United Nations

A/C.6/70/SR.23

General Assembly

Seventieth session

Official Records

Distr.: General
27 November 2015

Original: English

Sixth Committee

Summary record of the 23rd meeting

Held at Headquarters, New York, on Monday, 9 November 2015, at 10 a.m.

Chair: Ms. Morris-Sharma (Vice-Chair) . . . . (Singapore)
later: Mr. Holovka (Vice-Chair) . . . . (Serbia)
later: Mr. Charles (Chair) . . . . (Trinidad and Tobago)

Contents

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

Agenda item 81: Report of the United Nations Commission on International Trade Law on the work of its forty-eighth session (*continued*)

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Control Unit (srcorrections@un.org), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

15-19502 (E)

In the absence of Mr. Charles (Trinidad and Tobago), Ms. Morris-Sharma (Singapore), Vice-Chair, took the Chair.

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

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

1. **The Chair** invited the Commission to resume its consideration of chapters V to VIII of the report of the International Law Commission on the work of its sixty-seventh session.

2. **Mr. Logar** (Slovenia) said that his delegation welcomed the Special Rapporteur's detailed analysis of the topic of identification of customary international law and supported the Commission's request to the Secretariat to prepare a memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. It appreciated the Special Rapporteur's analysis of the relevance of the temporal relationship between the two elements of general practice and *opinio juris*, and agreed that, in seeking to ascertain whether a rule of customary international law had emerged, it was necessary in every case to consider and verify the existence of each element separately, which generally required an assessment of different evidence for each element. It was the presence of the two elements, rather than their temporal order, that was crucial for such a determination, reflecting the inherently flexible nature of customary international law and its role within the international legal system.

3. His delegation shared the view that, in some cases, inaction could serve as evidence of *opinio juris*; however, it was necessary to consider all relevant elements that would point to a deliberate decision by the State, such as circumstances that called for a reaction, actual knowledge of the practice in question, and the duration of inaction. With regard to the issues of particular custom and the persistent objector rule, additional attention should be paid to establishing the appropriate terminology and determining geographical limits. A distinction should be made between customary international law and *jus cogens*, as well as *erga omnes* obligations, in relation to the concept of a persistent objector, since *jus cogens* rules reflected commonly accepted values that were peremptory in nature and from which no derogation was allowed. With respect to particular custom, it was important to avoid the excessive fragmentation of customary international law; the existence of multiple "regional legal orders" with their own rules could hinder the development and coherence of customary law at the international level.

4. Concerning the topic "Crimes against humanity", his delegation noted the ambitious tentative road map for the completion of work on the topic. The four draft articles provisionally adopted by the Commission to date reflected certain concepts that were fundamental to an understanding of crimes against humanity — namely, their existence as crimes regardless of whether the conduct had been criminalized under national law and the irrelevance of whether or not they had been committed in time of armed conflict — that should be retained. Slovenia commended the methodology adopted, according to which the definition of crimes against humanity in draft article 3 was based on article 7 of the Rome Statute and drew on the Elements of Crimes of the International Criminal Court. With its 123 States parties, the Rome Statute was an indispensable source of guidance for the current work on the topic, and any new convention on crimes against humanity should be consistent with, and complement, its provisions. In that regard, draft article 3 would need to be amended when the Court's jurisdiction over the crime of aggression was activated.

5. His delegation appreciated the emphasis in the four draft articles on the obligation of prevention as well as punishment, and welcomed the effort to ensure that draft article 4, paragraph 2, encompassed both State and non-State actors. However, the placement of that paragraph should be revisited, since at present it might not lead to the immediate conclusion that non-State actors were also subjects of draft article 4.

6. Slovenia wished to reiterate the importance of inter-State cooperation on mutual legal assistance and extradition with regard to atrocity crimes. The fact that there was no modern multilateral treaty providing for mutual legal assistance and extradition for genocide, war crimes and crimes against humanity hindered the effectiveness of domestic prosecutions of those crimes. Recognizing the importance of closing that legal gap, Slovenia, together with Argentina, Belgium and the Netherlands, was leading an initiative for the adoption of a new multilateral treaty on mutual legal assistance

and extradition with respect to the domestic investigation and prosecution of the most serious international crimes, which covered genocide, crimes against humanity and war crimes. The new instrument was intended to serve as a useful tool for practitioners.

7. **Mr. Galbavý** (Slovakia) said that his delegation agreed that the final outcome of the Commission's work on the topic "Identification of customary international law" should be a set of simple but clear conclusions that would assist practitioners. It also strongly concurred with the two-element approach followed by the Special Rapporteur. Both general practice and *opinio juris* were indispensable in order to identify a rule of customary international law. The extensive presence of one element could not compensate for the lack of the other, and each element was to be separately ascertained.

8. His delegation agreed that there was a practical difficulty in qualifying inaction as practice or evidence of acceptance as law (*opinio juris*), although the criteria set out by the Special Rapporteur in his report for deciding whether inaction could serve as evidence of acceptance as law were helpful. His proposed draft conclusion 11 (Evidence of acceptance as law) would be improved by the inclusion of the essence of those specific criteria in the relevant paragraph. Draft conclusion 12 (Treaties) was very pertinent, since a number of international treaties, including those based on the Commission's work, as well as some that were not yet in force or were not even expected to enter into force, served as important evidence of rules of customary international law. As correctly reflected in draft conclusion 13, resolutions adopted by international organizations or at intergovernmental conferences could not, in and of themselves, constitute customary international law, although, in some specific situations, sufficiently supported by practice and *opinio juris*, they could in fact serve as evidence of a customary rule. Case-by-case consideration of relevant resolutions and their content therefore seemed to be the only right approach.

9. While it should be generally accepted that judicial decisions and the writings or teachings of prominent jurists frequently served as subsidiary means for the determination of rules of customary international law, it seemed appropriate to make a clear distinction between them. His delegation therefore supported splitting the Special Rapporteur's proposed draft conclusion 14 into two separate draft conclusions. It also shared the Special Rapporteur's view that separate and dissenting opinions attached to the decisions of international tribunals, although not formally part of those decisions, might be highly relevant in identifying rules of customary international law.

10. His delegation recognized particular custom as an exception to the general application of rules of customary international law and therefore supported the Special Rapporteur's draft conclusion 15. Given the nature of particular custom and the limited number of States bound by such a rule, it might seem more difficult to establish the necessary evidence of practice and *opinio juris* than with general rules of customary international law. While in theory, particular custom could be created among States from different regions, a geographical nexus could serve as an important element to establish unequivocally the existence of a particular custom. Furthermore, his delegation was convinced that the principle of the persistent objector had sufficient support in current international law; draft conclusion 16 was therefore an important part of the future outcome of the topic.

