the effects and consequences of categorizing an act as a crime against humanity. In his delegation's opinion, the first consequence should be the obligation either to prosecute or to extradite the perpetrator of such a crime. The Commission could also help to define the possible scope of universal jurisdiction in the case of crimes against humanity and the circumstances in which the State in which the crime was committed should have preference in trying the case, the overriding aim always being to ensure that serious crimes of international importance did not go unpunished.

53. His delegation welcomed the Commission's decision to include the topic of *jus cogens* in its long-term programme of work. One of the Commission's most important contributions was to have incorporated in a treaty instrument a clear and precise concept of what constituted a peremptory norm of general international law, or in other words a *jus cogens* rule. While a significant number of States participating in the United Nations Conference on the Law of Treaties 40 years earlier had expressed reluctance about — or frank disagreement with — the concept of *jus cogens* as it had been incorporated into the Vienna Convention, it was now widely accepted by States, international tribunals and scholars. Indeed, almost all writers considered *jus cogens* to be one of the basic foundations underlying the current international legal order. Nevertheless, there were several issues concerning its nature, the requirements for its identification and its consequences or effects that fully justified its inclusion in the Commission's programme of work. His delegation agreed that the main legal issues to be studied by the Commission should be the legal nature of *jus cogens*, the requirements for the identification of a norm as *jus cogens*, an illustrative list of norms that had achieved the status of *jus cogens* and the consequences or effects of *jus cogens*.

54. In conclusion, he wished to suggest that in the resolution to be adopted on the Commission's report special reference should be made to the fruitfulness of the work it had accomplished in the previous year.

55. **Mr. Sirikul** (Thailand), commending the Commission's work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), said that the Working Group established by the Commission had addressed all of the issues to which the Sixth Committee had accorded top priority. Of particular interest to his delegation were the clarifications provided in the Commission's final report on the gaps in the existing treaty regime, the legal relationship between the surrender of a suspect to an international or special court or tribunal and the obligation to extradite or prosecute, and the relationship between the obligation to extradite or prosecute and *erga omnes* obligations and *jus cogens* norms. The work on the topic would provide useful guidance for States in their cooperation aimed at combating impunity and promoting the rule of law.

56. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, as a party to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, Thailand granted immunity from criminal jurisdiction to persons entitled to such immunity under those conventions. Although it was not a party to the Convention on Special Missions, it also accorded

immunity to persons covered by host country agreements between Thailand and international organizations. Apart from cases coming under those agreements, Thai courts had little experience in dealing with immunity of foreign State officials from domestic criminal jurisdiction.

57. The Commission's work on the topic should be carried out carefully and should strike the right balance between according the necessary immunity to State officials and combating impunity. With respect to persons enjoying immunity *ratione materiae*, the focus should not be on the identification of who was an "official", as the term had yet to be firmly defined in international law and was characterized differently under the various domestic laws of countries. The Commission should take due account of State practice in that area. It would be very difficult, if not impossible, to draw up a list that would be acceptable to all States of all office- or post-holders who might be classified as "officials". The persons covered by immunity *ratione materiae* could only be determined by using identifying criteria to be applied on a case-by-case basis.

58. Immunity *ratione materiae* should not be extended to individuals or legal persons who were private contractors hired by their government or by a government agency to act on its behalf. There was no sound legal basis for granting immunity to non-State officials who could not be in a position to exercise governmental authority. At the same time, international law must recognize the immunity granted by domestic law to government agents for acts that were necessary in order to perform official functions or maintain law and order, but without the intent to commit violations of human rights. It was his delegation's belief that there should be no exceptions to the immunity of a Head of State, particularly when his or her constitutional role was a ceremonial one that carried no de facto authority to direct or influence an act or omission that constituted a core crime proscribed by international law.

59. **Mr. Simonoff** (United States of America) said that the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) provided an appropriate conclusion to the work on the topic. While his delegation considered extradite-or-prosecute provisions to be an integral and vital aspect of collective efforts to deny offenders, including terrorists, a safe haven, and to fight impunity for crimes such as genocide, war crimes and torture, there was no obligation under customary international law to extradite or prosecute individuals for offences not covered by treaties containing such an obligation. Rather, as the Commission had noted in its report, efforts in that regard area should focus on specific gaps in the existing treaty regimes.

