United Nations A/C.6/70/SR.21

General Assembly

Seventieth session

Official Records

Distr.: General
25 November 2015

Original: English

Sixth Committee

Summary record of the 21st meeting
Held at Headquarters, New York, on Friday, 6 November 2015, at 10 a.m.

Chair: Mr. Charles . . . . (Trinidad and Tobago)

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The meeting was called to order at 10 a.m.

Statement by the President of the International Court of Justice

1. **Mr. Abraham** (President of the International Court of Justice) said that the seventieth anniversary of the establishment of the International Court of Justice, which would be marked in April 2016, would provide an opportunity to take stock of its work and, in particular, its role within the United Nations. His statement would therefore address the Court's contribution to the development and interpretation of the institutional law of the Organization. Since its creation, the Court had contributed, particularly through its advisory opinions, to the advent of international institutional law in its current form. Its support had taken three forms. First, by clarifying the legal status of the United Nations and the scope of its powers, the Court had helped to consolidate the Organization's role and place in the international legal order. Second, the Court's decisions had shed light on the functioning and responsibilities of the principal organs of the United Nations, and on the limits of their respective functions. Third, the Court had also expressed itself regarding the value of certain principles put forward in the texts adopted by the General Assembly, thereby strengthening its cooperation with the Organization in promoting and developing international law.

2. In its first few years of activity, the Court had declared itself competent to interpret the Charter of the United Nations. In its 1948 advisory opinion concerning *Conditions of admission of a State to membership in the United Nations (Article 4 of the Charter)*, the Court had been asked to interpret the first paragraph of Article 4 of the Charter. The Court had found that it was competent to answer the question, noting that there was no provision in the Charter forbidding it from performing an interpretative function, since the latter fell within the normal exercise of its judicial powers as the principal judicial organ of the United Nations. The Court had reaffirmed that principle in its 1950 advisory opinion on *Competence of the General Assembly for the admission of a State to the United Nations*, in which it had been asked to interpret the second paragraph of Article 4 of the Charter. The Court had declared itself competent, on the basis of Article 96 of the Charter and article 65 of its Statute, to answer any legal question put to it, including those involving the interpretation of provisions of the Charter.

3. As part of such an interpretive exercise, the Court had recognized the international legal personality of the United Nations in its 1949 advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. The Court had considered whether the United Nations could bring an international claim against a State to obtain reparations when one of its agents incurred damage in the line of duty. It had answered in the affirmative, holding that the Organization was intended to exercise and enjoy functions and rights that could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It could not carry out the intentions of its founders if it was devoid of international personality.

4. The recognition of the legal personality of the United Nations had several consequences. As a subject of international law, it was not only entitled to have rights and privileges, but was also bound by legal obligations under general rules of international law, the Charter and international agreements to which it had become a party. On three occasions, the Court had interpreted agreements concluded between, on the one hand, the United Nations and its specialized agencies and, on the other hand, its Member States. In its 1989 advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court had been called upon to determine whether the provision at issue applied to the special rapporteur of a subcommission established by one of the principal organs of the Organization. The Court had concluded that the privileges and immunities provided for in section 22 of Article VI of the Convention were applicable to every expert on mission for the United Nations, whether or not he travelled, and that the provisions of section 22 could be invoked against the expert's State of nationality or residence. The Court had taken the view that such an interpretation was justified, in particular, by the need to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. The Court had considered similar questions in its advisory opinions on the *Interpretation of the agreement of 25 March 1951 between the World Health Organization and Egypt (1980)* and on the

Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947 (1988).

5. With regard to the obligations stemming from the recognition of the international legal personality of the United Nations, the Court had affirmed that the organs of the United Nations were bound by judicial decisions that had binding force on them. It had stated that principle in its 1954 advisory opinion on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*, in which it had held that the General Assembly did not have the right to refuse to give effect to an award of compensation made by an administrative tribunal which it had itself put in place in order to hear disputes between the Organization and its staff members. The Court had considered that, when the Secretary-General concluded a contract of service with a staff member, he engaged the legal responsibility of the Organization, which was the juridical person on whose behalf he acted. Consequently, a judgement settling a dispute relating to the termination of such contract bound the Organization as a party to the dispute. The Court had thus concluded that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgement.

6. In addition to delineating some of the rights and obligations of the United Nations, the Court had also stated, in two advisory proceedings, that the Organization enjoyed implied powers that were necessary to carry out its functions. In its 1949 advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court had stressed that the United Nations must be deemed to have those powers which, though not expressly provided in the Charter, were conferred upon it by necessary implication as being essential to the performance of its duties. After examining the nature of the functions entrusted to the Organization and the nature of the missions assigned to its agents, the Court had found that the Organization necessarily had the capacity to seek redress, through an international claim, for damages suffered by it and its agents. In its 1954 advisory opinion on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*, the Court had noted that the Organization and, in particular, the General Assembly, had the power to create subsidiary organs, and that the Charter contained no provision which authorized any of the principal organs of the United Nations to adjudicate disputes between the United Nations and its staff members. It had concluded that the General Assembly had the power to establish a tribunal to do justice as between the Organization and the staff members. That power was implicit in the Charter, as it would hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals, and with the constant preoccupation of the United Nations to promote that aim, that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which might arise between it and them.

7. In a number of advisory proceedings, the Court had addressed the scope of the General Assembly's activities, particularly in the light of the provisions of the Charter. In the two advisory opinions concerning admission to membership in the United Nations, the Court had asserted that the actions of the General Assembly were subject to the conditions set forth in Article 4 of the Charter. In the advisory opinion on *Conditions of admission of a State to membership in the United Nations (Article 4 of the Charter)*, it had held that a Member State called upon to vote on the admission of another State could not make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of Article 4. In particular, such consent could not be made contingent on the condition that other States should be admitted to membership together with the applicant State. In *Competence of the General Assembly for the admission of a State to the United Nations*, the Court had ruled that a State could not be admitted to membership solely based on a decision of the General Assembly without a recommendation of the Security Council. In reaching that conclusion, the Court had relied not only on Article 4, paragraph 2, of the Charter, but also on the structure of the Charter and the relationship that it established between the General Assembly and the Security Council.