11. His delegation was pleased to note that the Special Rapporteur intended for the Commission to complete its first reading of the draft conclusions and commentaries by the end of its sixty-eighth session. It underscored the importance of the commentaries for the application, use and interpretation of the future conclusions and agreed that sufficient time should be devoted to their formulation, consideration and adoption.

12. Speaking on the topic "Crimes against humanity", the Special Rapporteur's decision to approach the topic with a view to drafting a future convention on the prevention and punishment of crimes against humanity was a wise one, since that was the only viable option for ensuring effective implementation of the draft articles. His delegation welcomed the Commission's provisional adoption of draft articles 1 to 4, which were in fact the key provisions of the future instrument, as well as the extensive commentaries thereto. It supported the definition of crimes against humanity based on article 7 of the Rome Statute, which was generally considered to reflect customary international law. It also welcomed the inclusion of a draft article on the obligation of prevention, not only because such articles been long included in similar multilateral conventions,

but also because the effective prevention of crimes against humanity should be the primary purpose of the new legal instrument.

13. **Mr. Mminele** (South Africa) said that the Special Rapporteur for the topic "Crimes against humanity" was to be commended for producing a well-researched first report (A/CN.4/680), as well as four draft articles, in a short space of time. The focus of the draft articles on prevention and cooperation was especially commendable, as was their horizontal focus aimed at assisting States in adopting domestic legislation to criminalize, investigate, prosecute and punish crimes against humanity, and also to cooperate with other States in investigations and extradition. The principle of complementarity recognized that the most effective way to combat crimes against humanity was through domestic jurisdictions.

14. With regard to draft article 2 (General obligation), it went without saying that the obligation to prevent and punish crimes against humanity must apply both in peacetime and in time of armed conflict. His delegation agreed that the term "armed conflict" implicitly included both international and non-international armed conflict, as was shown by recent developments in international jurisprudence; however, it would do no harm to state explicitly that the term covered both international and internal armed conflict, in line with article 5 of the Statute of the International Tribunal for the Former Yugoslavia. His delegation agreed that the text of draft article 3 (Definition of crimes against humanity) should be drawn from the definition contained in article 7 of the Rome Statute, with the necessary contextual changes. That definition had not only been accepted as a treaty provision by the 123 States parties to the Rome Statute, but had also been incorporated in the domestic legislation of many States and was being applied in practice by the International Criminal Court. It had therefore probably obtained the status of customary international law. Lastly, his delegation agreed with the approach taken in draft article 4 (Obligation of prevention); South Africa had already adopted domestic legislation and procedures with a view to preventing crimes against humanity. It went without saying that exceptional circumstances could not be invoked as a justification of crimes against humanity.

15. **Mr. Nguyen** Vu Minh (Viet Nam) said that on the topic "Identification of customary international law" his delegation reiterated its full support for the two-element approach. It appreciated the Special Rapporteur's emphasis on the need to ascertain each element separately and to assess specific evidence for each of the two elements, regardless of their temporal order. With regard to draft conclusion 14 (Teachings), as provisionally adopted by the Drafting Committee, the work of the International Law Commission should not be equated with teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of customary international law. In many cases, the Commission's work should in fact serve as primary evidence of customary international law. As for draft conclusion 16 [15], his delegation was unwilling to encourage the recognition and promotion of particular customary international law among States having no geographical nexus, as that risked further fragmenting international law. Strict criteria should be applied to particular custom, identifying clearly which States had participated in the practice and accepted it as law.

16. His delegation noted the Commission's request for the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of determining customary international law. Although the question was pertinent, bearing in mind that the term "judicial decision" in article 38, paragraph (d), of the Statute of the International Court of Justice could include decisions of both national and international courts, caution was needed in addressing the role of national courts' decisions, in view of country-specific constitutional constraints and the doctrine of precedent in domestic law.

17. An examination of practical means of enhancing the availability of materials that could be used as evidence to determine customary international law, which the Special Rapporteur intended to include in his fourth report, would be of immense practical use to States. His delegation hoped that the commentaries to the draft conclusions would fully explain various nuances and provide detailed guidance on how to identify rules of customary international law on a case-by-case basis.

18. **Mr. Leonidchenko** (Russian Federation) said that his delegation had questioned the usefulness of the Commission's consideration of the topic "Crimes against humanity" when it had first been included in the Commission's programme of work since, such

crimes were already covered in the Nuremberg Charter and in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Therefore, the added value of the Commission's consideration of the topic was likely to be its contribution to the harmonization of domestic legislation on crimes against humanity. His delegation supported the Commission's use of the Convention on the Prevention and Punishment of the Crime of Genocide as a model in drawing up draft articles on the topic and the verbatim reproduction in draft article 3 of the definition of crimes against humanity found in the Rome Statute.

19. Draft article 3, paragraph 4, however, was not self-evident. The aim of a future convention on crimes against humanity should be to ensure effective intergovernmental cooperation in preventing crimes against humanity and punishing their perpetrators in national courts. That aim was achievable only if a State party to such a convention was bound by international obligations to criminalize such crimes in its legislation, as stipulated in the convention. However, under the draft article, States parties to such a convention could have legislation on crimes against humanity that contained higher standards than those established in the Rome Statute. Such discrepancies would make it challenging to cooperate effectively on matters of extradition. On the other hand, cooperation with a State party that had adopted legislation with a narrower definition of crimes against humanity could also pose a problem. The mention of "any broader definition" in draft article 3, paragraph 4, should be reconsidered.

20. Regarding draft article 4, since crimes against humanity were by definition widespread and systematic in nature, the draft article on the obligation to prevent such crimes did not lend itself to detailed provisions. The Convention on the Prevention and Punishment of the Crime of Genocide did not provide such detail. His delegation also questioned whether cooperation between States and intergovernmental organizations could be considered as part of the obligation to prevent. Furthermore, it had doubts about the wisdom of the provision on extraterritorial application of preventive measures. While the chapeau of paragraph 1 of draft article 4 rightly drew attention to the need for any preventive measures to be in conformity with international law, the extension of the obligation to prevent crimes against humanity to any territory under a State's control pursuant to paragraph 1 (a) could open the door to abuse. Recent decisions of various international bodies had interpreted that criterion very broadly.

21. While noting that draft article 4 was based on the judgment of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, his delegation questioned whether all aspects of that judgment in fact reflected existing law. The aim of the draft articles could be satisfied by simply including a general reference to the obligation of States to prevent crimes against humanity. The stipulation that any preventive measures should be taken in conformity with international law should also be maintained. It was important to note that the obligation of prevention was clearly one of conduct and not one of result. His delegation proposed moving draft article 4, paragraph 2, to draft article 3, under the definition of crimes against humanity. The Commission should not rush its work on the draft articles, lest the quality of the outcome should suffer.

22. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that his delegation supported draft conclusion 11, paragraph 1, since it agreed that articles 31 and 32 of the Vienna Convention on the Law of Treaties applied to any treaty that was the constituent instrument of an international organization. On the other hand, it should be borne in mind that international organizations were the subject of, and not States parties to, such treaties. It was important to note, when analysing subsequent practice to interpret treaties, that the practice of States fell under the remit of article 31 of the Vienna Convention on the Law of Treaties, whereas the practice of international organizations was covered by article 32 alone. Therefore, he proposed to remove the reference to article 31, paragraph 1, of the Vienna Convention in draft conclusion 11, paragraph 3. In draft conclusion 11, paragraph 2, it would be clearer and more appropriate not to refer to the practice of organizations in and of itself, but rather to the conduct of States with regard to the practice of international organizations.

23. His delegation would not comment on the topic "Identification of customary international law" since the Commission had yet to adopt the commentary to the draft conclusions. The Commission had achieved rapid progress on the topic in large part because it had

left many challenging issues to one side for the moment.

24. **Mr. Adamhar** (Indonesia), referring to the topic "Identification of customary international law" said that all the draft conclusions must be clearly written so as to ensure that their meaning was comprehensible to practitioners, especially those lacking familiarity with customary international law. With regard to draft conclusion 3 [4] (Assessment of evidence for the two elements), paragraph 2, the Special Rapporteur had managed to clarify the relationship between the two constituent elements, concluding that, while the two elements were inseparable, the existence of each element had to be considered and verified separately. However, his delegation had some doubts about the Special Rapporteur's assertion that when seeking to identify the existence of a rule of customary international law, evidence of the relevant practice should generally not serve as evidence of *opinio juris* as well. Such a rigid separation of the way in which evidence was evaluated could fail to take account of circumstances that were relevant as evidence for both elements. That said, his delegation agreed to the formulation of draft conclusion 3 [4], paragraph 2, as proposed by the Special Rapporteur, though the second sentence would be clearer if the word "generally" was deleted, as it could create uncertainty for practitioners.

25. With regard to draft conclusion 4 [5] (Requirement of practice), his delegation shared the view that the acts of international organizations might reflect the practice and convictions of their member States and thus constitute State practice or evidence of *opinio juris*. Although the Special Rapporteur's third report (A/CN.4/682) did not provide sufficient analysis specifically relating to the proposed paragraph 3 on conduct by other non-State actors, that paragraph served as an important exclusionary clause, confirming that such conduct was not practice for the purposes of formation or identification of customary international law, and would therefore complete the provisions of draft conclusion 4 [5].

26. His delegation agreed that inaction, referred to in paragraph 3 of the Special Rapporteur's proposed draft conclusion 11 (Evidence of acceptance as law), might serve as evidence of acceptance as law. However, although it was a form of practice that, when general and coupled with acceptance as law, might give rise to a rule of customary international law, it was sometimes difficult to identify and qualify. In that regard, the draft conclusion required some clarification; the second part of the sentence, which stated "provided that the circumstances call for some reaction" was, in particular, rather vague. The paragraph could be redrafted in order to reflect in a more narrative fashion the essence of the three conditions referred to in the Special Rapporteur's report, namely, that the inaction of a State could be relevant only to establishing concurrence where reaction to the relevant practice was called for; the State concerned must have had actual knowledge of the practice in question; and the inaction must have been maintained over a sufficient period of time.

27. With regard to the Special Rapporteur's proposed draft conclusion 12 (Treaties), his delegation had no difficulty with subparagraphs (a) and (b), but doubted whether the formulation of subparagraph (c), especially the phrase "by giving rise to a general practice accepted as law" would be sufficiently clear to those interpreting the draft conclusion. As for draft conclusion 13, resolutions adopted by international organizations and at international conferences had certainly played an important role in the formation and identification of customary international law. However, before a resolution or any form of normative position adopted by an international organization or at an international conference was deemed to provide evidence of customary international law, the practice of the member States in question and the degree of its acceptance as law must be examined. The last clause of draft conclusion 13, specifying that resolutions could not, in and of themselves, constitute customary international law, justified the need for caution in that regard.

28. Draft conclusion 14 should reflect the difference in the weight to be given to different judicial decisions, as well as to the writings of different authors. His delegation appreciated the inclusion of draft conclusion 15, since, although cases of particular custom were limited in number, it was important to have a provision covering the formation and identification of customary international law with regional or bilateral application. As draft conclusion 15, paragraph 1, did not indicate the scope of application of the particular custom concerned, it could be reformulated by the insertion of the phrase "manifesting regional or local custom" after "particular custom". Lastly, his delegation supported draft conclusion 16 (Persistent objector), on the grounds that both judicial decisions and State practice

had confirmed that a State was not bound by an emerging rule of customary international law to which that State had persistently objected and to which it maintained its objection after the rule had crystallized. The persistent objector rule was important in order to preserve the consensual nature of customary international law.

29. Turning to the topic of crimes against humanity, he said that a convention on such crimes was an essential part of the international community's effort to combat impunity and a key missing piece in the current framework of international law. Such a convention, which must be realistic and workable, could regulate inter-State relations in addressing crimes against humanity, focusing on the obligation of States to prevent such crimes, promoting relevant national capacity-building, and establishing the obligation for States parties to exercise jurisdiction over perpetrators, including non-nationals present in their territory. In addition, the question of State responsibility in relation to the obligation of prevention deserved further consideration by the Special Rapporteur, since the convention should contain provisions clarifying how a failure to prevent the commission of crimes against humanity would incur State responsibility.

30. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation appreciated the draft principles proposed by the Special Rapporteur, as well as those presented by the Drafting Committee, and looked forward to reading the commentaries to be considered at the Commission's sixty-eighth session.

31. On the topic of immunity of State officials from foreign criminal jurisdiction, his delegation noted that there was a necessary link between an act performed in an official capacity and the attribution of the act to a State and ultimately to its sovereignty, as the act constituted a manifestation of sovereignty in the form of an exercise of State authority. The inclusion of the term "exercise of State authority" in draft article 2 (f), as provisionally adopted by the Drafting Committee, was therefore important as one of the characteristics of the concept of "acts performed in an official capacity". His delegation concurred with the Special Rapporteur that the definition of the exercise of State authority should be based on two elements, namely, certain activities which, by their nature, were considered to be expressions of or inherent to sovereignty, and certain activities occurring during the implementation of State policies and decisions that involved the exercise of sovereignty and were therefore linked to sovereignty in functional terms. Such a definition must be applied on a case-by-case basis.

32. In order to contribute to the Commission's work on international law, even stronger and more intensive engagement between the Commission and the Sixth Committee should continue to be fostered.

