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Chair:	Mr. Charles	(Trinidad and Tobago)
later:	Mr. Kravik (Vice-Chair)	(Norway)
later:	Mr. Charles (Chair)	(Trinidad and Tobago)

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15-19412 (E)

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

Agenda item 82: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*) (A/70/423; A/C.6/70/L.10)

Draft resolution A/C.6/70/L.10: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law

1. **Ms. Abayena** (Ghana), introducing the draft resolution on behalf of the Bureau, said that it closely resembled resolution General Assembly 69/117 adopted on the same agenda item; however, she would like to draw attention to the following new provisions. There were two new paragraphs in the preamble that reflected the views of the Advisory Committee contained in paragraphs 68 and 74 of the report of the Secretary-General on that item. The second preambular paragraph noted that it was the fiftieth anniversary of the Programme of Assistance and emphasized the importance of ensuring its successful continuation for the benefit of current and future generations of lawyers. The eleventh preambular paragraph noted with regret that the Hamilton Shirley Amerasinghe Memorial Fellowship had not been awarded in 2014 owing to insufficient voluntary contributions. It also noted with appreciation that the Fellowship had been awarded in 2015.

2. In the operative part, paragraph 3 reflected the recommendation of the Advisory Committee contained in paragraph 71 of the report. Paragraph 3 (a) provided for a minimum of 20 fellowships for the International Law Fellowship Programme financed from the regular budget as well as one additional self-funded participant, 20 being the minimum number of fellowship participants to ensure that the training course was undertaken. The training course could only accommodate a maximum of 21 participants due to space constraints. The additional participant would be self-funded, with the costs covered by his or her Government. Owing to cost-saving measures and space constraints, there would be no need for additional voluntary contributions for the fellowship programme. Paragraph 3 (b) provided for a minimum of 20 fellowships for the three Regional Courses in 2016 and in 2017 financed from the regular budget as well as additional self-funded participants paid for by their Governments or additional fellowships funded by voluntary contributions, including in-kind contributions by the host countries and voluntary contributions. The Codification Division had indicated that it would make every effort to raise the additional voluntary contributions to ensure the maximum number of participants in those training courses. Paragraph 4 authorized the Secretary-General to award a minimum of one Hamilton Shirley Amerasinghe Memorial Fellowship per year.

3. Paragraphs 3 and 4 would not have financial implications for the following reasons. With regard to paragraph 3, the regular budget funding for the Regional Courses and for the Audiovisual Library had been included by the Secretary-General in the proposed programme budget pursuant to paragraph 7 of resolution 69/117. With regard to paragraph 4, the legislative mandate provided by the General Assembly when it had decided to establish the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea explicitly stated that the fellowship was to be financed by the voluntary contributions specifically made for the endowment of the Fellowship (General Assembly resolution 36/108). The General Assembly had not yet taken a decision to amend that mandate. While voluntary contributions had been insufficient to award the fellowship in 2014, a fellowship had been awarded in 2015 funded by voluntary contributions, and it was too soon to determine whether there would be sufficient voluntary contributions to award a fellowship for 2016. The Legal Counsel had indicated that he was making every effort to secure the necessary voluntary contributions. The General Assembly might consider the question of providing regular budget funding for those fellowships, taking into account its legislative mandate and the sufficiency of voluntary contributions.

4. Paragraph 10 contained a new reference to the handbook on international law that the Codification Division intended to prepare in commemoration of the fiftieth anniversary of the Programme of Assistance. The handbook would be used in the training courses conducted by the Codification Division, including the International Law Fellowship Programme, and would be made available to law schools in developing countries. As indicated during the consideration of that item, the preparation of the handbook would be funded by the remaining voluntary contributions for the International Law Fellowship Programme.

5. Paragraph 17 referred to the International Law Seminar for Arab States that would be conducted by the Codification Division later in the month in cooperation with the host country, Egypt, and the League of Arab States.

6. Paragraph 22 provided for the appointment of members of the Advisory Committee for the four-year term beginning on 1 January 2016. The membership would be included in the draft resolution before its adoption by the Committee, as consultations were ongoing at the moment. The draft resolution requested the Secretary-General to report to the next session of the General Assembly on the Programme of Assistance and, following consultations with the Advisory Committee, to submit recommendations regarding the Programme in subsequent years. The draft resolution also decided to include the item in the provisional agenda of the seventy-first session of the General Assembly.

7. The adoption of the draft resolution by the Sixth Committee would send a clear policy directive to the Fifth Committee and the General Assembly. It was important to continue to work together to ensure that those activities so essential for promoting the teaching and dissemination of international law around the world would no longer be dependent on voluntary contributions.

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (*continued*) (A/70/10)

8. **The Chair** invited the Committee to continue its consideration of chapters VI to VIII of the report of the International Law Commission on the work of its sixty-seventh session (A/70/10).

9. **Mr. Hennig** (Germany) said that his delegation welcomed the set of draft conclusions provisionally adopted by the Drafting Committee on the topic "Identification of customary international law". It supported the clarification in draft conclusion 3 [4], paragraph 2, that in the assessment of evidence, the existence of each of the two constituent elements of customary law, "general practice" and "*opinio juris*", must be ascertained separately. That was true even in cases where it might be the same fact or action which provided evidence of both State practice and *opinio juris*. The draft conclusion gave useful guidance, in particular for those legal practitioners who might not be very familiar with public international law.

10. His delegation also appreciated the approach taken in draft conclusion 4 [5] (Requirement of practice). While paragraph 1 unequivocally confirmed that States continued to be the primary subjects of international law, paragraphs 2 and 3 provided helpful insight into the possible significance of the practice of international organizations and of the conduct of certain non-State actors, for example the International Committee of the Red Cross. The contribution of international organizations to the development of customary international law was particularly important in the case of supranational institutions which exercised certain competences, in some cases even exclusively, on behalf of their member States. Such practice and *opinio juris* should be taken into account in the same way as if the member States had continued to exercise that competence at the national level. The commentary relating to paragraph 3 could provide guidance on and examples of cases in which the conduct of non-State actors might be deemed relevant for assessing the practice of States and international organizations.

11. Germany agreed that practice should be unequivocal and consistent, but the wording used in draft conclusion 7 [8], paragraph 2, might raise questions. In particular, it might result in less weight being given to the practice of countries with an open and pluralistic society, where the independence of the judiciary and the juxtaposition of government and parliament might lead to different views, or at least to different nuances being expressed. That should not automatically diminish the influence of the practice and *opinio juris* of such States. Although consistency of practice was an important aspect, that point merited attention and should be clarified in future commentary.

12. Draft conclusion 10 [11], paragraph 3, rightly clarified that States could not be expected to react to each instance of practice by other States. The absence of a specific reaction should be relevant only if circumstances in the given case would have called for some reaction.

13. Overall, and in the expectation of commentaries to provide additional insight and allow for a more substantiated assessment, his delegation supported the balanced approach to the topic that was already discernible at the current provisional stage.

14. As a staunch supporter of international criminal law, Germany welcomed the Commission's work on the highly relevant topic of crimes against humanity. A convention on the subject would not only complement treaty law on the core crimes, but might also foster inter-State cooperation on the investigation, prosecution and punishment of such criminal acts and provide further impetus to efforts to end impunity for atrocity crimes.

15. As one of the original signatories of the Rome Statute and an ardent supporter of the International Criminal Court, Germany welcomed the clear focus of draft article 3 (Definition of crimes against humanity) on article 7 of the Rome Statute. To ensure its success, the project must be compatible with existing rules and institutions of international criminal law, in particular the International Criminal Court and its Statute. Future developments in the case law of international courts and tribunals should play an important role in the interpretation of a future convention in order to avoid or, at any rate, minimize the danger of diverging implementation. His delegation therefore welcomed the clarification in the commentary to draft article 3 that the jurisprudence of the International Criminal Court and other international or hybrid courts and tribunals would continue to provide guidance on the meaning of the definition of crimes against humanity. That premise might even be formulated more strongly, for example by including an obligation to take such case law duly into account when interpreting that provision. That would still leave national authorities and courts the necessary discretion, while making clear the objective of a uniform criminalization of certain actions.

16. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation supported draft conclusion 11 (Constituent instruments of international organizations) and appreciated in particular the commentary thereto, which allowed States a more in-depth assessment of the Commission's work. Draft conclusion 11, paragraph 3, rightly reflected the case law of the International Court of Justice in recognizing that the practice of the international organization itself might deserve special attention in the process of treaty interpretation. His delegation agreed that that practice might be particularly relevant for determining the object and purpose of an international organization's constituent instrument. With reference to draft conclusion 11, paragraph 4, it would be useful in the commentary to provide examples of cases in which the rules of an international organization contained *lex specialis* provisions on the role of subsequent agreements and practice for the interpretation of its constituent treaty. The rules of the European Union, which seemed to exclude taking into account subsequent agreements between the parties regarding the interpretation of its constituent instruments in areas in which the Court of Justice of the European Union exercised jurisdiction, could serve as an illustration.

17. The draft conclusions and commentaries adopted to date already provided excellent orientation for interpretation without unduly restricting State practice.

18. **Ms. Wanner** (Switzerland) said that on the topic of crimes against humanity Switzerland was in favour of a concise convention that was as long as necessary and as short as possible. Her delegation was pleased that the four draft articles provisionally adopted were based on the existing international legal framework, including customary law. In particular, it strongly supported the decision to base the definition of crimes against humanity in draft article 3 verbatim on the text of article 7 of the Rome Statute of the International Criminal Court, apart from non-substantive changes. Competing or conflicting definitions would cause problems not only at the international level but also in the national legal systems of States, such as Switzerland, which had already incorporated the definition in their criminal codes. The existing standard of prevention, protection and punishment, supported by most States, must not be lowered under any circumstances.

19. Her delegation underscored the importance of the following points made in the report: crimes against humanity must be punished and prevented; States must take measures in both areas and cooperate with other States and with relevant organizations; crimes against humanity could be committed during armed conflict or in peacetime; they could be committed by all persons, not only state officials; and no exceptional circumstances could be invoked as a justification for such acts.

20. Key elements that future draft articles should address included provisions on mutual legal assistance requiring States to cooperate while respecting existing constraints in national systems; the irrelevance of official position; the inapplicability of statutes of limitations; and the need to deal with the legacy of

crimes against humanity. Such a convention would help ensure that persons who had committed crimes against humanity were prosecuted under national legislation, thereby strengthening complementarity with the Rome Statute system, and would give hope that violations would be prevented in the future.

21. Her delegation emphasized the importance of Geneva as the venue for meetings of the International Law Commission, whose activities should be kept entirely independent of the New York-based Sixth Committee. The differing legal cultures of those two bodies was the best safeguard against their becoming homogenized. With that in mind, and to enhance the status of the French language, international law should be promoted and its development encouraged not only from United Nations Headquarters in New York, but also from the Office of the United Nations in Geneva. The International Law Seminar, held annually in Geneva, which enabled participants — students, teachers and public servants — to broaden their knowledge of the Commission's work by attending public meetings and lectures by Commission members, would no longer be possible if Commission meetings were to be held in a venue other than Geneva.

22. Switzerland of course welcomed any effort to strengthen dialogue between the Sixth Committee and the Commission. The Global Law Week held annually in New York already offered an excellent opportunity for networking between the Commission and the Sixth Committee, and the interactive dialogue between the Committee and the members of the Commission was also very welcome. Her delegation had taken note of the recommendation concerning the holding of part of a Commission session in New York sometime during the next quinquennium. While not completely opposed to the idea, her delegation believed that the option must be examined in depth; on no account should it become normal practice.

23. **Ms. Brown** (Jamaica) said that the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties were very useful in drawing attention to the importance of such agreements and practice as an authentic means of interpreting the constituent instruments of international organizations under article 31 of the Vienna Convention on the Law of Treaties and as a supplementary means of interpretation under article 32. The analysis presented in the Commission's report was based mainly on the decisions of the International Court of Justice, with additional references to decisions of the Appellate Body of the World Trade Organization and the Court of Justice of the European Union, and to the views of writers.

24. Her delegation would like to draw attention to the jurisprudence of the Caribbean Court of Justice. In the 2003 Revised Treaty of Chaguaramas, the States members of the Caribbean Community (CARICOM) had conferred ipso facto compulsory and exclusive jurisdiction on the Caribbean Court of Justice to hear and determine disputes concerning the interpretation and application of the Revised CARICOM Treaty. The Caribbean Court had relied heavily on the practice of CARICOM bodies in its decisions under the Court's original jurisdiction in interpreting the Treaty.

25. In *Trinidad Cement Limited v. The Caribbean Community*, the Court had drawn on 1992 and 1993 documents predating the entry into force of the 2003 Revised CARICOM Treaty to interpret its provisions, based on evidence that the former practices which had existed under the original 1973 treaty had been maintained. The Court had held that those documents continued to reflect the policies of the Community and, until disavowed by the Community or disapproved by the Court, the guidelines and prescriptions contained in them should be taken as being still in force insofar as they were not inconsistent with the provisions of the 2003 Revised Treaty. The Court saw no need to justify its finding by explicit reference to articles 31 or 32 of the Vienna Convention, although the arguments presented to the Court had relied on those provisions.

26. Similarly, in *Shanique Myrie v. The State of Barbados*, the Court had drawn heavily on the practice of the Conference of Heads of Government, the supreme organ of the Caribbean Community, with regard to abstentions and reservations and the language generally used in Conference decisions in determining the nature of the decision of the Conference which had been central to the claimant's case. There again, the Court had seen no need to expound on the reasons for having recourse to institutional practice as a means of interpretation.

27. Institutional practice was of signal importance in transforming fragile institutional frameworks into strong integration entities. The inherent flaws of the treaty-making process, built on a desire to achieve the broadest possible consensus, left many details open. Institutional practice was accepted as a mechanism

through which ambiguous texts could be clarified. Of course, where there was a need to modify or amend the treaty, recourse must appropriately be had to the formal amendment procedures.

28. Constituent instruments of international organizations were treaties of a particular kind which needed to be interpreted in a specific way, as such treaties could raise problems of interpretation owing, inter alia, to their character, which was both conventional and institutional. Nevertheless, as the Commission observed in the commentary to draft conclusion 11, article 5 of the Vienna Convention allowed for the application of the rules of interpretation in articles 31 and 32 in a way which took account of the practice of an international organization in the interpretation of its constituent instrument, including taking into account its institutional character. Such elements could also contribute to identifying whether and how the meaning of a provision of a constituent instrument of an international organization could evolve over time.

29. Her delegation would welcome discussion on the jurisprudence of other regional courts in the Commission's further work in the area.

30. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, Jamaica had considerable national jurisprudence on the subject. On the topic of provisional application of treaties there had been extensive regional discussions. Some CARICOM countries were unable to apply regional agreements provisionally due to legislation requiring the ratification of treaties before their application. Nevertheless, there continued to be extensive use of the facility for provisional application within CARICOM to allow for the timely implementation of agreements, given the delays associated with formal ratification procedures. Countries with legislation precluding provisional application within the domestic sphere had found it necessary to accelerate formal acceptance procedures to that end. It was to be hoped that the Commission would give due consideration to practice in all regions and thereby promote an informed exchange on the differing legal perspectives and approaches to the issues addressed in the Commission's programme of work.

31. **Mr. Bickerton** (New Zealand) said that on the topic "Crimes against humanity" his delegation welcomed the focus on both prevention and punishment in draft articles 1 and 4 and also the proposed definition of crimes against humanity in draft article 3, including the "without prejudice" provision in paragraph 4. It noted that article 10 of the Rome Statute contained a similar provision and that the draft article did not attempt to elaborate a new definition of such crimes.

32. New Zealand had criminalized crimes against humanity in its International Crimes and International Criminal Court Act of 2000, section 10 of which provided that it was an offence to commit an act specified in article 7 of the Rome Statute, whether in New Zealand or elsewhere. The Act, together with the Mutual Assistance in Criminal Matters Act of 1992 and the Extradition Act of 1999, provided a comprehensive framework for providing assistance in criminal cases and for cooperating with other countries in extradition for serious crimes.

33. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, New Zealand agreed with draft conclusion 11, paragraph 1, with regard to the applicability of articles 31 and 32 of the Vienna Convention to the constituent instruments of international organizations. International organizations must take a flexible approach to their founding instruments; that would ensure that those organizations did not become frozen in time and were unable to meet the needs of their constituent States. Flexibility should not, however, be an excuse for bypassing the provisions of a constituent instrument when updating or altering an organization's mandate. The draft conclusions should strike a balance between the ongoing and agreed mandate of an international organization and the collective interpretation of the provisions of an organization's constituent instrument.

34. His delegation welcomed the report's finding that decisions of a plenary organ, whether supported by all States within the body or not, might express the position or practice of member States in the application of the treaty. In that regard, decisions adopted without a vote or without the full support of member States of an international organization provided supplementary material when considering the interpretation of a treaty under article 32 of the Vienna Convention. Where member States expressed no view at the time of the decision and did not raise an objection, such supplementary material was also informative.

35. New Zealand reiterated its strong support for the practical application of subsequent agreements and subsequent practice, among other methods of treaty interpretation, which allowed for an evolving relationship between parties based on mutual acceptance and shared intentions. It was in favour of clear and concise conclusions that provided best practice and guidance for practitioners, States and the judiciary in the interpretation of international agreements.

36. **Mr. Buchwald** (United States of America) said that, although the Special Rapporteur and the Drafting Committee had successfully addressed many important aspects of the topic "Identification of customary international law", his delegation remained particularly concerned that draft conclusion 4 [5] might be interpreted to mean that the role of practice of international organizations in contributing to the formation or expression of customary international law was the same as that of State practice, at least in some circumstances. The United States did not believe that the case law or the views expressed by States themselves had generally recognized that the actions of international organizations as such — in other words, as distinct from the practice of their member States — contributed directly to the formation of customary rules. The Special Rapporteur's report provided very little support for that proposition, notwithstanding the existence of international organizations for more than a century. Thus, the treatment of the role of international organizations in paragraph 2 of draft conclusion 4 needed to be reconceived in order to avoid misleading users of the final product, including judges and lawyers who might not be particularly well-versed in public international law and for whom the draft conclusions were largely intended.

37. International organizations could play important, indirect roles in the process by which the practice of States generated custom, including as the forums in which State practice and *opinio juris* might develop or be articulated and, in many fields, as the key actors to which States responded in ways that might generate State practice or evidence of *opinio juris*. However, that was not the same thing as saying that the practice of the international organization itself constituted practice that should be counted along with State practice when determining the existence of a customary rule.

38. One possible exception to that division of roles between States and international organizations might be the European Union and perhaps other organizations that might exercise similar competences now or in the future. However, even if those organizations "as such" contributed directly to the formation of custom in some areas, such a limited, exceptional role for certain types of international organizations did not support the broad language of paragraph 2.

39. If the Commission believed that it was important to address the role of international organizations in the identification of customary rules, it would be better to do so separately from that of States. That would make it possible to recognize and address the fact that international organizations included a great variety of entities, with differing roles, competences and practices, and it would also allow the Commission to identify specific cases in which it believed that the practice of international organizations was directly relevant and to explain how their practice would be "counted". For example, the Commission could consider whether the practice of one or more international organizations could result in the creation of a new customary rule despite there being insufficient State practice, or whether the practice of international organizations could block the creation of a customary rule even when State practice in favour was otherwise sufficient.

40. His delegation was concerned that the draft conclusions, by inviting readers to find evidence of customary international law in a wide variety of sources, might be understood to suggest that customary international law was easily created or inferred. His delegation did not believe that that was the case and therefore hoped that the commentary would underscore that only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* were met was customary international law formed. His delegation was also concerned that the draft conclusion on particular custom did not adequately articulate when such custom was and was not created. That matter should be clarified in the commentary or in future revisions of the draft conclusions.

41. With regard to the topic of crimes against humanity, the discussion in the commentary of the background of the concept of crimes against humanity was a sobering reminder of the importance of the topic and testified to the significant role that the

development of the concept had played in the pursuit of accountability. The widespread adoption of a number of multilateral treaties regarding serious international crimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, had been a valuable contribution to international law. The development of draft articles for a convention on the prevention and punishment of crimes against humanity could also prove valuable. The topic's importance was matched by the difficulty of some of the legal issues involved, which his delegation was confident would be carefully considered in the light of the views of States.

42. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation agreed with the content of draft conclusion 11, paragraphs 1 and 2, namely that the rules of treaty interpretation reflected in articles 31 and 32 of the Vienna Convention applied to the constituent instruments of international organizations and that a subsequent agreement or subsequent practice by the parties to a treaty might arise from or be expressed in the practice of an international organization in the application of its constituent instrument. For example, the parties might instruct the international organization to engage in a certain practice or react to the activities of the international organization in a way that constituted subsequent practice of the parties.

43. However, it was doubtful whether, as stated in paragraph 3, the practice of an international organization in the application of its constituent instrument might contribute to the interpretation of that instrument when applying article 31, paragraph 1, and article 32. The commentary explained that the purpose of that provision was to address the role of the practice of an international organization as such in the interpretation of the instrument by which it had been created. The Commission apparently recognized, correctly in his delegation's view, that the practice of that international organization was not subsequent practice for the purposes of the rule reflected in Vienna Convention, article 31, paragraph 3 (b), because the international organization itself was not a party to the constituent instrument and thus its practice as such could not contribute to establishing the agreement of the parties. However, faced with the inapplicability of article 31, paragraph 3 (b), the Commission proposed instead that consideration of the organization's practice was appropriate under article 31, paragraph 1, and article 32 of the Vienna Convention.

44. In his delegation's view, article 31, paragraph 1, was not relevant in that context. The factors to be considered pursuant to article 31, paragraph 1 — "ordinary meaning", "context" and "object and purpose" — did not encompass consideration of subsequent practice, regardless of whether the actor was a party or the international organization. The Commission provided no evidence from the *travaux préparatoires* of the Vienna Convention, including the Commission's own work, in support of using article 31, paragraph 1, in that way. Moreover, none of the very few cases cited by the Commission in support of that proposition appeared to rely on that provision. Article 32 of the Vienna Convention might potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it had been created, particularly where the parties to the treaty were aware of and had endorsed the practice. However, circumstances in which the practice of the organization might fall within article 32 should be explained in the commentary.

45. His delegation welcomed the placement of the topic in the framework of the rules on treaty interpretation reflected in articles 31 and 32 of the Vienna Convention. For that reason, it had questions about discussions in the commentary to draft conclusion 11 of interpretative rules that might be inconsistent with those reflected in articles 31 and 32, such as the reference in footnote 359 to paragraph (35) to a "constitutional interpretation".

46. The Commission had indicated an interest in examples where pronouncements or other action by a treaty body consisting of independent experts had been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty. The United States believed that the Commission must make clear that the actions or views of treaty bodies consisting of independent experts did not, in and of themselves, constitute a subsequent agreement or subsequent practice for the purposes of article 31, paragraph 3, of the Vienna Convention, as they were neither agreements "between the parties" nor practice that established such an agreement. The views of treaty bodies composed of independent experts might, however, be relevant indirectly. For example, States parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute

subsequent practice (of those States) for the purposes of article 31, paragraph 3.

47. *Mr. Kravik (Norway), Vice-Chair, took the Chair.*

48. **Mr. Campbell** (Australia) said that any approach to the topic "Identification of customary international law" must give separate consideration to each of the two elements of customary international law: State practice and *opinio juris*. The mere fact that a State engaged in a particular conduct did not, per se, mean that the State considered itself to be acting pursuant to a legal obligation. Australia supported the Special Rapporteur's conclusion that, in general, each element should be supported by separate evidence in order to avoid conflating the requirements of State practice and *opinio juris*.