8. The Court had recalled the need to preserve the balance of powers set out by the Charter. It had observed that the General Assembly and the Security Council were both principal organs of the United Nations, and that the Charter did not place the Security Council in a subordinate position. On the contrary, under Articles 4, 5 and 6 of the Charter, the Security Council cooperated with the General Assembly in matters of admission to membership, of suspension

from the exercise of the rights and privileges of membership, and of expulsion from the Organization. With respect to the specific question before it, the Court had concluded that to hold that the General Assembly had the power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power that had been entrusted to it by the Charter. It would almost nullify the Security Council's role in the exercise of one of the essential functions of the Organization.

9. The Court had also commented on the scope of the General Assembly's power to request advisory opinions. In its 1950 advisory opinion on the *Interpretation of peace treaties with Bulgaria, Hungary and Romania (first phase)*, the Court had declined to conclude that the General Assembly had exceeded its powers by requesting an advisory opinion on the observance of human rights in certain countries, a matter which some States had argued belonged essentially within the domestic jurisdiction of the States concerned. After considering the terms of the resolution by which the General Assembly had requested the opinion, the Court had found that it was based on Article 55 of the Charter, according to which the United Nations should promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

10. In a similar vein, in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had rejected the idea that the General Assembly had exceeded its powers by requesting an opinion on the effect of reservations on the entry into force of the Convention. The Court had found that the power of the General Assembly to request an advisory opinion could be exercised in parallel with the right of States parties to interpret the Convention. Moreover, under article 9 of the Convention, States parties might submit to the Court any dispute relating to the interpretation, application or fulfilment of the Convention. The Court also stressed the important role played by the General Assembly in the formulation and adoption of the Convention.

11. A similar issue had arisen with regard to the Court's 1996 advisory opinion on the *Legality of the threat or use of nuclear weapons*. Some States had argued that the General Assembly was not entitled to request an opinion on questions unrelated to its work, in spite of the fact that it was authorized, under Article 96, paragraph l, of the Charter, to request an advisory opinion from the International Court of Justice on any legal question. In the case under consideration, the Court had concluded that, irrespective of the proper interpretation of Article 96, paragraph 1, the question posed was relevant to many aspects of the General Assembly's activities and concerns. More importantly, it had added that Article 96, paragraph 1, of the Charter could not be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it could take binding decisions. In so doing, the Court had also confirmed that the General Assembly could put questions to the Court in areas in which it had issued only recommendations.

12. The Court had been faced with such issues from its beginnings. In the case concerning *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, its advisory opinion had been requested on whether expenditures authorized in certain General Assembly resolutions relating to the United Nations operations in the Congo and in the Middle East could be considered "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter. It had held that such expenses could be authorized by General Assembly resolutions, even though they sought to finance operations relating to the maintenance of international peace and security. It had thereby stated that the Security Council had primary, rather than exclusive, jurisdiction on all such matters. While indeed the Security Council held exclusive jurisdiction to order coercive actions under Chapter VII of the Charter, the functions and powers conferred by the Charter on the General Assembly were not confined to discussion, consideration, the initiation of studies and the making of recommendations; they were not merely hortatory.

13. More recently, in 2004, in its advisory opinion on the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the Court had recalled those functions and powers, in particular the power to recommend measures to ensure the peaceful resolution of various situations, pursuant to Article 14 of the Charter. While the Security Council was empowered to deal with matters concerning the maintenance of international peace and security, the General Assembly was also competent to address the humanitarian, social and economic aspects of such

matters. The two organs were thus entrusted with complementary functions in the maintenance of international peace and security.

14. General Assembly resolutions, particularly when adopted by a large majority, were relied on by the Court, in its judgments and advisory opinions, when they were relevant to the analysis of the applicable law. That, in turn, helped to clarify the rules and principles laid down in those resolutions and, sometimes, to identify an *opinio juris* on various points of law. For example, in its advisory opinion handed down in 1971 on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the Court had based its reasoning on General Assembly resolution 1514 (XV), which proclaimed the right to self-determination of all peoples, and had thus found that the continued presence of South Africa in Namibia was illegal and that South Africa had the obligation to withdraw from the occupied territory.

15. General Assembly resolutions were similarly referred to in a number of other judgments and advisory opinions, including in the Court's 1996 opinion on the *Legality of the threat or use of nuclear weapons*, where it had found that, while such resolutions were not binding, they nevertheless had a normative value. In particular, they could provide evidence important for establishing the existence of a rule or the existence of an *opinio juris*, and a series of resolutions might show a gradual evolution of the *opinio juris* required for the establishment of a new rule.

16. Conversely, the judgments and advisory opinions of the Court were widely cited in resolutions of the Security Council and the General Assembly. In its resolutions 301 (1971) and 366 (1974), the Security Council had called on all States to abide by the Court's opinion in the case relating to the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970)*. In addition, the General Assembly had referred to many of the Court's opinions in its resolutions and had even recommended that all Member States should comply with the principles set out therein. Moreover, delegations participating in the deliberations of the Sixth Committee had repeatedly acknowledged the crucial role played by the International Court of Justice in promoting the rule of law and respect for international law, thus reflecting the link between the work of the two bodies. The dialogue between them had helped to identify certain priorities in the legal road map of the United Nations and to reaffirm the important role of the Court in the peaceful settlement of disputes. Since its creation, 70 years earlier, the Court had never been so active as it was currently, with 12 pending cases before it, including four cases in which deliberations were under way. That showed the growing willingness of States to resort to peaceful means to resolve their disputes, which the Court could only welcome.

17. **Mr. Medina** (Bolivarian Republic of Venezuela) requested clarification as to the limits of the Security Council's powers and whether there was any organ that could hold it accountable for its actions.

18. **Mr. Horna** (Peru), referring to the important role of the Court in affirming the rule of law, and especially in the peaceful settlement of disputes, wondered about the main challenges facing it when requested to give an advisory opinion on sensitive political topics.

19. **Mr. Ware** (Ethiopia) said that the Court's work deserved to be better known throughout the world, particularly in developing countries. He wished to know what was being done in respect of outreach for the Court, to bring its activities to the attention of new generations of jurists.