33. **Ms. Shefik** (United Kingdom) said that, on the topic of identification of customary international law, her delegation broadly agreed with the approach taken and the substance of the draft conclusions provisionally adopted by the Drafting Committee. When parties to litigation before the domestic courts in the United Kingdom sought to make arguments based on customary international law, as was increasingly common, judges found guidance in the judgments of the International Court of Justice, but there was currently no other authoritative reference to which they could turn. A practical outcome of the Commission's work in the form of a set of conclusions with commentaries would be useful to judges and other legal practitioners in determining whether or not a rule of customary international law existed; it would also have real value in the field of public international law as a whole. Her delegation looked forward to considering the commentaries to the draft conclusions, which should be seen as a major component of the guidance on the identification of customary international law.

34. Although the draft conclusions dealt with international organizations to some extent, they did not yet do so in a way that was entirely consistent. When the action of the European Union — which had particular importance among the international organizations concerned — replaced the action of its member States, such practice should be equated with the practice of States. Otherwise, member States would themselves be deprived of their ability to contribute to State practice. It should, however, be made clear in the draft conclusions or the commentaries thereto that the practice of international organizations could be equated with the practice of States only where the international organization was not acting *ultra vires*. The action of the European Union, for example, could only be equated with State practice where it was properly taken in accordance with the document entitled "EU Statements in multilateral organizations — General Arrangements" (No. 15901/11), the positions

of member States and European Union institutions on the division of competences, and the powers of the European Union institutions as expressly conferred on them by the relevant treaties.

35. Draft conclusion 10 [11] (Forms of evidence of acceptance as law (*opinio juris*)), as provisionally adopted by the Drafting Committee, should more clearly state in paragraph 2 that the listed categories of evidence would constitute evidence of *opinio juris* only to the extent that the content demonstrated the necessary understanding of legal right or obligation. The opening part of the paragraph could be amended to read "Forms of evidence of acceptance as law (*opinio juris*) may include, but are not limited to …"; alternatively the commentary to the draft conclusion could make it clear that the listed forms of evidence would constitute *opinio juris* only in some circumstances.

36. With regard to the topic "Crimes against humanity", it would be beneficial to explore how an "extradite or prosecute" regime in respect of crimes against humanity could operate, bearing in mind that there was no current general multilateral framework governing such crimes. Her delegation appreciated the careful consideration given by the Special Rapporteur and the Drafting Committee to the relationship between their work and the Rome Statute, which already provided for the international prosecution of crimes against humanity. Any additional regime would need to complement rather than compete with the Rome Statute; it could do so by facilitating national prosecutions and thereby strengthening the Statute's complementarity provisions. In that respect, the fact that the definition of crimes against humanity contained in article 7 of the Rome Statute had been incorporated in draft article 3 without substantive changes was wholly positive.

37. The scope of the topic should not be expanded into such issues as civil jurisdiction and immunity. The Commission should therefore keep the draft articles simple, in line with earlier conventions containing the obligation to extradite or prosecute (*aut dedere aut judicare*). The Commission should also consider further the appropriate jurisdictional scope of the obligation of prevention under draft article 4.

38. Concerning the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", her delegation welcomed the Commission's provisional adoption of draft conclusion 11 (Constituent instruments of international organizations) and the accompanying commentary. The issue could be complicated, owing to the variety of international organizations and the different ways in which they operated. Draft conclusion 11 had been carefully drafted in conformity with article 5 of the Vienna Convention on the Law of Treaties and it applied the principles set out in previous draft conclusions regarding the application of articles 31 and 32 of the Convention, providing useful guidance on the application of those principles to the constituent instruments of international organizations.

39. **Mr. Kingston** (Ireland) said that, with regard to the topic "Identification of customary international law", his delegation welcomed the further analysis provided by the Special Rapporteur on the relationship between the two constituent elements of general practice and acceptance as law. It agreed with the addition of draft conclusion 3 [4], paragraph 2, as provisionally adopted by the Drafting Committee, indicating that each element was to be separately ascertained and that an assessment of specific evidence for each element was required. Like many aspects of the topic, that paragraph would benefit from further elucidation in the accompanying commentary, the basis for which might be found in the Special Rapporteur's report. His delegation was also pleased that the Special Rapporteur had further examined the practice of international organizations. Regarding the practice of actors other than States or international organizations, it supported the Drafting Committee's proposal to soften the general exclusion of such practice in draft conclusion 4 [5], paragraph 3, by noting that it might be relevant when assessing the practice of States or international organizations.

40. His delegation welcomed the further consideration afforded to the question of inaction. A cautious approach was required, since, while inaction might serve as evidence of acceptance as law, that was not always the case. Consideration should therefore be given to including, within the text of draft conclusion 10 [11], the specific criteria to be taken into account in order to qualify inaction as evidence of acceptance as law.

41. His delegation supported the cautious approach taken in the text of draft conclusion 11 [12] (Treaties), especially the reference to the fact that a rule set forth in a treaty "may reflect" a rule of customary

international law, if certain criteria were met. In and of themselves, treaties could neither create customary international law nor conclusively attest to it. The inclusion of a second paragraph in the draft conclusion, highlighting that even a rule set forth in a number of treaties might not necessarily reflect a rule of customary international law, further strengthened the note of caution. The Special Rapporteur's reference to the requirement expressed by the International Court of Justice in the *North Sea Continental Shelf* cases that the treaty provision concerned should be of "a fundamentally norm-creating character" might benefit from further consideration and elaboration. His delegation supported the Drafting Committee's proposal to alter draft conclusion 12 [13] by placing at the beginning, as paragraph 1, a statement to the effect that a resolution adopted by an international organization or at an intergovernmental conference could not, of itself, create a rule of customary international law. It also supported the separation of the Special Rapporteur's proposed draft conclusion 14 (Judicial decisions and writings) into draft conclusion 13 [14] (Decisions of courts and tribunals) and draft conclusion 14 (Teachings), and welcomed the distinction introduced by the Drafting Committee between decisions of international courts and tribunals and decisions of national courts. In view of the succinctness of the draft conclusions, further guidance in the commentary might be helpful. The specific reference to the International Court of Justice in draft conclusion 13 [14], paragraph 1, was justified, as was the cautionary reference in paragraph 2 that regard might be had "as appropriate" to decisions of national courts.

42. While in principle his delegation supported draft conclusion 15 [16] (Persistent objector) and draft conclusion 16 [15] (Particular customary international law), it looked forward to reading the relevant commentaries, which would be equally important in setting out a common understanding on those two sensitive issues touching on the fragmentation of international law. Lastly, his delegation welcomed the Special Rapporteur's proposal to consider, in his fourth report, practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law might be determined.

43. **Ms. Ahmad** (Malaysia) said that the topic "Identification of customary international law" was crucial to the progressive development of international law. Although her delegation welcomed the significant progress already made on the topic, there was a need for consensus and understanding among Member States in order to arrive at an acceptable position at the international level. It should be noted that, even where evidence of custom existed, courts in Malaysia were bound by the dualist nature of the Malaysian legal framework. However, they could apply international law if it was consistent with existing domestic legislation.