49. Caution should also be exercised before assuming that a State's failure to react to a given practice constituted evidence of *opinio juris*. Inaction could serve as evidence of *opinio juris* only when a State, in the circumstances, and by its silence, really did signal its acceptance of a particular practice as being required as a matter of law. The Commission's efforts carefully to delineate those circumstances were constructive. His delegation endorsed draft conclusion 10 [11], paragraph 3, as provisionally adopted by the Drafting Committee, pursuant to which, for inaction to be evidence of *opinio juris*, the relevant State must have been in a position to react and the circumstances must have called for a reaction. His delegation welcomed the Special Rapporteur's helpful observation that the State must have had knowledge of the practice to which it did not object and that the inaction must have been maintained over a sufficient period of time. There was no positive obligation for a State to protest against every practice that did not conform to its understanding of international law, although such protest might, in the case of a persistent objector, prevent an emerging customary norm from applying to that State.

50. It was first and foremost the practice and *opinio juris* of States that resulted in the formation of customary international law. For that reason, a cautious approach needed to be taken in drawing conclusions from the practice of other actors. Particular care should be taken to ensure that the practice of States within an international organization was properly attributed to the relevant States. On the other hand, Australia agreed that the practice of international organizations, particularly those that had independent legal personality, should not be assimilated to that of the States themselves. Australia was open to the possibility that the practice of international organizations might contribute to the formation of custom "in certain cases". However, apart from those exceptional cases where States had expressly and exclusively assigned certain of their competencies to an international organization, the role of international organizations in directly forming customary international law must be approached with caution. His delegation appreciated the Special Rapporteur's efforts to draw some parameters around the "certain cases" in which organizational practice might be relevant to the formation or expression of custom and hoped to see further consideration of that issue in the commentary.

51. Australia was of view that the conduct of other non-State actors did not contribute directly to the formation or expression of customary international law, although their work might operate as a catalyst for State action or comment. His delegation preferred the Special Rapporteur's formulation of draft conclusion 4 [5], paragraph 3, which clearly stated that conduct by other non-State actors was not practice in the relevant sense, to the version provisionally adopted by the Drafting Committee, which stated that the practice of non-State actors might be relevant when assessing the practice of States and international organizations.

52. With regard to the topic of subsequent agreement and subsequent practice in relation to the interpretation of treaties, and in particular draft conclusion 11 on constituent instruments of international organizations, Australia acknowledged that, because such treaties were in the nature of constitutional documents, they might give rise to special kinds of interpretative questions, for example relating to the jurisdiction of the organizations which they established. In its 1996 advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice had recognized that the constituent instruments of international organizations were treaties of a particular type. They created new subjects of international law, endowed with a degree of autonomy and entrusted by the States Parties with the task of realizing particular common goals. At the same time, the Court had also recognized that the constituent instruments of international organizations were first and foremost multilateral treaties, subject to the well-established principles of treaty interpretation. Article 5 of the Vienna Convention on the Law of Treaties made

that clear. The value of those general interpretative principles was that they were widely understood.

53. Article 31, paragraph 3, of the Vienna Convention was directed at the practice of the parties to a treaty. Draft conclusion 11, paragraph 2, reflected that position; it was directed not at the practice of international organizations as such, but at how State practice might "arise from, or be expressed in," the practice of those organizations. For example, the practice of the organization might prompt some reaction from States, or the organization might be a forum through which States' positions were expressed.

54. With regard to draft conclusion 11, paragraph 3, which concerned the circumstances in which the practice of an international organization might contribute to the interpretation of its constituent instrument, Australia recognized that, in certain cases, the practice of an international organization might inform the application of article 31, paragraph 1, and article 32 of the Vienna Convention. In many instances, such practice might be relevant for the very reason that the organization's member States concurred in that practice. It would be helpful if the language of draft conclusion 11 could be made more straightforward, for example by specifying that paragraph 2 was directed at the practice of States, whereas paragraph 3 applied to the practice of international organizations.

55. **Ms. Faden** (Portugal) said that the topic "Identification of customary international law" was of high practical value for legal advisors and practitioners around the world, and Portugal welcomed the Commission's intention to adopt the draft conclusions and the commentary thereto at its next session. A set of practical and simple conclusions, together with commentary, was the right way to proceed, though her delegation agreed with those who had cautioned against oversimplification and had argued that some draft conclusions would benefit from further elaboration.

56. She would refer to the text of the draft conclusions provisionally adopted by the Drafting Committee. Concerning the relationship between the two constituent elements of custom, as described in draft conclusion 3 [4] (Assessment of evidence for the two elements), her delegation agreed that there the two-element approach could be applied differently in different fields or with respect to different types of rules and that further exploration of the respective weight of the two elements was required. It might also be specified that, although each element — general practice and *opinio juris* — was to be separately ascertained, the same material could be evidence for both elements and that they need not occur in any particular sequence.

57. With regard to draft conclusion 12 [13] (Resolutions of international organizations and intergovernmental conferences), it would be useful to indicate in detail in which circumstances such resolutions might be evidence of customary international law or contribute to its development. The Special Rapporteur's initial phrasing, "they cannot, in and of themselves, constitute it", was too categorical. The Drafting Committee's formulation for paragraph 1 was more acceptable, but her delegation was in favour of deleting the paragraph, since paragraphs 2 and 3 were sufficient to characterize the significance that resolutions of international organizations had for the identification of customary international law.

58. On draft conclusion 15 [16] (Persistent objector), her delegation concurred with the Drafting Committee in characterizing the persistent objector rule as a matter of opposability. It should be specified, however, that persistent objector status was not compatible with norms of a *jus cogens* character. Examples should be provided in the commentary to substantiate the rule.

59. As to draft conclusion 16 [15] (Particular customary international law), her delegation agreed with the Special Rapporteur on the need for its inclusion. The Drafting Committee had usefully added the specification that particular customary international law could be regional, local or other. Moreover, the assessment of the two elements might be different for particular custom than for general custom. For instance, in *Right of Passage over Indian Territory (Portugal v. India)*, the International Court of Justice referred to a "long continued practice" and not to general practice; thus her delegation wondered whether the qualifier "general" (with respect to the constituent element of practice) was appropriate in the context of particular custom.

60. On balance, the draft conclusions gave more prominence to the issue of evidence than to that of formation as envisaged in the original title of the topic. In her delegation's view, greater emphasis should be placed on the aspect of formation with regard to the

two elements of practice and *opinio juris*. On the basis of a description of how customary law was formed, it would be easier to elaborate a methodology which would allow for the identification of current and future norms of customary international law. Hence a study on "formation" should precede the more practical issue of how evidence of a customary rule was to be established.

61. With regard to the topic of crimes against humanity, a number of valid points had been made in favour of drafting a convention on the subject, in particular when it came to establishing rules for cooperation and legal assistance between States and allowing for the prosecution of those crimes when a State or other organizations, such as the International Criminal Court, did not have jurisdiction over them. Such an instrument could help fight impunity and ensure accountability. However, the topic should be addressed with caution, taking into account the existing legal framework concerning crimes against humanity. It was important to avoid entering into conflict with regimes already in place, in particular the Rome Statute, but rather to complement them. Her delegation welcomed the use of the definition of crimes against humanity contained in article 7 of the Rome Statute, with the necessary changes, in draft article 3.

62. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", although article 5 of the Vienna Convention on the Law of Treaties reflected the view that constituent instruments of international organizations were different from other bilateral and multilateral treaties, it clearly confirmed that all its provisions, including the rules of interpretation set out in articles 31 and 32, were applicable to such instruments, without prejudice, however, to any relevant rules of the organization. In view of that legal framework, further consideration should be given to the difference between the concept of the "subsequent practice" of the parties pursuant to article 31, paragraph 3 (b), and the concept of "established practice" as an element of the rules of an international organization pursuant to article 2 (j) of the 1986 Vienna Convention and thus pertinent to article 5. The connection between those concepts was that established practice could influence the preconditions for and the significance of subsequent practice in the interpretation of the constituent instruments of international organizations. Although the question was only touched upon briefly in the commentary to draft conclusion 11, there was a need to look further into those distinct but interconnected concepts in order to clarify whether and when a practice represented a manifestation of the Vienna Convention's rules of interpretation or whether and when it reflected a special or different rule of interpretation that was applicable to the constituent instruments of international organizations.

63. **Mr. XU Hong** (China) said that the punishment of such acts and other serous international crimes was a common goal of the international community and was in the common interest. The Commission's discussion and codification of the topic "Crimes against humanity" was therefore of great significance.