20. **Mr. Abraham** (President of the International Court of Justice) said that the provisions of the Charter defined the powers and limits of the Security Council, and the Court was competent to interpret those provisions. Since he could not prejudge the Court's position on any point which it had not yet addressed, his response to the question regarding the limits of the Security Council's powers must remain general. As for the challenges facing the Court when asked to deliver an advisory opinion, they were enunciated in its case law. First, it had to decide whether it was competent, in other words, that all the conditions laid down in the Charter had been met. Once that was established, it needed to determine whether or not, as the case might be, it could nevertheless, because of exceptional circumstances, respond to the request. So far, the Court had never refrained from giving an advisory opinion when the conditions for its competence had been met. Such requests were treated with care, by order of priority according to their degree of urgency, so as to

ensure that the advisory opinion would serve a useful purpose.

21. He agreed with the representative of Ethiopia that it was always desirable to make the Court's work better known throughout the world and expressed the hope that the celebration of its seventieth anniversary would help to bring that about. A permanent effort by everyone concerned was required, however, particularly since the mass media were less interested in it than in other courts, including international courts.

22. **Mr. Alabrune** (France) asked what useful purpose was served by the work and deliberations of the International Law Commission, from the perspective of the International Court of Justice.

23. **Mr. Abraham** (President of the International Court of Justice) said that the Court's judgments referred frequently to the work of the International Law Commission, and particularly to the texts it adopted, including, for example, the articles on responsibility of States for internationally wrongful acts. The Court must, however, apply existing law and therefore needed to distinguish in the texts adopted by the Commission between matters relating to the codification of customary law and issues of progressive development. Those texts could not always have the value of positive law for the Court, but it nevertheless took them into account in determining the current state of customary international law in any particular area. It was noteworthy that many current members of the International Court of Justice were former members of the International Law Commission and were consequently well aware of the Commission's valuable contribution to the codification of international law.

24. **Mr. Atlassi** (Morocco) expressed appreciation for the continuing tradition of visits by the President of the International Court of Justice to the Sixth Committee. He asked what use the Court made of the draft articles submitted for its consideration, even when not yet adopted. Was there any interaction between so-called hard and soft laws?

25. **Mr. Abraham** (President of the International Court of Justice) said that the Court was generally reluctant to refer to articles that were only provisional, but it still took such work into account in determining applicable law.

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

26. **Mr. Popkov** (Belarus), commenting on the topic "Identification of customary international law", said that his delegation still believed that it would be useful to consider the formation of customary international law alongside the identification of rules. In practice, it was impossible to separate the two; in order to understand how customary international law came into being, it was essential to identify specific rules. His delegation emphasized the importance of the two-element approach, namely the consideration of both general practice and *opinio juris*. The question of the chronological link between the two did not affect the requirement that both should be present.

27. Addressing draft conclusion 14, concerning judicial decisions and writings, he said that the work of legal experts was unquestionably relevant to the topic. The writings of legal experts included accessible, precise and well-argued demonstrations of the elements that constituted customary international law. At the same time, however, customary international law was formed exclusively on the basis of State practice, so those legal opinions were relevant only if considered in that context. The practice of non-State actors was not relevant to the formation of customary international law, and the acts of intergovernmental organizations should be taken into consideration only to the extent that they reflected the practices of Member States, first and foremost in representative bodies, as opposed to secretariats, treaty bodies or similar institutions.

28. The third report of the Special Rapporteur (A/CN.4/682) included some excellent research on the question of particular custom. The term as such was not ideal, but it did fulfil the purpose of recognizing the existence of the phenomenon and highlighting that it should not be defined on exclusively geographic grounds. The requirement for evidence should be higher than for other rules of general international law. Particular or local custom should be adopted in a clearly expressed form by all of the affected States.

29. As for draft conclusion 16 concerning the persistent objector, there was a need for closer research into the circumstances in which States might free themselves from fulfilling their commitments. Open and formal objection to the formation of a rule of customary international law could result in the rule not

being binding for the State in question, provided that a majority of States did not adduce weighty motives to the contrary. Rules of customary international law did not always need universal recognition; but the broad practice of applying such rules was important for strengthening their status as a source of international law that could have advantages when compared with treaty rules. The requirement of persistent objection over time was not fully consistent with the chronological approach and, on the whole, was burdensome for States. Moreover, a State's temporary failure to object to a practice could be misinterpreted as tacit agreement, leading to groundless expectations regarding that State's future behaviour. His delegation would welcome further research on that question, particularly with regard to the criteria for the change or cessation of a rule.

30. Turning to the topic "Crimes against humanity", he said that, in the light of recent treaty practice and the systematization of crimes against humanity, it was useful from a practical standpoint to consider measures to prevent and punish such crimes. The result of that endeavour should not necessarily be an international treaty; such crimes were covered by existing treaties, and the hasty adoption of a new instrument could be counterproductive.

31. There were contradictions between draft articles 2 and 3. Draft article 2 rightly separated the definition of crimes against humanity from the presence of an armed conflict. Draft article 3, however, used terminology that was characteristic of international humanitarian law. Excluding any category of persons, such as non-civilians, from the scope of the draft article would be inconsistent with its aims. Reference to the judgements of international judiciary bodies did not take into consideration the fact that they viewed crimes against humanity in the context of armed conflict.

32. His delegation supported the inclusion in the draft articles of a provision in favour of a more effective system of prosecution for crimes against humanity as stipulated in international or national law. However, it would not be acceptable to establish preconditions in favour of the automatic use of national legal concepts in defining crimes against humanity.

33. It would be useful to further develop paragraph 2 of draft article 4. His delegation had no objection to the content of the draft article, which was already enshrined in international law. While it was indeed unacceptable to invoke exceptional circumstances to justify crimes against humanity, such circumstances sometimes made it impossible to adopt measures to prevent those crimes. The disarray of national authorities and the potential for harm to the population were two cases in point. Paragraph 2 of draft article 4 could be better placed elsewhere, and other norms of international law on the obligations of States should be considered.

34. Turning to the topic "Subsequent agreements and subsequent practices in relation to the interpretation of treaties", he said that the third report of the Special Rapporteur had made a significant contribution to the subject. His delegation hoped that there would be a more detailed examination of the specifics of the relevant treaties, including a more regularized and formalized approach to States' interactions with their obligations. His delegation believed that the practice of international organizations should be considered in a restrained manner. The core task was to interpret the practice of States, and it would not be appropriate to pit that practice against that of the international organizations that those States had established. Only organs with a broad representation should be taken into account, and the practice of each body should be viewed only within the limits of its competence. It would be logical to interpret such particularities in a more precise manner within the draft conclusions, rather than in the commentary. Lastly, it would be useful to have further information on the established practice of organizations in that regard.