44. With regard to draft conclusion 12 [13] provisionally adopted by the Drafting Committee, her delegation noted that the negotiation and adoption of resolutions by international organizations and conferences, together with explanations of vote, were acts of the States members of the international organization in question. The act of a State that was not a member of an international organization but chose to adopt, support or implement a resolution of that organization should also be considered to provide evidence of State practice. Her delegation's final position on draft conclusion 13 [14] (Decisions of courts and tribunals), while currently favourable, would be subject to its review of the commentary. As for draft conclusion 14 (Teachings), even though the term "highly qualified publicists" was derived from article 38, paragraph 1 (d), of the Statute of the International Court of Justice, her delegation viewed it as subjective and open to different definitions. It hoped that the commentary to draft conclusion 14 would define and explain the term more adequately.

45. In addition to taking into account the interests of Member States, the Special Rapporteur should consider the work of the Asian-African Legal Consultative Organization (AALCO) Informal Expert Group on Customary International Law. At the Expert Group's third meeting, participants had discussed, among other topics, draft conclusion 3 [4] (Assessment of evidence for the two elements) and draft conclusion 8 [9] (The practice must be general). With regard to draft conclusion 3 [4], although each element was to be separately ascertained, there were various forms of evidence that could be assessed for the purpose of ascertaining general practice and *opinio juris*, and the forms of evidence for each element might overlap. Consequently, her delegation generally agreed that the same form of evidence might be assessed in determining each of the elements, although it sought further clarification on specific instances. As for draft

conclusion 8 [9], the requirement for the relevant practice to be sufficiently widespread and representative should be clarified. Due consideration should also be given to the practice of specially affected States in the identification of customary international law.

46. Turning to the topic of crimes against humanity, she said that her Government was firmly committed to ending impunity and would continue to support all efforts by the Commission to achieve that end. In Malaysia, perpetrators of crimes against humanity could be prosecuted under general criminal legislation, in particular the Penal Code. International cooperation was mainly governed by the Mutual Assistance in Criminal Matters Act of 2002 and the Extradition Act of 1992.

47. Her delegation noted that, although the Special Rapporteur for the topic had stated in his first report (A/CN.4/680) that there was no global treaty dedicated to preventing and punishing crimes against humanity, the criminalization of the acts enumerated in draft article 3, paragraph 1, had already been addressed in several international instruments, including the Rome Statute of the International Criminal Court. Based on the concept of complementarity, Malaysia was of the view that States parties to the Rome Statute might be required to enact legislation to prosecute the crimes enumerated therein, failing which they might be deemed unwilling or unable to do so. Bearing in mind that there were currently 123 States parties to the Rome Statute, the value added of draft article 3, paragraph 1, which substantially reflected article 7, paragraph 1, of the Rome Statute, was therefore unclear. It was perhaps important to address the reason why not all States parties to the Rome Statute had enacted national legislation to criminalize crimes against humanity. In that regard, the draft convention on crimes against humanity should be drafted in such a way as to ensure that any further work complemented, and did not overlap with, existing regimes.

48. The current urgent issues to be addressed in relation to the impunity of perpetrators of international crimes, including crimes against humanity, were practical issues relating to the investigation and prosecution of such offences. Her delegation therefore hoped that future draft articles would address, inter alia, international cooperation among States on the investigation, apprehension, prosecution and punishment of perpetrators of crimes against humanity. Other related legal issues, such as universal jurisdiction, primacy of jurisdiction and immunity of State officials, also merited consideration in discussions on the draft articles. The Commission should focus on drafting guidelines or articles that could be adopted or used as guidance by States in developing domestic legislation on crimes against humanity.

49. Regarding the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, her delegation reiterated its concern about the modifying effect of a subsequent agreement or subsequent practice, in particular when it altered the provisions of the treaty or provided an overly broad interpretation of treaty provisions. Modification or amendment of a treaty should only be done in line with articles 39 to 41 of the 1969 Vienna Convention on the Law of Treaties.

50. Draft conclusion 11 contained important guidance on the role of subsequent agreements and subsequent practice in the interpretation of constituent instruments of international organizations, as envisaged in article 5 of the 1969 Vienna Convention, under the rules of treaty interpretation contained in articles 31 and 32 of that Convention. However, as draft conclusion 11 did not apply to treaties adopted within an international organization, the Special Rapporteur should explore the applicability of articles 31 and 32 of the 1969 Vienna Convention to such treaties in order to provide a more comprehensive and fuller understanding of article 5 of the Convention, especially from the perspective of treaty interpretation.

51. In view of the important differences between sovereign States and international organizations, as elaborated in the Commission’s general commentary to the articles on the responsibility of international organizations, those differences should be borne in mind in addressing questions relating to the interpretation of constituent instruments of international organizations. There was a need to examine again the first 10 draft conclusions provisionally adopted by the Commission, which had mainly been analysed from the perspective of States, with a view to ascertaining whether they were applicable and relevant to constituent instruments of international organizations. In that connection, her delegation noted that the Commission might revisit the definition of “other subsequent practice” in draft conclusion 1, paragraph 4, and draft conclusion 4,

paragraph 3, which, so far, was limited to the practice of States parties.

52. **Mr. Rhee** Zha-hyoung (Republic of Korea) said that it was difficult to comment in depth on the draft conclusions on identification of customary international law provisionally adopted by the Drafting Committee, since they were not yet accompanied by commentaries. With regard to draft conclusion 4 [5], paragraph 3, concerning the role of the conduct of other actors in assessing the evidence for a rule of customary international law, the commentary should provide a sufficiently detailed explanation of the specific circumstances in which such conduct might be relevant, bearing in mind the different views that existed as to whether certain non-State actors could play an important role in the formation of rules of customary international law. Draft conclusion 10 [11], paragraph 3, seemed to oversimplify the very delicate legal question of what constituted "inaction" as a form of evidence of acceptance as law (*opinio juris*). A detailed explanation of the phrase "the circumstances called for some reaction" should be provided in the commentary.

53. Pursuant to draft conclusion 11 [12], paragraph 2, even a rule set forth in a number of treaties might not necessarily reflect a rule of customary international law. The commentary should therefore provide sufficient explanation regarding the criteria for determining the relevance of a treaty provision as evidence of a rule of customary international law. Concerning draft conclusion 12 [13], the Commission should approach the assessment of the evidentiary value of resolutions adopted by international organizations or at intergovernmental conferences with great caution, because not all resolutions were considered to have the same value. The commentary should clarify the elements required, including the composition of the international organization, the results of the voting, the voting procedures followed, and the objective of the resolution.

54. His delegation was concerned at the provisional adoption of draft conclusion 15 [16] (Persistent objector) by the Drafting Committee, bearing in mind that the persistent objector rule was one of the most controversial issues in the theory of customary international law. Some Commission members considered that it was not supported by sufficient State practice and jurisprudence and that it could lead to the fragmentation of international law. The final draft conclusions on the topic should therefore maintain a high level of clarity, so that they could be used as practical guidance for national and international legal practitioners. Moreover, the Commission should carefully review the issues, rather than rushing to adopt the draft conclusions at its sixty-eighth session.