60. His delegation welcomed the Commission's approach to subsequent agreements and subsequent practice in relation to the interpretation of treaties, which situated the topic in the framework of the rules on treaty interpretation reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties and recognized the need to distinguish between the interpretation of a treaty and its amendment in accordance with the rules reflected under article 39. More work might be needed, however, in order to clarify that distinction.

61. His delegation continued to have concerns about some of the language in the draft conclusions. There appeared to be a number of ambiguities which were clarified only in the commentary. Such excessive reliance on the commentary to flesh out the meaning of the rules set forth in the draft conclusions was undesirable, particularly as the conclusions might well be read by practitioners, and perhaps even reproduced, without the commentary. It would be preferable to include important limitations and explanations in the draft conclusions themselves. In addition, the Commission might consider including an introductory commentary making it clear that the commentary was integral for understanding their meaning.

62. Draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty) illustrated his point. It failed to make clear that in one way or another — whether by engaging consistently in a practice or accepting the practice of others — all the parties to a treaty must manifest their agreement with the interpretation at issue. That important clarification was provided only in the accompanying commentary. Similarly, a reader must look to the commentary to find the important caution that a State's acceptance of a practice by way of silence or inaction was not easily established. Those clarifications should have been provided in the draft conclusion itself.

63. His delegation was concerned that draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties) and its

commentary might suggest that the work of such conferences generally involved acts that might constitute subsequent agreements or subsequent practice in the interpretation of a treaty. It was by far the exception, not the rule, that a conference of the parties would produce a decision that constituted a subsequent agreement of the parties or engage in actions giving rise to subsequent practice, where such a decision or action reflected the agreement of all the parties, not just those present at the conference. The wording of the draft conclusion should be modified to indicate that such an outcome was neither widespread nor easily demonstrated.

64. As to whether the practice of an international organization might contribute to the interpretation of a treaty and whether pronouncements or other actions by a treaty body might give rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty, his delegation noted that draft conclusion 10 was concerned only with subsequent agreements and subsequent practice as they related to the rules set forth in the 1969 Vienna Convention on the Law of Treaties, not the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, for the purposes of that draft conclusion it was only the States parties to a treaty that could enter into a subsequent agreement or engage in relevant subsequent practice. While it was possible for those parties to act through other bodies, such as a plenary organ of an international organization or a conference of the parties, it was the agreement of all parties to the treaty in question that must be demonstrated.

65. His delegation had previously expressed concerns about the suitability of the topic "Protection of the atmosphere", and he feared that those concerns had been borne out by the first report of the Special Rapporteur (A/CN.4/667). His delegation had not believed the topic useful for the Commission to address, since various long-standing instruments already provided not only general guidance to States in their development, refinement and implementation of treaty regimes, but often specific guidance tailored to discrete problems relating to atmospheric protection. Any exercise aimed at extracting broad legal rules from such agreements would be infeasible, unwarranted and potentially quite harmful if doing so undermined carefully negotiated differentiation among regimes. Moreover, such an exercise would be likely to complicate rather than facilitate future negotiations and thus inhibit State progress in the environmental area.

66. Those concerns had been somewhat alleviated by the understanding reached by the Commission in 2013 limiting the scope of work. Unfortunately, the Special Rapporteur had not adhered to that understanding. Indeed, the first report evinced a desire to re-characterize the understanding altogether and generally took an expansive view of the topic. While welcoming the fact that the draft guidelines proposed in the first report had not been sent to the Drafting Committee, his delegation remained seriously concerned about the direction the topic appeared to be taking. He urged the Special Rapporteur, in his next report, to adhere to the letter and the spirit of the 2013 understanding in order to help ensure that the Commission's work on the topic might provide some value to States, while minimizing the risk that it would complicate and inhibit important ongoing and future negotiations on issues of global concern.

67. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, one of the challenges in connection with immunity *ratione personae* had to do with the small number of criminal cases brought against foreign officials, and particularly against Heads of State, Heads of Government and Ministers for Foreign Affairs — the so-called "troika". The federal Government of the United States had never brought a criminal case against a member of the "troika", nor was he aware of a state government within the United States having ever done so. The draft articles on immunity *ratione personae* provided for absolute immunity of members of the "troika" during their term of office for all acts, whether in a private or official capacity, regardless of whether they occurred during or before the term in office. The recognition of immunity for a sitting Head of State for acts performed prior to taking office was consistent with the practice of the United States in civil cases against Heads of State. For example, in a case brought in the United States, the Executive Branch had submitted a suggestion of immunity on behalf President Kagame of Rwanda with respect to allegations against him that predated his presidency, and the courts had agreed. In that connection, his delegation would suggest that waiver might be the only exception for immunity *ratione personae*.

68. The phrase "acting as such" in draft article 5 (Persons enjoying immunity *ratione materiae*) in

combination with the definition of "State official" in draft article 2 (Definitions), subparagraph (e), could be understood to mean that the acts for which immunity *ratione materiae* was available were those in which a State official either represented the State or, far more broadly, exercised State functions. Paragraph (11) of the commentary to draft article 2, subparagraph (e), indicated such functions were to be understood to mean all the activities carried out by the State. That statement would appear to express a broad view of immunity *ratione materiae* — subject, of course, to exceptions and procedural requirements. However, paragraph (15) of the commentary indicated that the definition of "State official" had no bearing on the type of acts covered by immunity. It would be important to resolve that ambiguity. Very broad immunity could be limited by exceptions or by strict procedural requirements, major areas yet to be addressed in the work on the topic. Hence, despite the Commission's impressive progress to date, a great deal of difficult ground remained to be covered.

69. **Ms. Hioureas** (Cyprus), referring to the topic of protection of persons in the event of disasters, said that Cyprus was firmly committed to providing disaster relief and supporting regional and international collaboration in that regard. In recent years it had placed significant emphasis on enhancing its preparedness to respond and to facilitate international cooperation in responding to crisis situations. Her Government was currently studying the draft articles and commentary appearing in chapter V of the Commission's report and would provide written comments in due course.

70. Her delegation welcomed the initial work undertaken on the topic of *jus cogens* and agreed with the proposal of further work in order to promote greater clarity on the concept. Establishing standards for determining the legal content of *jus cogens* and the process by which legal norms might rise to peremptory status would be an important undertaking for the Commission.

71. **Ms. Faden** (Portugal) said that, having examined the final report on the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation believed that the Commission had been unable to find solutions and give clear answers to all of the issues associated with the topic and had therefore found it difficult to continue its work. Portugal had repeatedly stressed the importance of the obligation to extradite or prosecute, the aim of which was to combat impunity and prevent the creation of safe havens for offenders. The legal community and international society in general must continue the debate on the obligation and strive to find answers to the questions raised by the Commission. The Commission's work of recent years, as summarized in the final report, would form a good basis for continued discussion in other settings.

72. Concerning the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the five draft conclusions provisionally adopted during the Commission's sixty-sixth session, like those adopted previously, reflected customary international law and offered valuable guidance for the interpretation of treaties. Her delegation believed that subsequent practice under article 31, paragraph 3, and under article 32 of the Vienna Convention on the Law of Treaties should not be treated in the same way and therefore welcomed the Drafting Committee's reformulation of the draft conclusions in order to draw a clear distinction between the two situations.

73. Her delegation welcomed paragraph 2 of draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a mean of interpretation), which drew attention to a relevant question in relation to subsequent practice, namely that its weight in the interpretation of treaties would depend on whether and how it was repeated. As pointed out in the commentary, the degree of continuity over time and the character of the repetition of the subsequent practice demonstrated how rooted it was with regard to the interpretation of a treaty.

74. In future work on the topic, the Commission must avoid the temptation to go beyond the Vienna Conventions on the Law of Treaties. Its work should strive to provide clarification and guidance for States, international organizations, courts and tribunals, as well as individuals who were the subjects of treaty rights and obligations.