35. **Ms. Krasa** (Cyprus) said that her delegation shared the concerns already expressed as to the relevance of the persistent objector rule to chapter VI of the Commission's report, given that that chapter concerned the identification rather than the application of customary international law. Moreover, the use of that rule as a means to avoid customary international law obligations was highly contentious and could lead to the fragmentation of international law. No tribunal had ever ruled that the status of persistent objector prevented the application of a norm of customary law to the objecting State, nor was the concept supported by State practice; whatever credence might be given to it, it was indisputably inapplicable to *jus cogens*. Any right of a State to dissent from a rule of customary international law should not be construed narrowly merely to protect the basic scope of *jus cogens* as a

fundamental principle of a law-abiding international community. Rather, it should be construed broadly to safeguard the stability, predictability and security afforded to international relations by customary international law.

36. She wondered what would be the outcome, in international relations, if a State were allowed, on the basis of persistent objection, to question the validity of generally binding rules of international law. In any case, a State could be a "persistent objector", and have the benefits deriving therefrom, only to the extent that the rule had not yet solidified into custom. Accordingly, such a controversial theory, without sufficient support in State practice and international jurisprudence, should not be included in the draft conclusions.

37. As for the concept of particular local or regional custom, addressed in draft conclusion 16 [15] of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.869), while the International Court of Justice had acknowledged that it could be invoked in some instances, it must be tacitly accepted by all the parties concerned and its existence proved by the State invoking it. The draft conclusion should therefore include an additional clause to the effect that the State invoking an alleged regional custom should bear the burden of proof for the existence of such a rule, in order to safeguard the interests of dissenting States.

38. **Ms. Lijnzaad** (Netherlands), commenting on the topic "Identification of customary international law", said that it was difficult to interpret inaction or silence as evidence for the identification of rules of customary international law. Such an approach raised deeper questions involving States' motives and the assumption that their actions, or lack thereof, were based on rational decision-making. Her delegation appreciated the generally careful approach of the Special Rapporteur, who had urged against drawing too many conclusions from the silence or inaction of States. Silence did not necessarily imply acquiescence; such a conclusion could be drawn only in a particular situation in which a State would have been expected to react and had not done so. In order for inaction to serve as evidence of acceptance as law, the States involved must have actual knowledge of the practice in question. That view raised the question of how public or well-reported a practice or *opinio juris* needed to be, and whether there was a general requirement for information on the acceptance of a nascent customary rule to be made available in order for consequences to be drawn from silence. In certain cases, apparent silence could conceal confidential government actions, such as diplomatic correspondence, which were not shared with the public but were nevertheless relevant.

39. The Commission had held interesting discussions regarding whether judicial decisions and writings could be used as a subsidiary means for the identification of customary international law. Her delegation wondered whether further clarification could be provided as to how that discussion related to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, which referred to the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

40. Her delegation agreed that the persistent objector rule needed to be included in the Commission's conclusions on the topic. However, it had hesitations regarding the rule as formulated thus far. Draft conclusion 16 in its current form provided that a State that had persistently objected to a new rule of customary international law while that rule was in the process of formation was not bound by the rule for so long as it maintained its objection. That wording implied that the objector had an obligation to continue expressing its objection to the rule. Her delegation questioned the origin of such an obligation, which was neither theoretically nor logically correct. At the heart of the position of the persistent objector rule was the notion that international law was a consensual system. In the case of treaties, such consent was explicit. The same was not true of customary international law; on the contrary, only explicit, consistent and clearly-expressed objections would prevent a State from becoming bound by a rule. Such objections must be made during the formation of the rule, rather than after it. It followed that once a State had made it sufficiently clear that it did not wish to be bound, it had no obligation to reiterate that desire. On the contrary, the State would lose its position as a persistent objector only when its subsequent practice or legal positions expressed support for the new rule and deviated from its earlier position. Paragraph 93 of the Special Rapporteur's third report correctly reflected that view.

41. Turning to the topic "Crimes against humanity", she said that her Government shared the Commission's concerns regarding the continuing occurrence of crimes against humanity. The issue, however, was

perhaps not one of definition: in view of the established case law of the various international criminal tribunals and the existing legal instruments defining crimes against humanity, such as the Rome Statute of the International Criminal Court, the notion of what constituted a crime against humanity was now familiar. The issue, rather, was how to operationalize the mechanisms to prevent and punish crimes against humanity, particularly within domestic jurisdiction. It would be useful to have a treaty to fulfil that purpose. That instrument, and hence the work of the Commission, should examine how to enforce the prohibition on crimes against humanity, instead of providing yet another definition.

42. It would also be pertinent to address the relation between the draft articles on crimes against humanity and the Rome Statute, which the Netherlands supported. States parties to the Rome Statute were obliged to implement its provisions, including those on crimes against humanity, in their respective national legal systems. Any subsequent instrument on the same topic should build on that existing practice. At the same time, the obligation to prevent and prosecute crimes against humanity was just as binding on States not parties to the Rome Statute.

43. Particularly in cases with numerous international dimensions, it was vital to ensure that the relevant national judicial systems were connected in order to foster inter-State cooperation with regard to prosecution. For that purpose, mutual legal assistance should be strengthened, and a legal instrument should be formulated covering all atrocity crimes. Together with the Governments of Argentina, Belgium and Slovenia, her Government was working towards a new multilateral treaty on mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes. To date, 48 States from all continents, including both parties to the Rome Statute and non-parties, had expressed support for the opening of negotiations on such a treaty. That support was growing steadily. Her delegation would welcome close cooperation between the Commission and the promoters of the initiative in order to improve legal cooperation in combating the most serious international crimes.

44. Addressing draft conclusion 11 of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that constituent instruments of international organizations were important as a particular type of treaty to which the different elements and criteria of subsequent agreement and subsequent practice could apply. Treaty interpretation should be distinguished from the amendment or modification of treaties through the operation of subsequent agreements or subsequent practice, especially in the case of the practice of an international organization in the application of its constituent instrument. It was not the function of interpretation to revise treaties or to read into them provisions that they did not expressly or implicitly contain. However, the conduct of an organ of an international organization could influence that organization's practice in the application of a constituent instrument, especially when that practice had never been challenged by the parties to the instrument. That situation could result in an implicit modification of the constituent instrument of the organization.