55. With regard to the topic of crimes against humanity, his delegation commended the Commission for having provisionally adopted four draft articles and accompanying commentaries at the current early stage in its consideration of the topic. Bearing in mind that the Commission sought not only to strengthen international cooperation for the prevention and punishment of crimes against humanity but also to establish a model for domestic legislation on such crimes, his delegation noted that States were likely to be hesitant to become parties to the prospective convention on crimes against humanity if its provisions were significantly different from those of existing domestic legislation or imposed exceedingly burdensome obligations on them. Close consultation between the Commission and Member States, particularly in the Sixth Committee, would be useful in that regard.

56. His delegation supported the Commission's formulation of draft article 3 (Definition of crimes against humanity) based on the Rome Statute, as it prevented unnecessary conflict with that instrument and duly respected the role of the International Criminal Court. In drafting a convention on crimes against humanity, the relevant provisions in existing treaties and the interrelationship of those provisions should be examined in detail in order to avoid conflicts with other treaty regimes. Furthermore, if parties to the prospective convention were truly willing to strengthen the system for the prevention and punishment of crimes against humanity, they should also become parties to the Rome Statute, in order to close any impunity gap.

57. The tentative road map for the completion of work on the topic, provided by the Special Rapporteur in chapter VII of his first report, would be of vital importance for the Commission's future work. The various issues likely to be addressed in the Special Rapporteur's second report should be examined from the perspectives of prevention and punishment.

58. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation

of treaties, he said that, in view of the practical difficulties in applying articles 31 and 32 of the 1969 Vienna Convention, the Commission's work was expected to provide States with indispensable guidance by identifying and clarifying the scope and the roles of various subsequent agreements and practices related to the interpretation of treaties.

59. With regard to draft conclusion 11, although constituent instruments of international organizations were multilateral treaties to which the 1969 Vienna Convention applied under its article 5, they required particular consideration since their purpose was to establish a subject of international law. Paragraph 1 of draft conclusion 11 explained that subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 of the 1969 Vienna Convention could be means of interpretation for the constituent instruments of international organizations. In connection with paragraph 2, it was sometimes difficult to determine whether States meeting within a plenary organ of an international organization were acting as members of that organ or in their independent capacity as States parties to the constituent instrument of the organization, although such a determination was important in order to decide whether those acts were acts of the plenary organ or acts of the States parties. The most important factor in that regard was the intention of the States concerned, which could be determined by means of a comprehensive examination of the content of the decision of the organ and the circumstances in which it was adopted. As for paragraph 3, which addressed an international organization's own practice in the application of its constituent instrument, his delegation agreed that such practice as a means of interpretation of the constituent instrument of an international organization should be evaluated on a case-by-case basis. Paragraph 4 affirmed the content of article 5 of the 1969 Vienna Convention, recognizing that more detailed relevant rules of interpretation included in a constituent instrument of an international organization could prevail over the general rules of the Vienna Convention.

60. It should be noted that three topics currently under consideration by the Commission touched on the role of international organizations in the development and application of international law; namely, draft conclusions 10 (Decisions adopted within the framework of a Conference of States Parties) and 11 (Constituent instruments of international organizations) on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; draft conclusions 4 [5] (Requirement of practice) and 12 [13] (Resolutions of international organizations and intergovernmental conferences) on the topic "Identification of customary international law"; and draft article 8 [5] (Duty to cooperate) on the topic "Protection of persons in the event of disasters". Furthermore, all three topics addressed the role of intergovernmental conferences and non-State actors in the application and formation of international law. The Commission should therefore ensure that the final outcomes of those three topics, in relation to the role of international organizations, intergovernmental conferences and non-State actors, maintained logical coherence and struck a balance between *lex lata* and *lex ferenda*.

61. **Mr.** Reza **Dehghani** (Islamic Republic of Iran) said that the Commission's consideration of the topic "Identification of customary international law" should be based on the centrality of States; in other words, the general practice of States should constitute the principal means for the identification of rules of customary international law because States were the main actors in international relations. The decisions of international courts and tribunals and the writings of publicists were subsidiary means, as set forth in article 38 of the Statute of the International Court of Justice. While acknowledging the important role of international organizations in the formation of customary international law in specialized fields, his delegation emphasized that the practice of international organizations should be viewed in the light of the centrality of States. Although the actions of non-governmental organizations could not, a priori, be qualified as practice relevant for the formation and identification of rules of customary international law, their role in endorsing those rules was undeniable.

62. Regarding the question of inaction as a form of practice, his delegation held that, contrary to the rule set out in the draft conclusions, the inaction of a State with regard to the violation of a rule of international law by another State could not be considered relevant practice for the purposes of the formation of customary international law. Put differently, inaction, which was almost always based on political considerations, could not, as a form of practice, have the effect of eroding the validity of an existing rule of international law.

Furthermore, any consideration of the role of inaction in the formation of customary international law should take into account the hierarchy of international norms. Inaction could not be considered evidence of acceptance as law when it was in response to the violation of a peremptory norm such as the prohibition of the threat or use of force set out in the Charter of the United Nations, of which there were numerous recent examples by a small number of States.

63. As to whether a rule of customary international law had emerged when a treaty enjoyed quasi-universal participation, his delegation considered that the conduct of States parties to a treaty could not, per se, constitute sufficient practice for the formation of customary international law. Nor could the universality of the content of a particular provision or provisions contained in a quasi-universal treaty be considered a criterion for the identification of a rule of customary international law. In the United Nations Convention on the Law of the Sea, for example, the provisions concerning transit passage through straits used for international navigation were considered to represent progressive development of international law but not to constitute rules of customary international law, despite worldwide acceptance of the Convention. In that regard the practice of States not parties to the treaty was essential evidence. It was therefore necessary for the Commission to define the criteria to be met in order for such provisions to crystallize into customary international law that was binding on States that were not parties to those instruments.

64. Resolutions adopted by international organizations or international conferences could not, in and of themselves, create rules of customary international law without the establishment of the two constituent elements of State practice and *opinio juris*. He agreed with the Special Rapporteur that the United Nations General Assembly (and other international bodies) were political organs whose decisions, which were taken by Member States, were political rather than legal in nature. He recalled that, as clarified by the International Court of Justice in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*: "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption".

65. The decisions of national courts also merited further consideration by the Commission, given that there were wide gaps between different legal systems, notably between common law and Romano-Germanic systems. Some national courts had dealt with matters involving international law, while others had not touched on them at all. The decisions of the national courts of a limited number of States could therefore not constitute generally accepted practice for the purpose of the formation of customary international law.