75. Portugal attached great importance to protection of the atmosphere. As the topic demanded immediate attention, her delegation welcomed the Commission's intention to refrain from interfering with any political negotiations. The issue should be dealt with, as a matter of urgency, primarily within the policy realm. A study of protection of the atmosphere from a legal perspective could make a valuable contribution towards the identification of solutions in a broader diplomatic

setting. Indeed, an international law approach to the topic could contribute to the development of a global environmental ethic and highlight the need for universal, distributive and equitable action. Regarding the scope of the proposed guidelines, her delegation favoured a "cause and effect" methodological approach. It had been demonstrated, for instance, that the degradation of the atmosphere might have concurrent causes that might be difficult to isolate and attribute to specific operators or States. Additionally, adverse consequences might also be felt where the contribution of human activity to the degradation of the atmosphere was relatively small.

76. On the topic of immunity of State officials from foreign criminal jurisdiction, her delegation was pleased with the definition of "State officials" proposed in draft article 2, subparagraph (e). It was straightforward and broad enough to allow a case-by-case interpretation. That approach meant, however, that the commentary had to establish very precise criteria for interpretation. Her delegation agreed that the term "official" was more appropriate than the term "organ", as it referred very clearly to an individual or a natural person, the subject of immunity under the topic. The International Court of Justice, for example, had used the term "official" throughout the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In contrast, the term "organ" might be taken to mean legal persons, which fell outside the scope of the topic.

77. With regard to draft article 5 (Persons enjoying immunity *ratione materiae*), any act performed for personal benefit would fall outside the scope of immunity from foreign criminal jurisdiction. Such immunities were functional in nature and should be as limited as possible. Considerations of public order and individual rights should prevail in respect of any act performed within the private sphere by a State official. In that connection, it would be advantageous to specify in the commentaries that immunities were without prejudice to States' general obligation to consider waiving the immunity of one of their officials when so requested and that, where immunity was not waived, States had a legal obligation to prosecute any official who committed a crime abroad in the exercise of State functions. While her delegation agreed with the Commission's use of the phrase "acting as such" in draft article 5 in order to emphasize the functional nature of immunities *ratione materiae*, it believed that the Commission could further explain the minimum content of the necessary link between the official and the State. For instance, a person who acted ultra vires should not be entitled to immunity. Other situations that it would be useful to clarify included cases of corruption or coercion of State officials.

78. Her delegation encouraged the Commission to take a value-oriented approach to the topic, the discussion of which, both within and outside the Commission, was illustrative of a broader debate on the core principles that should frame international social relations and their normative structure in the twenty-first century. Immunities could never exist as a privileged exception that prevailed over individual rights and public order.

79. **Mr. Gharibi** (Islamic Republic of Iran) said that the approach to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" had shifted in a way that risked touching on issues distant from the Commission's original mandate. The shift was particularly evident in the Special Rapporteur's focus on interpretation of treaties rather than on determination of what conduct constituted subsequent practice in the application of a treaty. In considering the variety of forms that subsequent agreements and subsequent practice might take under article 31, paragraphs 3 (a) and 3 (b), of the Vienna Convention on the Law of Treaties, it seemed that the Commission had accorded excessive weight to silence and inaction. It went without saying that the element of consent was a prerequisite to acceptance of any kind and that silence on political grounds could not be regarded as conduct giving rise to subsequent practice, which must be established on a case-by-case basis. It should be emphasized that, as noted in the commentary, silence or inaction could be construed as acceptance of a practice only under certain circumstances.

80. His delegation did not share the Commission's conviction that both externally oriented conduct and internally oriented conduct contributed to subsequent practice under article 31, paragraph 3 (b), without the need to meet any particular formal criteria. Externally oriented conduct, including official acts, statements and voting at the international level, could clearly contribute to subsequent practice, but internal conduct such as official legislative acts or judicial decisions would have to be specifically linked to the application of a treaty in order to merit consideration as subsequent

practice. Again, the particular circumstances surrounding a given conduct at the national level were an important consideration, especially in view of the different value accorded to treaties in different legal systems.

81. As the International Court of Justice had indicated in its recent judgment in the case concerning *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening)*, when decisions were made within international organizations by consensus or by a unanimous vote, they might be relevant for the interpretation of the treaty concerned. However, consensus could not per se define the limits and scope of a treaty; it was simply one of many relevant factors in the interpretation of its provisions. Moreover, political expediency often overshadowed legal assumptions of States in joining a consensus, a fact which might render overly prescriptive any serious assessment of unanimous decision-making within international organizations.