45. At the same time, it was often difficult to determine whether a decision interpreting or modifying a constituent instrument had been taken by an organ of the organization or by the Member States that were parties to the instrument. In such situations, it could be difficult to establish subsequent practice in the application of the constituent instrument within the meaning of article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

46. **Mr. Alday González** (Mexico), commenting on the topic "Identification of customary international law", said that the third report of the Special Rapporteur (A/CN.4/682) displayed a clear and concise approach to an area of law in which those qualities were often lacking. In particular, it provided a comprehensive analysis of the effects of inaction both as a practice and as evidence of *opinio juris*. As the report showed, the idea that inaction was a practice was only apparently contradictory. When States did not react to an event of which they were aware, and which had a visible and verifiable effect on third parties, that course of action could be read as a specific practice. The evaluation of inaction as a subjective and objective element was a more complex area that required further analysis.

47. In several places, the report stated that treaties, resolutions of international organizations and decisions and writings were not in themselves conclusive

evidence of the existence of a rule of customary international law. However, all of those subsidiary sources could provide indications that should be evaluated with caution according to the circumstances, and that could confirm the existence or otherwise of a practice, *opinio juris* or both.

48. His delegation believed that treaties could codify, crystallize or generate new rules of customary international law, with due consideration for the specificities of any particular rule. It was also possible that a treaty could declare the existence of a rule, especially when its purpose was not to enshrine that rule but to complement it. Decisions and writings could distil, but not generate the practice and *opinio juris* of States and international organizations in respect of practical application or theory.

49. The action or inaction of international organizations could point to the presence of the subjective or objective element. In order to evaluate the action or inaction of international organizations, it would also be interesting to consider which of two situations applied. In one scenario, the organizations were collectively delegated to carry out activities that would in principle be the preserve of States, such as foreign policy or a given economic activity. In that case, the action or inaction of the organizations could in principle be viewed alongside the practice and *opinio juris* of its Member States. In another scenario, the organizations were assigned functions that States did not and could not carry out individually, such as authorizing the use of force where the unilateral use of force was prohibited. In that case, their action or inaction had value in and of itself.

50. His delegation believed that, despite their clarity, the draft conclusions often did not fully reflect the ample analysis and debate that had preceded their drafting. It hoped that the final wording would be balanced, setting out practical conclusions while also including the various components of the debate in the depth and detail that were evident in the Special Rapporteur's reports. Without those components, the conclusions would lose the clarity and comprehensiveness that had characterized the study of the topic. The ultimate benchmark was whether the conclusions were useful for practitioners.

51. Turning to the topic "Crimes against humanity", he said that the prohibition on crimes against humanity was unquestionably a fundamental *jus cogens* rule of international law. The Commission's work on the topic should complement the relevant existing instruments, such as the Rome Statute of the International Criminal Court. His delegation therefore agreed with the proposed focus of the draft articles, which would address the obligation of States to prevent and punish such crimes, including cooperation among States to investigate, prosecute or extradite suspects.

52. His delegation welcomed the fact that the draft articles used the definition of crimes against humanity contained in the Rome Statute. At the same time, the latter definition was wanting in two respects, and the draft articles should seek to be more specific. First, draft article 3, paragraph 2 (a), referred to crimes committed in furtherance of a State or organizational policy; the wording should specify that the organization in question was a State-like organization. As the commentary recognized, the Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind referred to acts committed by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities. After World War II, crimes against humanity had been defined as international crimes precisely because the crimes of that period had been State crimes, and hence unlikely to be prosecuted by the State in question. Given the gravity of such crimes, it had been deemed appropriate to override State sovereignty and allow their prosecution by the international community. That situation did not, however, apply to the policies of organizations of a non-State-like character, whose members' actions were subject to the courts of their respective nations.

53. Admittedly, the International Criminal Court had in some instances ruled that any organization could be deemed to have carried out crimes against humanity. However, those decisions involved only the cases that had come before the Court, and one judge had written a powerful dissenting opinion that was supported by numerous experts and academics. In any event, the question remained under discussion, and the draft commentary should reflect the continuing nature of the debate.

54. Second, many academics felt that the phrase "Other inhumane acts of a similar character" (draft art. 3, para. 1 (k)) was not sufficiently specific for the purposes of international criminal law. The Commission's work would provide a valuable opportunity to make that definition more precise.

55. **Mr. Pang** Khang Chau (Singapore), commenting on the topic "Identification of customary international law", said that the Special Rapporteur's third report had rightly given closer consideration to the question of the relevance of acts of international organizations. Caution was required when assessing the practice of international organizations and the weight to be given to variations in organizational structures, mandates, composition of decision-making organs and the manner of decision-making. The report made an important distinction between the practice of States within international organizations and that of international organizations as such. The acts of the latter should not generally be assimilated to those of States. His delegation therefore welcomed the decision to include a new paragraph 3 in draft conclusion 4 [5] stating that conduct by other non-State actors was not practice for the purpose of formation or identification of customary international law.

56. His delegation agreed that there was no pre-determined hierarchy among the different forms of practice and that, as stated in draft conclusion 11, inaction could also serve as evidence of acceptance as law under certain circumstances. It was necessary for the applicable conditions to be clear, as States could not be expected to react to all instances of practice on the part of other States. If such inaction was to form the basis of a rule of customary international law, the circumstances and evidence of *opinio juris* must be compelling.

57. The resolutions adopted within international organizations and at international conferences covered a great range of cases. The General Assembly was one political organ in which it was often far from clear that Member States' acts carried juridical significance. Considerations such as the language adopted, the nature of the body, the circumstances and methodology of adoption and the degree of support all called for a multifaceted analysis. His delegation therefore believed that caution was needed when ascribing significance to the role of such resolutions in the formation or identification of customary international law.

58. His delegation welcomed the affirmation in draft conclusion 16 of the principle of the persistent objector. At the same time, the requirement that the objection should be maintained persistently should be approached in a balanced and pragmatic manner. It was unrealistic and unwise to expect total consistency or persistency. In view of the increasing convergence of distinct disciplines and subject matter in various forums, not to mention the complex political considerations that were reflected in observable practice, that element required a holistic and contextual analysis.