66. His Government supported the inclusion of the persistent objector rule in the draft conclusions and considered it to be an important institution in the process of the formation of a customary rule. It was one of the manifestations of the principle of equal sovereignty and could be considered an expression of the fundamental right of all States, without distinction, to be excluded from the scope of a given emerging rule. The persistent objector rule was an aspect of the "centrality of States" approach to the process of the formation of a rule of customary international law and a natural consequence of the essentially consensual nature of customary international law.

67. Turning to the topic "Crimes against humanity", he noted that it was premature for the Commission to draft a new convention on crimes against humanity. First of all, crimes against humanity were crimes under international law, and since the Second World War, they had been clearly defined in numerous international instruments, the most important of which was the Rome Statute of the International Criminal Court. Almost all the delegations that had spoken on the topic in the Sixth Committee debate had expressed the view that the Commission should not adopt a definition of crimes against humanity that deviated from that of article 7 of the Rome Statute. In addition, a number of States had criminalized crimes against humanity in their national legislation, which provided a solid basis for the prosecution of perpetrators of the crime throughout the world. Furthermore, since several international instruments, as well as bilateral judicial assistance agreements, provided for the principle of *aut dedere aut judicare*, a sufficient legal basis already existed for the prevention and punishment of crimes against humanity. The answer to addressing the lack of implementation of certain provisions relating to crimes against humanity was not to prepare a new convention

but to identify the reasons for such non-implementation and to propose solutions. His Government was not yet convinced that drafting a new convention would bring any added value to the existing international legal framework and could even contribute to its fragmentation.

68. Regarding the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation considered that the Commission's work should not exceed the limits set out in articles 3l to 33 of the 1969 Vienna Convention on the Law of the Treaties and should remain consistent with the Convention's object and purpose. The subsequent practice of the parties to an international organization's constituent instrument that was relevant for interpreting that instrument was limited to the parties' express intentions regarding such interpretation. Moreover, as observed by the International Court of Justice in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, the recommendations of international organizations could be relevant for the interpretation of a particular instrument only when they were adopted by consensus or by a unanimous vote. Similarly, the practice of an organ of an international organization that did not involve all States members of the organization should not be regarded as relevant for interpreting the organization's constituent instrument. The organization's "own practice", such as the adoption of its internal rules despite the opposition of certain member States, did not constitute subsequent practice that established the agreement of the parties regarding the interpretation of the treaty. In sum, a proper interpretation of the constituent instrument of an international organization must be accompanied by consideration of the intention of the negotiators of the original instrument, the member States' unanimous practice and the intention of all member States to modify the instrument's original mandate.

69. **Mr. Fernandez Valoni** (Argentina) said that the Commission's study on the topic "Identification of customary international law" would be of practical value, especially to national courts called upon to interpret applicable rules of international law in particular cases. At the same time, there was a risk that the study might be too general, thus reducing its practical impact. He looked forward to the formulation of the commentary to the draft conclusions in order to have a more complete picture of the project.

70. His Government was concerned at the reference to the practice of non-State actors; in its view, only the practice of entities that were subjects of international law acting within the sphere of their competence could be taken into account for the purposes of the formation or identification of a rule of customary international law. The practice of intergovernmental organizations, for example, was relevant for such purposes only to the extent that it accurately reflected the will of the organizations' member States.

71. On the topic "Crimes against humanity", his delegation supported the idea of establishing a separate legal framework for inter-State cooperation in countering such crimes, as the existing legal framework of mutual legal assistance in the investigation and prosecution of international crimes at the national level was outdated and inadequate. Consequently, Argentina, in conjunction with other States, was promoting the negotiation of a multilateral treaty on procedures for mutual legal assistance and extradition, which would serve to strengthen the principle of complementarity embodied in the Rome Statute.

72. At the same time, in order to avoid duplication or fragmentation of the existing legal framework, The Commission should be cautious when attempting to define the elements of crimes against humanity. In that connection, his delegation welcomed the Commission's faithful reproduction of the pertinent rules of the Rome Statute as a recognition of the customary nature of those rules.

73. *Mr. Holovka (Serbia), Vice-Chair, took the Chair.*

74. **The Chair** invited the Committee to consider chapters IX to XI of the report of the International Law Commission on the work of its sixty-seventh session (A/70/10).

75. **Mr. Singh** (Chairman of the International Law Commission), introducing chapters IX to XI of the Commission's report, said that, on the topic "Protection of the environment in relation to armed conflicts" (chapter IX), the Commission had had before it the second report of the Special Rapporteur (A/CN.4/685). She had proposed to deal with the topic in temporal phases in order to address the legal measures to be taken to protect the environment before, during and after an armed conflict: phases I, II and III, respectively. In her preliminary report (A/CN.4/674 and Corr.1), the Special Rapporteur provided an

introductory overview of phase I, namely the environmental rules and principles applicable to a potential armed conflict, referred to as "peacetime obligations". Her second report addressed phase II (during armed conflict) and identified and examined existing rules of armed conflict that were directly relevant to the topic. It contained proposals for five draft principles relating to those questions, as well as three draft preambular paragraphs on scope, purpose and use of terms, respectively. The Commission had referred the five draft principles and three preambular paragraphs to the Drafting Committee on the understanding that the "use of terms" provision would be left pending at the current stage and had been included only in order to facilitate discussion in the Drafting Committee.

76. The Drafting Committee had provisionally adopted the provisions on scope and purpose, which had become part of an introductory section, as well as six draft principles, after restructuring them to correspond to the three temporal phases. The Chairman of the Drafting Committee had delivered a statement to the plenary Commission on the report of the Drafting Committee on the topic (A/CN.4/L.870), including a review of the draft introductory provisions on scope and purpose and the six draft principles. The statement was available on the Commission's website. The draft principles, as provisionally adopted by the Drafting Committee, had also been reproduced in footnote 378 of the Commission's report. They had not, however, been considered or adopted by the plenary Commission. The Commission would consider the draft introductory provisions and draft principles, together with the accompanying draft commentary, at its sixty-eighth session.

77. The report identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. It also addressed some aspects of methodology and sources and provided a brief recapitulation of the discussions within the Commission during the previous session, as well as information on the views and practice of States and selected relevant case law.

78. The debate in the Commission on the second report had centred on methodology and the proposed draft introductory provisions and draft principles. With regard to methodology, Commission members had generally welcomed the detailed information on State practice and the analysis of applicable rules, although some had observed that it was not entirely clear what conclusions could be drawn from that information and how it fed into the elaboration of the proposed draft principles. Although some members had acknowledged that the purpose of the second report was to identify rules of armed conflict that were directly relevant to the topic, they had also stressed the need to examine methodically the rules and principles of international environmental law in order to assess their continued applicability during armed conflict and their relationship to the armed conflict regime. That approach was considered to be of key importance to the topic. A number of members had cautioned against simply transposing provisions of the law of armed conflict relating to the protection of civilians or civilian objects to the protection of the environment.