82. The topic of protection of the atmosphere was tightly interwoven with political, technical and scientific considerations; however, that did not mean that the importance of the legal issues surrounding the topic should be downplayed. The task assigned to the Special Rapporteur was fraught with difficulties. The approach adopted should be cautious and allow ample flexibility in order to fulfil the task of identifying custom regarding the topic and also identifying, rather than filling, any gaps in the existing treaty regimes. Regarding the end result of the work, while the aim was not to fill gaps in international legal instruments applicable to State activities in relation to the atmosphere, the concerns expressed about the topic would seem to warrant more than pure research; however, a less restrictive approach would require flexibility with respect to the 2013 understanding.

83. With regard to draft guideline 1 (Use of terms), the use of technical terms seemed inevitable, as defining the boundaries of the atmosphere would inevitably involve technicalities. In the interests of political expediency, the definition put forward might be regarded as an initial definition, subject to the formulation of a legal definition to be complemented by technical commentaries. As to draft guideline 2 (Scope of the guidelines), the terms used to describe the scope of the work were sufficiently precise, and the references to alteration of the composition of the atmosphere and significant adverse effects could provide an appropriate starting point. In relation to subparagraph (b) of the draft guideline, reference to basic principles of international environmental law would be inevitable. It would be impossible to examine rights and obligations of States regarding protection of the atmosphere without expounding upon, for example, the *sic utere*, polluter pays, cooperation and precautionary principles. Concerning draft guideline 3 (Legal status of the atmosphere), the notion of protection of the atmosphere as a common concern of humankind was, in his delegation's view, linked to the need for inter- and intra-generational equity and the special role of the developed countries in protecting the atmosphere. The Commission would undoubtedly take into account the circumstances and requirements of developing countries, especially in the light of efforts to promote sustainable development in the framework of instruments forming the foundation of international environmental law, in particular the 1992 Rio Declaration on Environment and Development.

84. The topic of immunity of State officials from foreign criminal jurisdiction was deeply grounded in the principle of sovereign equality of States and the premise that the State and its rulers were one and the same for the purposes of immunity. That premise held true especially with regard to Heads of State, Heads of Government and Ministers for Foreign Affairs, to whom international law attributed representational functions, which had to be taken into account in international relations. However, State officials other than the "troika" were assuming greater importance in international affairs. Some of them held sensitive political positions, which had raised concerns with regard to personal immunity in the case of officials who made frequent missions abroad as representatives of their respective States. The issue could be considered one of *de lege ferenda*. With regard to the necessary link between a State official and the respective State, nationality might be considered the main element for establishing a genuine relationship and the basis for immunity from foreign criminal jurisdiction.

85. **Ms. Telalian** (Greece) said that the outcome of the Commission's work during its sixty-sixth session on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, in particular the commentaries to the draft conclusions, provided a well-balanced and insightful approach to some main features of the topic. Her delegation wished to reaffirm its support for the Commission's approach

to the topic, namely the production of draft conclusions with commentaries that reflected considerable practice and would therefore be very useful to practitioners in interpreting and applying international treaties.

86. Her delegation particularly welcomed paragraph 1 of draft conclusion 6, which was of great practical value as it provided a clear statement of the process of identifying subsequent agreements and subsequent practice under article 31, paragraph 3, of the 1969 Vienna Convention. That process was an indispensable prerequisite for subsequent agreements to be taken into account under the general rule of interpretation embodied in article 31. The second sentence of paragraph 1 of the draft conclusion, however, stressed that a common subsequent practice did not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but might signify instead their agreement not to apply the treaty temporarily or to establish a practical arrangement. Her delegation had some doubts as to whether that sentence should be included; it might give the wrong impression about the frequency with which parties might have recourse to such practical arrangements, particularly as the commentary provided only one example, which dated back to 1906. In addition, recourse to such arrangements was only one possibility among several that might come into play when evaluating whether parties, by an agreement or practice, had assumed a position regarding the interpretation of a treaty or whether they were motivated by political or other factors. Her delegation believed that such considerations would fit better in the commentary than in the draft conclusion itself.