59. Turning to the topic "Crimes against humanity", he welcomed the comprehensive approach adopted in the Special Rapporteur's first report (A/CN.4/680). In the light of the early stage of the topic, it was important to avoid pre-determined results, and any outcome would require further study. While the report sought to address the potential benefits of developing draft articles that could serve as the basis of an international convention, there might be other, more appropriate outcomes. Questions such as the relation between the topic and existing legal regimes would need careful consideration in order to avoid duplication or conflict.

60. Addressing the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that the interpretation of any treaty should be grounded in the treaty itself, which was the most explicit and authoritative expression of the parties' intentions. Subsequent practice should be invoked only very prudently. That was especially true with regard to the constituent instruments of international organizations, which were established for specific purposes and often had distinct functions and powers as compared to those of their members. Membership of such organizations could often be fluid, and new members could be admitted that had not been involved in negotiating the constituent instrument or forming subsequent practice. While aware of the need for flexibility in view of changing circumstances, his delegation believed that it was advisable to avoid circumventing the amendment mechanisms set out in constituent instruments. Questions of transparency and legitimate expectations for prospective members should also be borne in mind.

61. In the light of the broad variation among constituent treaties, there should be a more robust and precise definition of what constituted subsequent agreements or subsequent practice for the purposes of articles 31 and 32 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). The illustrations and explanations set out in the commentaries were therefore welcome. For instance, it

was useful to distinguish between, on the one hand, a practice that could reflect an agreement or practice of Member States as parties to a treaty and, on the other hand, a practice that expressed or amounted to a subsequent practice under article 31, paragraph 3 (b) of the Vienna Convention on the Law of Treaties. His delegation also welcomed the consideration of the question of whether and when acts of plenary organs of international organizations amounted to subsequent agreement or subsequent practice. Those complex issues warranted further reflection, and he hoped that the Commission would continue to update and compile relevant examples.

62. Lastly, while draft conclusion 11 did not address questions relating to the pronouncements of treaty-monitoring bodies consisting of independent experts, the Commission might wish to assess whether it needed to be addressed at a later stage. There was a range of such bodies, with different responsibilities, and the weight of their pronouncements depended both on the constituent document of the body and on the practice of parties in applying the treaty.

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

63. **Ms. Pathak** (India) commended the Special Rapporteur for his work on the topic "Identification of customary international law", noting that the International Court of Justice was mandated to apply such law in the settlement of disputes between States. Her delegation urged the Commission to give equal importance to the two elements, namely State practice and *opinio juris*, and to take into account the practice of States from all regions. Developing States, which did not publish digests of their practice, should be encouraged to communicate that practice, including statements made in international and regional forums and their case law. For its part, the Commission should engage with regional organizations, as many countries did not have the capacity to explore the topic. The efforts of the Asian-African Legal Consultative Organization to facilitate discussions with the Commission for that purpose deserved mention.

64. Concerning the Special Rapporteur's proposal that the opinions of Government legal advisers should be taken into account when accepted and acted upon by the Government, she noted the difficulty of the exercise, given that many countries did not publish those opinions. Further thought also needed to be given to the concept of "qualified silence" as a relevant practice. Her delegation agreed that all treaty provisions were not equally relevant as evidence of rules of customary international law and that only those of a "fundamentally norm-creating character" could generate such rules. As for possible relevance of the "conduct of other actors", referred to in draft conclusion 4 [5] of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.869), that expression needed to be clarified. In addition, the decisions of other courts besides the International Court of Justice should not be ignored; equal importance should be given to all geographical regions and account should also be taken of separate and dissenting opinions of judges.

65. Regarding the topic of crimes against humanity, she said that, in view of the existing legal regimes and mechanisms, it would require in-depth study and thorough discussion in the Commission. The proposed obligations should not conflict with existing treaty obligations and should not duplicate existing regimes

66. **Ms. Wyrozumska** (Poland) said that customary international law was one of the most fundamental sources of international law, but one that was sometimes ignored and sometimes abused. Her delegation supported the two — element approach to its identification while stressing that the two elements — general practice and *opinio juris* — while interrelated, could not be mixed but needed to be proved separately. She recalled that, according to the Commission, the decisions of national courts could not be regarded as evidence of both. The issue of necessity as an important factor of *opinio juris sive necessitatis* should be duly considered in that context. The question of particular customary international law should also be addressed in relation to the fragmentation of international law, in the context of possible special or self-contained customary regimes. However, the issue of "custom over time" should also be borne in mind: it was not only of theoretical but also of practical importance, as exemplified in the jurisprudence of international investment tribunals.

67. Furthermore, the Commission should analyse under what circumstances a binding rule of customary international law could be departed from and whether such a situation constituted a violation of the rule or the beginning of a new practice leading to the creation of a new custom. More specifically, her delegation

considered that draft conclusion 12 [13] of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.869) went too far in limiting the role of international organizations in the creation of customary rules; moreover, it did not differentiate between customs that were binding only within an international organization and general customary rules. In draft conclusion 11 [12], the word “or” needed to be inserted at the end of paragraph 1 (a). She took it that the solution proposed in that draft conclusion did not relate to the possible formation of a customary norm on the basis of a treaty; in evaluating State practice and *opinio juris*, special attention should be given to that possibility. In draft conclusion 15 [16], it should be expressly indicated that persistent objection should be manifested not only in verbal but also in physical acts.

68. Her delegation welcomed the Commission’s work on the topic of crimes against humanity and supported its use of the definition of such crimes contained in article 7 of the Rome Statute. The draft articles would benefit from the introduction of a victim-oriented approach, with particular attention to the most vulnerable category of victims, children. It should thus be stipulated in draft article 1 that the draft articles also applied to “a remedy and reparation for victims”. The final words of draft article 4, paragraph 2, should read “as justification of failure to prevent crimes against humanity”; that would be in line with the stated purpose of the obligation of prevention.

69. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, she said that her delegation fully endorsed draft conclusion 11, which perfectly reflected article 5 of the Vienna Convention on the Law of Treaties, and welcomed the careful drafting of its paragraphs 2 and 3. She commended the Special Rapporteur and the Commission for the well-documented and convincing commentary to the draft provision.

70. **Ms. Weiss Ma’Udi** (Israel) said that her Government was grateful to the Commission and the Special Rapporteur for their invaluable work on the identification of customary international law, particularly as it would be of assistance to practitioners. What was important was indeed the presence of both general practice and *opinio juris*, not their chronological order, and different evidence was usually required for each. Her delegation also agreed with draft conclusion 4 [5] of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.869) that the conduct of non-State actors was not practice for the purposes of the formation or identification of such law. The establishment of custom should be State-driven and should exclude non-State actors, for fear of polarization and politicization, particularly since the international community might otherwise be forced to determine which non-State actors were legitimate sources of custom and which were not.