64. Codification should be based on a thorough review of State practice. In the Special Rapporteur's report and the draft articles provisionally adopted by the Commission, considerable attention was given to the practice of international judicial organs, whereas, by comparison, little reference was made to the general practice and *opinio juris* of States. For instance, draft article 2 omitted the traditional qualifier "in time of war" for crimes against humanity. Such an approach was based primarily on the practice of international judicial institutions and failed to consider whether State practice had reflected a general recognition that crimes against humanity under international law need not necessarily be committed in wartime.

65. Draft article 3, in establishing the definition of "crimes against humanity", had adopted verbatim the provisions of article 7 of the Rome Statute of the International Criminal Court, effectively regarding the latter as a universally accepted definition. In fact, the definitions of crimes as contained in the Rome Statute should be interpreted in conjunction with the Elements of Crimes adopted by the Assembly of States Parties. Moreover, during the negotiations on the Rome Statute, there had been disagreements over the definitions and elements of various crimes, including crimes against humanity, which partly explained why some States were not yet parties to the Rome Statute. Thus, the Commission must review the positions and practice of States in a more comprehensive manner in order to establish a sound basis for the definition.

66. With respect to the list of specific crimes, due consideration should be given to differences between national legal systems. Draft article 3 contained a list

of specific acts which constituted crimes against humanity, including "enforced disappearance of persons". However, in many States, especially those not party to the Rome Statute, the crime of "enforced disappearances" might not exist in their domestic law. The enforcement of relevant provisions by those States and the harmonization of domestic law with the relevant rules of international law were subjects that required further attention in the Commission.

67. As currently drafted, the obligation of States to prevent crimes against humanity was too broad. Paragraph 1 (b) of draft article 4 provided that States were under an obligation to cooperate, as appropriate, with "other organizations" to prevent crimes against humanity. According to the commentary, "other organizations" included non-governmental organizations. However, the commentary was silent on the legal basis of such an obligation and the practice of States in that respect. The Commission should therefore consider carefully whether it was appropriate to impose such an obligation upon States.

68. On the topic "Identification of customary international law", his delegation drew the Committee's attention to the contribution made by the Asian-African Legal Consultative Organization (AALCO) in that connection. At the fifty-fourth annual session of AALCO, held in Beijing in April 2014, the Special Rapporteur of AALCO's Informal Expert Group on Customary International Law had presented his report on the topic. In addition, AALCO had organized a meeting of informal experts in Malaysia in August 2015 and had invited the Commission's Special Rapporteur on the topic to exchange views with its experts on the report. The AALCO report could help the Commission appreciate the concerns and views of many Asian and African States on the topic.

69. In determining whether a treaty provision reflected a rule of customary international law, the criteria of objectivity and impartiality should be applied, and the investigation should be based strictly on general practice and *opinio juris*. Consideration should be given to factors such as the extent to which the treaty in question had been ratified, acceded to or accepted by States and whether a treaty provision had a universal character. In particular, non-party States should not arbitrarily determine which treaty provisions were rules of customary international law based on their narrow national interests. Such tactics of expediency were tantamount to utilitarianism or double standards.

70. A comprehensive assessment should be made of the supplementary role of judicial rulings and writings in the identification of rules of customary international law. The Commission should not highlight only the judicial decisions of international judicial institutions while neglecting the decisions of national courts; it should not focus exclusively on decisions from a few jurisdictions while ignoring those from other national courts; and it should not rely heavily on the writings of publicists from a small number of countries while overlooking those authored by scholars of other States.

71. His delegation welcomed the progress made in the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. With respect to the draft articles provisionally adopted by the Drafting Committee, on the whole, his delegation endorsed draft article 6 (Scope of immunity *ratione materiae*), and it agreed with the formulation of subparagraph (f) of draft article 2, pursuant to which an "act performed in an official capacity" meant "any act performed by a State official in the exercise of State authority". The phrase "exercise of State authority" should be interpreted in a broad sense. The definition of an act as an "exercise of State authority" should be made on a case-by-case basis in accordance with the constitutional system and legislation of the State of nationality as well as the circumstances of the case in question; it should not be determined subjectively or arbitrarily by the forum State. His delegation sought the Commission's clarification on the difference between the notion of "exercise of State authority" in draft article 2, subparagraph (f), and that of "exercise of State functions" in subparagraph (e) of the same article.

72. According to draft article 6, paragraph 1, the only yardstick for determining whether acts of State officials enjoyed immunity *ratione materiae* should be whether such acts were "performed in an official capacity". However, the reports of the Special Rapporteur and the Commission made reference to the view that acts constituting serious international crimes, *ultra vires* acts, *acta jure gestionis* or acts performed in an official capacity but exclusively for personal benefit did not qualify as acts "performed in an official capacity" and therefore were not covered by immunity *ratione materiae*. Those views are not in line with positive international law and were even in clear

breach of certain rules. For example, the *ultra vires* character of an act did not affect its recognition as an act "performed in an official capacity", as was clearly confirmed in article 7 of the articles on responsibility of States for internationally wrongful acts.

73. The Commission should consider clarifying, in the draft article or the commentary thereto, that immunity rules were procedural in nature and did not pertain to substantive rules of international law that dealt with the legality of acts or the issue of accountability. The Special Rapporteur had indicated her intention to address the exceptions to immunity of State officials in her next report. The immunity of State officials was based on the principle of sovereign equality of States and reflected mutual respect among nations. Immunity provisions were procedural rules and should not be associated with impunity. The International Court of Justice had already made that point clear in its rulings in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) and Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*.

74. On the topic "Protection of the environment in relation to armed conflicts", the Commission should distinguish between rules applicable to international armed conflicts and those applicable to non-international armed conflicts. While the Commission had successfully identified the applicable rules in relation to the protection of the environment during international armed conflicts, research on non-international armed conflicts was relatively limited. Given the scarcity of international rules directly relevant to non-international armed conflicts and the difficulties involved in obtaining information on practices, the codification of rules for the protection of the environment in the context of non-international armed conflicts was a challenging task. The Commission should consider limiting the scope of the draft principles to international armed conflicts only. Without the support of international practice, it would be inappropriate simply to transpose rules applicable in international armed conflicts to non-international armed conflicts.

75. **Ms. Metelko-Zgombić** (Croatia) said that Croatia strongly supported all efforts aimed at developing a global international instrument for the prevention, prosecution and punishment of crimes against humanity and promoting States' cooperation in that regard. The division of the two initially proposed draft articles on crimes against humanity, which had resulted in the four provisionally adopted, including a separate article on scope, had contributed to the conceptual clarity of the topic.

76. One of the Commission's most important tasks was to clearly identify and precisely define the concept and scope of crimes against humanity. To that end, the Commission should, to the greatest extent possible, draw upon the existing legal framework reflected in international conventions, customary international law, national laws and prior instruments of the Commission, as well as the statutes and jurisdiction of international criminal courts and tribunals. It was also important to make a clear distinction between some core international crimes, in particular crimes against humanity and war crimes, which was still somewhat blurred in theory and practice, as shown by jurisprudence of the International Tribunal for the Former Yugoslavia — for instance, the question of whether persons *hors de combat* were included or excluded from the ambit of crimes against humanity when the crimes committed against them occurred as part of a widespread or systematic attack against the civilian population (compare the judgements of the Appeals Chamber in *Mrkšić et al.* and *Milan Martić*). The Commission's contribution would be vital to the codification of generally accepted developments in international humanitarian, international criminal and international human rights law.

77. Her delegation saw no need for the reference to armed conflict in draft article 2. Its deletion would highlight the distinction between crimes against humanity and war crimes. War crimes were inseparably connected to armed conflict and could be committed only in time of armed conflict or in territories under occupation (yet another potential for confusion between crimes against humanity and war crimes as regulated by the Fourth Geneva Convention); consequently, armed conflict was automatically part of the definition of war crimes, whereas crimes against humanity could also be committed when no armed conflict was involved. That important difference would be better expressed by removing any reference to armed conflict. The definition of crimes against humanity in article 7 of the Rome Statute, which had served as a model for draft article 3, made no such mention.