87. With regard to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), her delegation welcomed the recognition in paragraph 3 of the presumption that the parties, by a subsequent agreement or practice in the application of a treaty, intended to interpret it, not to amend or modify it. That presumption, which was supported in the commentary by a significant amount of relevant case law, was crucial for the stability of treaty relations. The disclaimer clause in the third sentence of paragraph 3, regarding the rules on amendment or modification under the 1969 Vienna Convention and customary international law, was also welcome. However, it might better form a separate paragraph 4 under draft article 3.

88. As to draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation), the frequency of subsequent practice was an essential element to be taken into account under article 31, paragraph 3 (b), of the Vienna Convention. A one-off practice by the parties could hardly meet the criteria for establishing their agreement regarding the interpretation of a treaty. However, as international law was not formalistic, one could not exclude the possibility that a one-off practice might evidence the conclusion of a subsequent tacit agreement regarding the interpretation of a treaty. Nevertheless, such an agreement would fall within the scope of article 31, paragraph 3 (a), not paragraph 3 (b).

89. The statement in paragraph 1 of draft conclusion 9 that an agreement regarding the interpretation of a treaty need not be legally binding could be a source of misunderstanding if left without further clarification. As indicated in paragraph 2 of draft conclusion 6 (Identification of subsequent agreements and subsequent practice), subsequent agreements and subsequent practice could take a variety of forms, including that of a decision of a conference of States parties, as provided in draft conclusion 10. Such decisions were not usually legally binding. In substance, however, an agreement regarding the interpretation of a treaty produced legal effects and needed to be taken into account for the purposes of treaty interpretation because, although it might be incorporated in a non-binding legal instrument, it was an authentic expression of the intentions of the parties. In her delegation's view, the distinction between the substance and the form of such an agreement should be more clearly reflected in the text of draft conclusion 9.

90. Her delegation questioned the need for and desirability of a separate draft conclusion relating to decisions adopted by a conference of States parties. Indeed, considering such decisions as embodying a subsequent agreement regarding the interpretation of a treaty under article 31, paragraph 3, of the Vienna Convention would imply acceptance that they had legal effect, although in fact they were not legally binding. That possibility, while agreeable to her delegation, was already covered in paragraph 2 of draft conclusion 6, which stated that subsequent agreement and subsequent practice could take a variety of forms, one of them being decisions of a conference of States parties. There seemed little reason to highlight that particular form of subsequent agreement or subsequent practice. It would

be more appropriate to incorporate the considerations contained in draft conclusion 10 and its commentary into draft conclusion 6 and its commentary.

91. The issue of immunity of State officials from foreign criminal jurisdiction was of great importance, especially given its significance to national and international courts when dealing with matters related to universal jurisdiction. Her delegation agreed that a definition of "State official" was useful, given that immunity from criminal jurisdiction concerned individuals. It also agreed with the definition suggested by the Commission, which was general in nature and encompassed all categories of officials who enjoyed immunity, whether *ratione personae* or *ratione materiae*, thus defining the term "official" with reference to the individual's duties and, in particular his or her relationship with the State. That definition had the advantage of not confusing the subjective element of who should be granted immunity with the objective element of what acts should enjoy such immunity.

92. Her delegation also agreed with the Commission's decision not to make a distinction between the "troika" and other officials, as such a distinction was not necessary for the purpose of defining the term "official". It further agreed with the use of the word "official" rather than "organ", as the term encompassed all categories of State officials. With respect to draft article 5 (Scope of immunity *ratione materiae*), as the commentary underlined, the article had the same structure and uses, mutatis mutandis, and the same wording as draft article 3, on immunity *ratione personae*. Whereas in draft article 3 the persons enjoying immunity *ratione personae* were determined *eo nomine*, in draft article 5 persons enjoying immunity *ratione materiae* were defined as "State officials acting as such", thus giving emphasis to the functional nature of immunity *ratione materiae* and at the same time distinguishing it from immunity *ratione personae*.