71. Her delegation agreed with draft conclusion 10 [11], while stressing that silence or inaction should be considered acquiescence only when such silence or inaction was intentional. It took note of the cautious and qualified language used in draft conclusion 12 [13] to the effect that, while resolutions adopted in international forums might in some circumstances be evidence of customary international law or contribute to its development, they could not, in and of themselves, constitute it. Such resolutions constituted, as a rule, “soft law”, were prone to politicization and tended not to reflect accurately binding customary international law. Her delegation recommended great caution on that point and proposed that such an approach should be rejected in favour of a State-driven approach.

72. As for draft conclusion 13 [14], she said that her Government shared the position of the International Court of Justice, as expressed in the 2002 case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, that national judicial decisions were to be treated as evidence of States’ beliefs in regard to existing international law. On the other hand, the jurisprudence of international courts should be relied upon as a subsidiary means of identification only when their decisions included a comprehensive review and analysis of State practice. She reiterated her delegation’s concern that the approach adopted in draft conclusion 16 [15] to particular customs might well increase confusion and incoherence and create greater discrepancies between States in an international legal system that was already disjointed. She expressed agreement with draft conclusion 15 [16] on the persistent objector rule; it safeguarded the autonomy of individual States and helped to ensure that customary international law did not become the domain of certain States to the disadvantage of others.

73. Her Government also appreciated the valuable work done on the topic of crimes against humanity, which was a matter of particular concern to it, given

the history of the Jewish people. Israel had been one of the first nations to accede to the Convention on the Prevention and Punishment of the Crime of Genocide and to adopt domestic legislation accordingly. Moreover, it was currently conducting an internal review to examine the compatibility of Israeli criminal legislation with definitions of serious international crimes under international law, including crimes against humanity. As part of that process, Israel was considering the adoption of domestic legislation that would explicitly address crimes against humanity. A comprehensive, global codification of such crimes would benefit the entire international community; it should reflect customary international law and the widest possible consensus among States.

74. States should guard against any attempt to abuse existing enforcement mechanisms and ensure that new mechanisms would be properly resilient to such abuse. The increased involvement of non-State actors in the commission of crimes against humanity should receive special attention, and any codification should cover crimes against humanity committed by States and non-State actors alike. The Government of Israel would be honoured to contribute to the drafting of the new proposed treaty.

75. **Mr. Galea** (Romania), referring to the topic of identification of customary international law, commended the Special Rapporteur on his third report, which brought clarification to the relationship between general practice and *opinio juris*; the issue should be further examined so as to assess the weight of those two elements in different fields and different types of rules. Furthermore, the report treated the role of inaction in greater depth, which was an important development, particularly for Romania, which in 2014 had expressed the view that inaction as a relevant practice might be regarded as a constituent element of customary international law, but only where inaction resulted from consciousness of a duty not to act. Indeed, inaction might have legal consequences other than the formation of a custom, such as an estoppel.

76. His delegation welcomed the suggestion made during the Commission's debates that the criteria or circumstances under which inaction would be relevant should be specified. It might be usefully noted in that connection that, if a State invoked a general custom against another State, the latter State was not required to participate in the practice or action; indeed, its inaction might be sufficient to denote its acceptance of a custom proven by the practice and *opinio juris* of other States. However, it would be hard to argue that such inaction represented evidence of a custom. Where international treaties were concerned, his delegation shared the Special Rapporteur's view that multilateral ones were most significant, while the impact of bilateral treaties, although not excluded from the draft conclusions, should be approached with caution. There was likewise value in the view that there was little difference between the crystallization of a customary rule and the generation of a new rule through the adoption of a treaty.

77. Romania agreed that judicial decisions and writings, now included in draft conclusion 14, should be treated separately because of their different weight and significance. It welcomed the considerations as to particular custom, particularly the emphasis on the practice and acceptance of each State concerned, as opposed to the general custom. His delegation approved of the inclusion of the persistent objector rule but considered that difficulties might arise in view of the fine difference between cases where a custom existed but was not binding for one or more persistently objecting States and situations where a number of persistent objectors led in fact to a non-uniform practice. He recalled that in both the *Asylum case (Peru v. Colombia)* and the *Fisheries case (United Kingdom v. Norway)*, the persistent objector argument had been invoked after it had been shown that no custom existed owing to non-uniform practice. His delegation looked forward to having a full set of first reading draft conclusions and commentaries by the end of 2016, as envisaged by the Special Rapporteur.

78. His delegation also appreciated the Commission's work on the topic of crimes against humanity and had read with great interest the Special Rapporteur's arguments for a treaty to prevent and punish such crimes. Romania needed further time to study the implications of that option, as it was particularly wary of undermining, even indirectly, efforts towards the universality of the Rome Statute of the International Criminal Court. Romania remained a strong and constant supporter of that Court.

79. His delegation welcomed the inclusion of a draft article on the scope of the draft articles and agreed with the position expressed in draft article 2 that crimes against humanity could occur in times of peace as well as in times of armed conflict. With respect to draft article 3, it supported the Commission's approach

of not departing from the provisions of article 7 of the Rome Statute, which enjoyed broad consensus. His delegation likewise shared the view reflected in draft article 4, paragraph 1 (a), in so far as it covered situations of both *de jure* and *de facto* State jurisdiction, and was favourable to the inclusion of the non-derogation provision.

80. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that his delegation appreciated the Special Rapporteur's comprehensive analysis and welcomed draft conclusion 11 and the commentaries thereto. There was, however, a very fine line between paragraphs 2 and 3 of draft conclusion 11, such that the difference between them was clarified only after a thorough reading of the commentaries. His delegation therefore proposed, for the sake of clarity, that the words "subsequent agreements or subsequent practice of the parties" should be included in paragraph 2, and "practice of the international organization as such" should be included in paragraph 3. On substance also, the difference between the two paragraphs was very slender. He agreed with the idea expressed in paragraph (15) of the commentary that subsequent practice of States might arise from their reactions to the practice of an international organization, and similarly with the view in paragraph (34) of the commentary that the "own practice" of organizations was "relevant for the determination of the object and purpose of the treaty". Since, however, the reactions of States to such "own practice" mattered, the relation between draft conclusion 11, paragraphs 2 and 3, on the one hand, and draft conclusion 9, paragraph 2, on silence constituting acceptance, on the other, should be further explored.