78. With regard to specific elements in the Rome Statute that made crimes against humanity different

from other core international crimes ("a widespread or systematic attack directed against any civilian population, with knowledge of the attack"), and the existence of a "State or organizational policy"), it was important to confirm the understanding that those references, as contained in draft article 3, paragraph 2 (a), included the conduct of non-State actors. In her delegation's view, the words "organizational policy" encompassed policy or actions of any organization or group with the capacity and resources to plan and carry out a widespread and systematic attack and which might or might not be affiliated with the Government — precisely as suggested by the Commission in its comments to what had later become the draft code of crimes against the peace and security of mankind, and as borne out by contemporary jurisdictional trends, including the judgements of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. By unambiguously extending the scope of the draft articles to non-State actors, the Commission would confirm the basic principle underpinning the notion of crimes against humanity: the fundamental understanding that certain rules of basic humanity should be respected in all situations, at all times and by all persons, without any exception with regard to the nature of a conflict or its participants. Given the recent developments in Syria and Iraq and the predominant role of non-State actors, Croatia strongly supported such an approach.

79. In draft article 3, paragraph 1 (j) and paragraph 2 (h), and notwithstanding article 7 of the Rome Statute, her delegation was in favour of replacing the word "apartheid", which was very specific and slightly dated, with the more general and comprehensive concept of racial discrimination or segregation.

80. *Mr. Charles (Trinidad and Tobago) resumed the Chair.*

81. **Mr. Troncoso** (Chile) said that, although the title of the topic "Identification of customary international law" had been changed from the original title, "Formation and evidence of customary international law", his delegation agreed with some members of the Commission that the change in the title should not affect the topic's focus. The Special Rapporteur had therefore done well to continue to emphasize the importance of the elements that constituted custom — namely, a general, consistent and uniform practice and general acceptance as law — and the way in which they emerged to form customary rules. The evidence for those elements was already part of their identification. In view of the general agreement that the outcome of the work on the topic should be a set of practical and simple conclusions with commentary in order to assist practitioners in the identification of rules of customary international law, it was vital to continue the discussion on the formation of customary rules.

82. His delegation welcomed the reference in the Special Rapporteur's proposed draft conclusion 13 to resolutions adopted by international organizations or at international conferences and agreed that they might be evidence of customary international law. Special mention should be made to General Assembly resolutions: because of the votes they received and their wording, they might provide a way of determining the existence of custom. Chile was also in agreement as to the need for a discussion of the specific role played in international custom by the work of the Commission: certain provisions of the draft articles submitted by the Commission to the General Assembly might reflect customary international law, and others might constitute proposals for the progressive development of international law. From that viewpoint, the draft articles contributed to the study of international custom, even though they remained proposals and were not binding on States.

83. With regard to the question of inaction dealt with in paragraph 3 of draft conclusion 11 (Evidence of acceptance as law), the commentary should clearly establish the requirements for inaction to be considered evidence of acceptance of a conduct as law. In international law, where the will of States played a central role, silence generally did not imply consent and thus, in order for inaction by a subject of international law to be binding internationally, its scope must be clearly limited to cases where a reaction by one subject to another's conduct could be expected but did not occur.

84. His delegation endorsed the content of draft conclusion 16 (Persistent objector).

85. On the topic of crimes against humanity, the Special Rapporteur had been careful to address the actual prevention and punishment of such crimes (draft article 1), and the current draft therefore focused on the approval of domestic legislation and effective and efficient cooperation between States (draft article 4).

86. The obligation of States to prevent and punish crimes against humanity was part of customary international law. The prohibition of such crimes was a peremptory norm of international law. The obligation of States to prevent and punish such crimes was also included in the Rome Statute of the International Criminal Court. However, unlike the case of war crimes and genocide, there was no international treaty specifically requiring States individually to prevent and punish such crimes. Thus, the Commission's contribution to developing a specific treaty in that area was vital. In order to protect the most essential rights of the individual, it was important to reiterate that crimes against humanity were crimes under international law, whether or not committed in time of armed conflict and whether or not criminalized under national law.

87. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation noted with regard to draft conclusion 11 (Constituent instruments of international organizations) that for over a century, international organizations had played a leading role in international law, and their constituent treaties were the basis of their status as subjects of law. The constituent treaty of the world's most important international organization, the United Nations, was the Magna Carta of international law. It was in that context that draft conclusion 11 acquired its importance, by stating that articles 31 and 32 of the Vienna Convention were applicable to the constituent treaties of international organizations. The draft conclusion simply indicated that, on certain occasions and in compliance with the high standards set by general practice and jurisprudence, a constituent treaty of an international organization might be interpreted in the light of a subsequent agreement or subsequent practice. A well-known example was the interpretation of the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations, pursuant to which the abstention of a permanent member of the Security Council did not constitute an obstacle to the adoption of decisions. That interpretation enjoyed the general support of the States Members of the United Nations.

88. It should be borne in mind that the interpretation of a treaty through a subsequent agreement or subsequent practice was a narrowly defined situation; a treaty could not be modified or amended by mere conduct. Chile was aware of its common responsibility to ensure that the international system functioned smoothly, and an essential element was the principle of adherence to international law, which included strict respect for treaties, as a guarantee of international peace and stability.

89. His delegation welcomed the inclusion of the topic "*Jus cogens*" in the Commission's programme of work. Article 53 of the Vienna Convention referred to that concept and assumed its existence. Until a few decades previously, the concept had raised questions for some members of the international community and had not been unanimously accepted. Today there was no doubt that the rules of *jus cogens* constituted the basic pillar of international law; there were few legal concepts on which such unanimity existed. Hence the importance of the Special Rapporteur's work for the codification and progressive development of international law. The Commission would need to decide how to identify a *jus cogens* rule and what its legal nature was. *Jus cogens* rules were clearly important in the international community, since they protected essential values shared by all humanity and were true norms of international public order which limited the free will of States.

90. His delegation urged the General Assembly, when it adopted its resolution on the report of the Commission, to emphasize the valuable contribution of the Commission's work.

91. **Ms. Palacios** (Spain) said that, on the topic "Identification of customary international law", her delegation found the Special Rapporteur's proposed draft conclusion 4 [5] (Requirement of practice) too strict in excluding conduct by other non-State actors for the purpose of identifying customary law. There were fields of international law where non-State actors played an important role, and their conduct should be taken into account in determining existing international law. Her delegation was in favour of a more nuanced approach.

92. In draft conclusion 11 (Evidence of acceptance as law), it might be useful to consider inaction not only as evidence of *opinio juris*, but also as evidence of the dilution of a previous *opinio juris*. When conduct which in principle was in violation of customary law did not prompt a reaction from those who could invoke the violated rule, it could be inferred that its acceptance as law had become weaker. Should inaction continue or become generalized, it could even be

concluded that *opinio juris* had ceased to exist. In that connection, her delegation preferred the well-established term "*opinio juris*" to "acceptance as law".

93. Concerning judicial decisions and writings, referred to in draft conclusion 14 as a subsidiary means for the identification of customary international law, her delegation considered that the rulings of national courts should be included within the "judicial decisions" category. In areas such as the immunities of foreign States, which concerned the exercise of jurisdiction by such courts, the consideration of national judicial decisions was unavoidable. With regard to writings, the role of the resolutions of the International Law Institute could be taken into consideration in the commentary.

94. On the topic of crimes against humanity, the Commission's work had been facilitated by the existence of previous treaty instruments, in particular the Rome Statute but also treaties applicable to other international crimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Following the example of the latter Convention, the phrase in draft article 1 "the prevention and punishment of crimes against humanity" could be used as the title of the draft articles, and draft article 1, the wording of which was not entirely satisfactory, could then be deleted. It did not seem technically correct to state that the draft articles "apply" [*se aplique*] to the prevention and punishment of crimes against humanity; it would be more suitable to say that they "concern" [*tiene por objeto*] the prevention and punishment of such crimes.

95. Draft article 4, paragraph 2, should be moved elsewhere, since it had nothing to do with the title of draft article 4 or the content of paragraph 1.

96. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, draft conclusion 11 would be clearer if it specified that the subsequent agreements, subsequent practice and other subsequent practice referred to in paragraphs 1 and 2 concerned the agreements and practice of States parties to the constituent treaty of the international organization, either that of all of them (they would then come under article 31, paragraph 3, of the Vienna Convention), or that of one or a number of them (they would then fall within the ambit of article 32). It was true that draft conclusion 4 already defined subsequent agreement, subsequent practice and other subsequent practice, indicating the parties concerned, but given that in the case of the constituent treaties of international organizations the States parties were States members of the organization, a reference to the subsequent agreement and practice of member States or one or a number of them could be included. That would help highlight how those paragraphs differed from paragraph 3, whose object was not the subsequent practice of States, but the practice of the international organization as such.

97. As article 32 of the Vienna Convention did not refer to practice of any kind, it did not seem appropriate, in the Spanish version, to use the phrase in paragraphs 1 and 2 "*en el sentido del artículo 32*", which should be replaced with "*en virtud del artículo 32*". That comment also applied to other draft conclusions which used that phrase.

98. Moreover, the intent of paragraph 2 should be better worded in order to distinguish it from that of paragraph 3. The phrase "may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument" in paragraph 2 was not sufficiently clear. Moreover, the commentary to that provision pointed in two different directions: on the one hand, the examples given alluded to the subsequent agreements and practice of member States or States parties which were reflected in the practice of the international organization; on the other, paragraph (15) of the commentary suggested that the practice of an international organization might trigger an agreement or a practice of States, either to react to it or to acknowledge it. It was important to clarify what the paragraph referred to so as to ensure that its wording and the commentary relating to it fully achieved their purpose.

99. **Ms. Escobar** (El Salvador) said that, on the topic of identification of customary international law, she would refer to the draft conclusions provisionally adopted by the Drafting Committee. With regard to draft conclusion 3 [4] (Assessment of evidence for the two elements) there had been a debate on who would bear the burden of proof for demonstrating the existence of a customary norm; in her delegation's view, the analysis of the draft conclusion should not focus on the evidentiary aspect, since it should not be assumed that the invocation of a customary norm would always be the subject of controversy. Although the wording of the provision was suitable, her

delegation suggested replacing the title with something more general, for example "Assessment of the existence of the two elements" [*Valoración de la existencia de los dos elementos*] or "Means of identifying the two elements" [*Medios para identificar los dos elementos*].

100. Her delegation agreed with the new formulation of draft conclusion 8 [9], in which the reference to States whose interests were specially affected had been deleted, because the particular interests of one or several States should not condition the application of a customary norm already established in international law.

101. Draft conclusion 10 [11], paragraph 3, should be based on the idea that not all inaction could be considered *per se* to be acceptance as law by States; consequently, it was appropriate to set conditions and limits on the content of the provision. The current wording introduced only two limiting elements: inaction was relevant only when the State was in a position to react and the circumstances called for some reaction. Both those elements should be clarified in the commentary, and other limiting criteria should be added, such as requiring actual knowledge of the practice and the continuation of such practice for a sufficient period of time.

102. With regard to draft conclusion 15 [16], it was important not to confuse the persistent objector rule with the violation of a customary norm or other norms of international law. To that end, the text should make it clear that States could not avail themselves of that rule when an established rule of customary law already existed or when the persistent objector was obligated by other sources of international law, such as treaties or peremptory norms of international law. The title of draft conclusion 16 [15] (Particular customary international law) was problematic, because it appeared to introduce a contradiction in terms. A more precise wording should be found and more examples of its current application cited in the commentary.

103. Concerning the topic of crimes against humanity, her delegation agreed on the importance of elaborating a draft convention devoted exclusively to such crimes so as to fill existing gaps, promote standardization of criminal law at the national level and enhance compliance by States with their obligation to prevent and punish such acts.

104. In draft article 1, it was essential to clarify that such crimes could be committed at any time, and her delegation therefore suggested using the formulation in the Convention on the Prevention and Punishment of the Crime of Genocide, which specified that such a crime could be committed in time of peace or in time of war. In the Spanish version, the phrase "*contemplados en el derecho internacional*" should be replaced with "*de derecho internacional*", which was a better rendering of the English phrase "under international law".

105. Although it was necessary to ensure consistency with existing treaties, that did not mean that their content should be automatically reproduced. There should be a discussion of the scope of the definition of crimes, and in particular draft article 3, paragraph 1 (h), regarding the grounds given for the persecution of a group, which seemed very limited and difficult to interpret. In addition to the obligation to prevent and punish crimes against humanity, it was also necessary to include the obligation to provide compensation, which had been recognized by a number of human rights tribunals.

106. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", her delegation was pleased that attention had been given to the constituent instruments of international organizations, because it was important to address the question of subsequent agreements and subsequent practice bearing in mind the particularities of international organizations, which, unlike States, were governed by the principle of "speciality". Her delegation agreed with the content of draft conclusion 11, but its wording was too general, and some of the clarifications contained in the commentary should be included in the draft conclusion itself to facilitate understanding. Although her delegation was aware of the difficulties involved in addressing the subsequent practice of international organizations due to their great diversity, a number of aspects could still be considered, for example an analysis of which actors could perform subsequent practice, in other words, those to whom it was possible to attribute the subsequent practice of the international organization. Draft conclusion 5 already dealt with attribution of subsequent practice, and its wording was based on the articles on responsibility of States for internationally wrongful acts. It would be useful to include a similar analysis for international organizations that gave rise to

a general rule of attribution for them. Bearing in mind the articles on the responsibility of international organizations, the draft conclusions or their commentary should focus specifically on actions carried out at different levels by the organs and agents of international organizations entrusted with exercising the organization's functions and the value that could be attributed to them.

107. In addition to the constituent treaties of international organizations, it would be very useful to produce a separate draft conclusion on treaties adopted within an international organization, bearing in mind that that had also been specifically established in the Vienna Convention, and given the many instruments adopted in the framework of those organizations.

108. **Ms. Zeytinoğlu Özkan** (Turkey) said that her delegation supported the two-element approach to the topic "Identification of customary international law" and welcomed the progress made by the Special Rapporteur in elaborating draft conclusions. With regard to his draft conclusion 4 [5], since States remained the primary subjects of international law, her delegation agreed that conduct by other non-State actors was not practice for the purposes of formation or identification of customary international law.

109. With regard to draft conclusion 11 (Evidence of acceptance as law), the elements relied upon to ascertain the formation of a rule of international customary international law needed to be carefully evaluated. Evidence not substantiated through concrete elements or based on mere assumptions should not be taken into account. The circumstances under which inaction could be seen as relevant should be further examined. Concerning draft conclusion 12, on the role of treaties, her delegation did not agree with the view expressed by some Commission members that the geographical distribution of the parties to a treaty could serve as evidence of the general character of practice. The approach should not be limited to a sole criterion. With respect to draft conclusion 13, her delegation believed that a high threshold should be set for the evidentiary value of resolutions adopted by international organizations or at international conferences with regard to formation and identification of customary international law. The adoption of a resolution should not be equated with the acceptance of its content as customary international law. With regard to draft conclusion 14, her delegation agreed that judicial decisions could serve as subsidiary evidence for the identification of rules of customary international law.

110. As to draft conclusion 16, her delegation was pleased that the concept of persistent objector, which was well established in international law, had received widespread support, and it agreed with the Special Rapporteur's approach.

111. Concerning the topic "Crimes against humanity", her delegation had some questions about the Special Rapporteur's report (A/CN.4/680), in particular about footnote 44, which did not accurately reflect the content of the document to which it referred.

112. The definition of crimes against humanity contained in draft article 3 differed from the one set out in the Rome Statute on two points on which her delegation would welcome further clarification. First, draft article 3, paragraph 4, stated that "[t]his draft article is without prejudice to any broader definition provided for in any international instrument or national law"; the Convention against Torture contained a similar provision. Her delegation doubted whether paragraph 4 served the purpose of the topic under consideration, namely the harmonization of national laws. Second, the last part of paragraph 1(h), which was modelled on article 7, paragraph 1 (h), of the Rome Statute, made reference to the crime of genocide and war crimes. Those crimes were not defined, nor did the draft articles make any mention of instruments containing such definitions. It would be useful to address that gap, because it might create uncertainty.