93. Her delegation supported the Commission's decision to adopt a separate article on the subjective scope of immunity *ratione materiae*, notwithstanding doubts raised by some members who had pointed out that the essence of such immunity was the act itself, not the person performing it. Although that was true, it did not imply that the act replaced the person who performed it, particularly as immunity from foreign criminal jurisdiction concerned, after all, persons. A separate article on the subjective scope of immunity *ratione materiae* — similar to draft article 3 on immunity *ratione personae* — was also needed for reasons of consistency and uniformity of the draft articles.

94. **Mr. Och** (Mongolia) said that his delegation had supported the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work with the belief that the work would focus on the importance of a new treaty complementing the Rome Statute of the International Criminal Court. Now that the Commission had decided to include the topic in its current programme of work, his delegation had concerns about the introduction of new definitions that might differ from those in the Rome Statute. Such definitions might create problems in relation to the determination of the crime and result in impunity for those responsible.

95. The formulation in article 7 of the Rome Statute had greatly contributed to the specification and definition of crimes against humanity. It criminalized specific acts and was applicable to States parties and non-States parties alike. In that connection and in reference to the matters on which the Commission had requested comments from Member States, his delegation wished to note that the international treaties to which Mongolia was a party, including the Rome Statute, had the same legal effect as domestic legislation. Hence, although crimes against humanity were not yet defined in its domestic legislation, the definition contained in the Rome Statute could be applied in domestic legal proceedings.

96. The draft articles on protection of persons in the event of disasters represented an impressive contribution to enhanced legal protection for persons affected by disasters. However, his delegation noted conflicting understandings in relation to the definition of "disaster" in draft article 3 and the commentary to draft article 21, concerning the relationship of the draft articles to international humanitarian law, which provided that the draft articles could, in some circumstances, apply in situations of armed conflict and in disasters connected with armed conflicts. His delegation was of the view that the draft articles should not apply to armed conflicts under any circumstances.

97. His delegation wished to underline the importance of interaction and dialogue between the Sixth Committee and the Commission. It also valued

the Commission's contribution to improvement of the knowledge and capacity of Member States through the organization of the annual International Law Seminar.

98. **Mr. Nolte** (Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties), expressing gratitude for members' thorough and constructive comments, said it was a source of great satisfaction that the Commission's work on the topic had received a generally friendly reception. He had heard no fundamental criticism, although he had noted some apprehension in relation to several points. One concern that had been raised a number of times related to overemphasis of the importance of subsequent agreements and subsequent practice as means of treaty interpretation at the expense of other means. Behind that apprehension was the concern that work on the topic might go beyond the provisions of the Vienna Convention on the Law of Treaties. He could assure Member States that that was certainly not his intention. Rather, the aim was to elaborate on and provide guidance within the context of the Vienna Convention. Member States might wish to consider, however, that it was in their best interests that subsequent agreements and subsequent practice as a means of interpretation should be thoroughly examined and discussed because they would thus be assured of a voice and influence in the interpretation of treaties. In that sense, the work on the topic might be seen not as a source of concern but as a source of legitimation of treaty interpretation and application.

99. Some speakers had also expressed concern that the draft conclusions might be too prescriptive, while others had thought them not prescriptive enough. It was a difficulty inherent in the topic that it could not be broken down into clear-cut rules, and indeed trying to impose overly restrictive rules would be a mistake. It was possible, however, to provide some general guidance on how to interpret treaties, bearing in mind that it was not just experts in international law who were concerned with the topic, but also domestic courts and practitioners at the national level. While he would not want to formulate the draft conclusions in a manner that was inappropriately prescriptive or normative, he was open to the idea of incorporating additional elements in the commentary with a view to clarifying and supplementing the draft conclusions and thereby avoiding possible misunderstandings.

100. That would be for a later stage, however. The next phase of the work on the topic would deal with the relevance for treaty interpretation of the practice and activities of international organizations and the pronouncements and activities of treaty bodies. The role of domestic courts in that regard would also be examined. Member States' comments on that work would always be welcome. Those who had followed the work on the topic closely would realize that the Commission clearly took into account statements made in the Sixth Committee.

The meeting rose at 6 p.m.