81. **Ms. Silek** (Hungary), after noting the significant achievements of the Commission at its sixty-seventh session and commending its Chairman and the special rapporteurs for their outstanding work, said that Hungary had a particular interest in the topic "Protection of the atmosphere" as it considered climate and air quality protection and the prevention of ozone depletion a high priority. It had been a party, from the very beginning, to all the conventions forming the basis of the Commission's work on the draft guidelines. Her delegation had noted the statement in the Commission's commentary that the main sources of transboundary atmospheric pollution were sulphur dioxide and nitrogen oxides. Since, however, in Hungary and other European countries, most health problems were caused by particulate matter, including black carbon, and tropospheric ozone, her delegation considered that those pollutants should also be included in the scope of the draft guidelines. The Commission might usefully consult in that regard the secretariat of the Convention on Long-range Transboundary Air Pollution.

82. She noted that the combination of three different subject matters — climate change, air quality and ozone depletion — created problems, even in the definition of certain terms. An increase in the number of States parties to existing conventions and a greater commitment to their implementation might prove more effective in protecting the atmosphere than a combined regulatory framework. Moreover, and in contrast with all the other conventions relating to the topic, the Convention on Long-range Transboundary Air Pollution was of limited scope, having been adopted within the framework of the Economic Commission for Europe. Thought might be given to enlarging its scope or even elaborating a new, global convention on air pollution.

83. Turning to the topic of crimes against humanity, she said that Hungary, as a State party to the Rome Statute, was deeply committed to ending impunity for major international crimes and had lent its full support to the endeavours of international judicial bodies to establish individual accountability for such crimes. There was no unified treaty basis for prosecuting crimes against humanity, such as existed for war crimes and genocide, and that legal gap needed to be addressed. As States were primarily responsible for preventing and punishing crimes against humanity, the current legal regime must be reinforced so as to assist national authorities in those efforts which, moreover, needed to be extended beyond the community of States members of the International Criminal Court. Her delegation therefore supported the Commission's work on the topic, while recognizing the need to avoid conflict with other existing legal regimes in the field, especially the Rome Statute. The Commission was to be commended for so far following the guidance to that effect given by States in previous debates.

84. **Mr. Saeed** (Sudan), commenting on the topic "Identification of customary international law", said that his delegation supported the two-element approach adopted in the third report of the Special Rapporteur. General practice and *opinio juris* were closely

interconnected, and each should be carefully considered in order to ascertain that a new rule of customary international law had been established. Such an assessment should take into consideration the various forms of evidence, which should be assessed in a specific manner and while taking the context into consideration. The two elements should be ascertained separately.

85. In practical terms, it was difficult to determine whether inaction was evidence of the acceptance of a practice as law. The draft conclusions raised the question of which standards should be taken into consideration. It was also important to ascertain whether the State was effectively aware of the practice in question, and that the circumstances called for a response on the part of the State.

86. Addressing draft conclusion 13, concerning resolutions of international organizations and conferences, he said that the role of international organizations could not be assimilated to that of States. When assessing the resolutions of international organizations, it was important to focus on the organ within the organization that had the broadest membership. Only intergovernmental organizations should be considered, and the context and means of adoption of the decision should be taken into account.

87. His delegation believed that draft conclusion 14, concerning judicial decisions and writings, required more thorough study. In particular, the decisions of the International Court of Justice were of pivotal importance and could not be seen as having the same weight as the decisions of other international courts.

88. Draft conclusion 15, concerning particular custom, required further analysis and greater detail. Draft conclusion 16, concerning the persistent objector, stood in need of clarification and practical examples detailing the conditions that must be met in order for a State to be deemed a persistent objector.

89. Future work on the topic should take place in several stages, so that the Drafting Committee could complete its work and the Member States could examine the draft conclusions along with the commentaries of the Special Rapporteur. That approach would enable Member States to analyse the topic in sufficient depth.

90. **Mr. Horna** (Peru), referring to the topic of identification of customary international law and reserving the possibility of making further comments subsequently, said that there were practical difficulties in qualifying inaction in international law as practice and/or evidence of acceptance as law, notwithstanding the criteria set out in the Special Rapporteur's third report (A/CN.4/682). Any determination of "a sufficient period of time" (para. 80 of the Commission's report) always ran the risk of being arbitrary. States could not be expected to react in every instance to the practice of other States, and the circumstances surrounding inaction needed to be carefully evaluated before determining whether or not such inaction had legal consequences.

91. As for the relevance of treaties to the identification of customary international law, he noted that the concept of the exclusive economic zone developed during the Third United Nations Conference on the Law of the Sea and referred to by the Special Rapporteur in his third report as an important example of how treaties might crystallize customary rules *in statu nascendi*, had originated in unilateral proclamations beginning in 1947, subsequently supplemented by a tripartite declaration in 1952. Such proclamations had in fact been cited as the most notable example of so-called "Latin American regionalism".

92. Similarly, another unilateral declaration, President Truman's 1945 proclamation on the continental shelf, together with other unilateral declarations, had been considered by the International Court of Justice, in the *North Sea Continental Shelf* cases, as the source of a rule of customary international law, as well as playing an important role, for instance, in the adoption of the Convention on the Continental Shelf in 1958. Peru therefore considered it important to include such considerations under "Particular customary international law" in the draft conclusions. He expressed the hope that the draft conclusions and the commentaries thereto would be adopted at first reading in 2016. A second reading would then be possible in 2018, thereby paving the way for the preparation of a practical guide that would greatly help professionals to identify customary international law.

93. Turning to the topic of crimes against humanity, he said that Peru welcomed the Special Rapporteur's work towards the development of a possible future convention. He would make only preliminary comments, given that the work was still in progress. Since a legal framework already existed for crimes

against humanity, it would be important to emphasize that the draft articles were not seeking to compete with or replace that framework but to supplement it, particularly in respect of the prevention and punishment of such crimes. His delegation hoped that the second report, to be submitted in 2016, would include the obligation of States to ensure that such crimes were so defined in national legislation and to adopt the necessary measures for States to exercise jurisdiction over them.

The meeting rose at 1.05 p.m.