113. **Mr. Tiriticco** (Italy) said that, with regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation supported draft conclusion 11 and appreciated the decision to address the interpretation of treaties that were the constituent instruments of international organizations and to exclude from the scope of the draft conclusion the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties concluded by international organizations which were not constituent instruments of international organizations. Constituent treaties of international organizations were treaties with specific features, as the International Court of Justice had authoritatively and repeatedly recognized, and they therefore required separate consideration.

114. His delegation saw the merits of having separate paragraphs 2 and 3 — the former referring to the

practice of member States within one or more organs of the organization, and the latter referring to the practice of the organization as such- for which different provisions on interpretation under the Vienna Convention were applicable. While the rationale of that distinction appeared clearly in the commentary, the text of the draft conclusion could be improved. The notion of the "practice" of an international organization in paragraph 3 was not accompanied by any qualification, such as "established". His delegation could agree to such flexibility, without prejudice to further consideration of the point at issue at a future stage of the debate.

115. His delegation endorsed paragraph 4 as a safeguard clause with respect to "relevant rules" of interpretation that might, however rarely, be contained in a constituent instrument. It agreed that such rules should take precedence over the general rules of interpretation; that was also in line with article 5 of the 1969 Vienna Convention; article 2, paragraph 1 (j), of the 1986 Vienna Convention; and article 2 (b) of the articles on responsibility of international organizations. His delegation also supported the view that the "established practice of the organization" should be recognized as being equivalent to a "rule of the organization". For the purposes of paragraph 4, as opposed to those of paragraph 3, it was appropriate that the notion of "practice" should be qualified as "established".

116. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation endorsed the three-phase approach which had been taken, but reserved its position on the format of the end product. His delegation was prepared to concur with the idea of elaborating a set of draft principles as a working method at the current stage, without prejudice to the possibility of choosing a different format later on.

117. While realizing that the main purpose of the second report was to identify the existing rules of international humanitarian law applicable to the protection of the environment in time of armed conflict, his delegation would also welcome a study of the applicability in relation to armed conflict of the international rules and principles of international environmental law, both treaties and customary law. In the same vein, his delegation encouraged further study of the interrelation between international humanitarian law and environmental law, as well as human rights law, in relation to the protection of the environment and the right to health in armed conflict. Further examination would also be welcome of the contours of the *lex specialis* character of international humanitarian law during armed conflict and of the effects of armed conflict on environmental agreements.

118. As to the scope of the principles, his delegation was pleased to see language referring to "armed conflict", so as to encompass international and non-international armed conflicts. It shared the view of those who wished to retain the term "environment" throughout the text without the qualification "natural". In the draft preamble, in the paragraph concerning the purpose of the draft principles, his delegation favoured the phrase "minimizing damage to the environment", with the deletion of the word "collateral" before "damage".

119. Qualifying the environment as "civilian in nature" allowed for the application of the principle of distinction in draft principle 1. It would, however, be useful to provide guidance concerning the conditions under which the environment, or parts of it, might become a military objective. As to the degree of damage to be prevented, it would be useful to incorporate the phrase "widespread, long-term and severe damage", as in article 35, paragraph 3, and article 55, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). In draft principle 2 or draft principle 3, an additional reference should be made to the prohibition of hostile environmental modification techniques.

120. His delegation endorsed the language in draft principle 3, and also the prohibition of reprisals against the environment referred to in draft principle 4, in line with article 55, paragraph 2, of Additional Protocol I, even though the customary law nature of such a prohibition was not generally recognized. The designation in draft principle 5 of areas of major ecological importance as demilitarized or protected zones was appropriate; a reference to areas of cultural importance, as proposed by the Drafting Committee, should be added.

121. Italy reiterated the importance that it attached to a comprehensive and in-depth analysis of the topic "Immunity of State officials from foreign criminal jurisdiction", which touched upon several issues of

critical relevance in current State and judicial practice. His delegation agreed with the view that the definition in subparagraph (f) of an act performed in an official capacity was not necessarily identical with *acta jure imperii*, just as the distinction between acts performed in an official capacity and acts performed in a private capacity were not meant to be equivalent to that between *acta jure imperii* and *acta jure gestionis*.

122. His delegation was pleased that the Special Rapporteur, in order to determine when an act was performed in an official capacity, had referred to the concept of "elements of the governmental authority" elaborated on by the Commission in paragraph (5) of the commentary to article 5 of the articles on responsibility of States for internationally wrongful acts, according to which "beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise". That point had been acknowledged by the Commission during the debate. The rich national and international case law researched by the Special Rapporteur, including civil claims relevant to criminal case law, was largely sufficient to corroborate the point.

123. His delegation appreciated the mention, by both the Special Rapporteur and Commission members, of the activities of the police and the armed forces as one of the categories which were widely acknowledged by judicial practice as falling within the exercise of "governmental authority" for determining the application of immunity *ratione materiae*. It continued to stress that the activities of the armed forces fell within the scope of "acts performed in an official capacity" for the purposes of the application of immunity *ratione materiae*.

124. His delegation agreed with the scope of immunity ratione materiae as set out in draft article 6 and the time during which it applied. The order of paragraphs 1 and 2 was acceptable, but paragraph 3 could be deleted so as to avoid duplication with draft article 4, paragraph 3.

125. **Mr. Hanami** (Japan) said that on the topic "Identification of customary international law" his delegation took a cautious view of the idea that inaction would constitute evidence of acceptance as law. There was a practical difficulty in distinguishing inaction that might serve that purpose from other kinds of non-action. Without a clear expression of intention by a number of States on separate occasions, inaction should not be construed as evidence of acceptance as law. His delegation understood the Special Rapporteur's view that inaction could serve as evidence of *opinio juris* when the circumstances called for some reaction. However, the existence of circumstances calling for some reaction should be strictly interpreted, because there was no clear benchmark to identify such circumstances.

126. His delegation was aware that there had been a debate in the Commission over the persistent objector rule. As some members had pointed out, the notion was controversial, because substantial questions remained, such as whether the existence of the persistent objector prevented the establishment of such a rule as customary international law, or whether the rule simply prevented the application of the customary rule to the persistent objector. Further deliberation and specific examples of general practice were needed in order to substantiate the rule.

127. His delegation agreed with the Commission's conclusion that resolutions adopted by international organizations might be evidence of the existence and content of a rule of customary international law. However, the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. With regard to the evidentiary value of judicial decisions, practitioners frequently referred to decisions of international courts, in particular those of the International Court of Justice, when analysing whether a rule could be categorized as customary international law or not; that practice should be taken into account.

128. Since the Special Rapporteur intended to complete a first reading of the draft conclusions and commentaries by the end of the Commission's sixty-eighth session, the Commission might consider spending sufficient time to make the project truly useful to practitioners.

129. On the topic "Crimes against humanity", his delegation acknowledged the significance of the work initiated by the Special Rapporteur on filling the legal gap with regard to the obligation to prevent and punish such acts. Japan placed great importance on combating

impunity for the most serious crimes of concern to the international community as a whole. Whereas the Rome Statute regulated “vertical relationships” between the Court and its States parties, it did not prescribe any obligations regarding the adoption of national laws on crimes against humanity or concerning inter-State cooperation. The work currently under way, which would establish “horizontal relationships” among States and regulate inter-State cooperation, would enhance the efforts of the international community to prevent those crimes and punish their perpetrators.

130. The current work should avoid any legal conflicts with the obligations of States arising under the constituent instruments of international courts or tribunals, including the International Criminal Court. Article 7 of the Rome Statute was an appropriate basis for defining crimes against humanity, considering that it had been accepted by more than 120 States parties to the Rome Statute. The scope of the draft articles applied only to the prevention and punishment of crimes against humanity. Thus, the current work addressed inter-State cooperation on prevention, investigation, extradition and prosecution and would contribute to the realization of the principle of complementarity under the Rome Statute, rather than conflicting with the regime of the International Criminal Court. As the fight against impunity for such crimes required coordinated action by the international community, it was to be hoped that the Commission would continue to deliberate on the topic in a cooperative and constructive manner.

The meeting rose at 6.05 p.m.