79. There had been substantial discussion in the Commission on the delimitation of the scope of the topic. While there had been widespread agreement that it should extend to both international and non-international armed conflicts, several members had emphasized the need for further research on the practice of non-State actors in the context of non-international armed conflict. Commission members had expressed divergent views as to whether the draft principles should deal with the use of specific weapons and whether they should exclude natural and cultural heritage. A number of members had referred to what they considered to be *lacunae* in the proposed draft principles, and various proposals for additional provisions had been made. In that context, several members had highlighted the need for the draft principles to reflect the prohibition to employ methods and means of warfare that were intended or could be expected to cause widespread, long-term and severe damage to the natural environment.

80. With regard to draft principle 1, which contained a general provision on the protection of the environment during armed conflict, several Commission members had expressed concern over the labelling of the environment as a whole as "civilian in nature". They considered that term to be too broad and ambiguous, and it had been suggested that it would be more appropriate to express the rule of environmental protection in terms of its specific parts or features.

81. There had been general agreement with the thrust of draft principle 2, which concerned the application of the law of armed conflict to the environment. However, concern had been expressed over the expression

"strongest possible protection", which was viewed as not accurately reflecting requirements laid down in international humanitarian law or recognizing factual circumstances on the ground.

82. A number of Commission members had supported draft principle 3, which addressed the need to take into account environmental considerations when assessing what was necessary and proportionate in the pursuit of military objectives. They had noted that the text of the draft principle had been drawn from the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. Some members had observed a certain overlap between draft principles 2 and 3 and had proposed merging the two; others had observed that draft principle 3 was more specific than draft principle 2 and should be retained as a separate provision.

83. The prohibition against reprisals set forth in draft principle 4 had received considerable attention. It had been noted that the language mirrored the provision laid down in article 55, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Differing views had been expressed as to the appropriateness of including such an absolute prohibition in the draft principles, since the prohibition against reprisals had not been generally accepted as a rule of customary international law. Moreover, it had been observed that, in exceptional cases, belligerent reprisals could be considered lawful when used as an enforcement measure in response to unlawful acts of the other party to a conflict. Some members were therefore of the view that it was necessary to redraft the draft principle with appropriate caveats. Several other members had noted, however, that if the environment or some part of it became a military objective, other rules applied in relation to attacks against it, so that anything less than an absolute prohibition against reprisals did not seem warranted.

84. Whereas several members had expressed support for the thrust of draft principle 5, which concerned the designation of areas of major ecological importance as demilitarized zones, they had observed that it raised several important questions that required further examination, including the practical application of such a provision and its normative implications. Proposals had also been made to broaden the scope of the draft principle to include cultural and natural heritage sites, as well as to extend its temporal span to all temporal phases.

85. Concerning the future programme of work, the Special Rapporteur had proposed to address in her third report issues that had not yet been examined in the context of phase II and the law applicable in post-conflict situations, and to provide a summary analysis of the three phases.

86. Commission members had stressed the importance of receiving information from States concerning legislation and regulations in force on the protection of the environment in relation to armed conflicts. Accordingly, in chapter III of its report the Commission reiterated its request to States to provide information by 31 January 2016 on whether, in their practice, international or domestic environmental law had been interpreted as applicable in relation to international or non-international armed conflict. The Commission further indicated its desire to receive information from States on any instruments they had developed aimed at protecting the environment in relation to armed conflict, such as national legislation and regulations; military manuals, standard operating procedures and rules of engagement or status-of-forces agreements applicable during international operations; and environmental management policies related to defence activities.

87. With regard to chapter X on the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission had had before it the Special Rapporteur's fourth report (A/CN.4/686). Her third report (A/CN.4/673) had addressed the subjective normative elements of immunity *ratione materiae*, namely the identification of its beneficiaries. The fourth report discussed issues relating to the material scope of such immunity, namely what constituted an "act performed in an official capacity", as well as matters concerning the temporal scope of such immunity. The report contained proposals for draft article 2 (f), which defined an "act performed in an official capacity", and draft article 6, which dealt with the material and temporal scope of immunity *ratione materiae*.

88. Following its plenary debate on the topic, the Commission had decided to refer the two draft articles to the Drafting Committee. The Chairman of the Drafting Committee had presented the report of the Drafting Committee on the topic (A/CN.4/L.865),

which contained draft article 2 (f), and draft article 6, as provisionally adopted by the Drafting Committee. The texts of those draft articles also appeared in footnote 390 of the Commission's report on the work of its sixty-seventh session. The Commission planned to adopt those draft articles together with the commentary at its sixty-eighth session.

89. The Commission's report reflected the plenary debate on the two draft articles, as proposed by the Special Rapporteur in her fourth report, which had revolved around a number of central points. The first related to the definition of "an act performed in an official capacity", which was set out in draft article 2 (f). While the importance of that concept in the context of immunity *ratione materiae* had been emphasized, some Commission members had expressed doubts about the need for a definition, while others took the view that, if properly drafted, such a definition could be necessary or useful. The definition proposed by the Special Rapporteur in draft article 2 (f), comprised three elements: namely, the criminal nature of the act; the attribution of the act to the State; and the link to sovereignty and the exercise of elements of governmental authority.

90. With regard to the criminal nature of the act, some members had expressed the view that the main determinant of an act performed in an official capacity for the purposes of immunity was not the nature of the act but the capacity in which the individual had acted. Accordingly, the criminal nature of such an act did not alter its official character. That did not mean, however, that the criminality of the act could be regarded as an element of the definition of an act performed in an official capacity, and the connection between the two was therefore considered excessive and unnecessary. Some members had pointed out that the reference to the "criminal nature" of the act was merely a descriptive notion for the purposes of the draft articles and was not intended to imply that all official acts were "criminal" in nature.

91. Regarding the attribution of the act to the State, some members considered it logical to refer to the rules of attribution for State responsibility in the context of immunity *ratione materiae*, since the immunity in question belonged solely to the State. However, others were not prepared to concede that the immunity of a State official from the criminal jurisdiction of another State was completely aligned with the immunity of the State. In their view, the distinction that the Special Rapporteur sought to make when asserting that "any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed" was useful and should be explored further.

92. With regard to the link with sovereignty and the exercise of elements of governmental authority, Commission members had recalled that the language of the definition in the Special Rapporteur's proposed draft article 2 (f) had been inspired by article 5 (Conduct of persons or entities exercising elements of governmental authority) of the 2001 articles on responsibility of States for internationally wrongful acts. Several members had pointed to the difficulty of defining sovereignty and the exercise of elements of governmental authority. Doubts had been expressed regarding the usefulness of the formulation "act performed by a State official exercising elements of the governmental authority", as the word "elements" was unclear and the word "governmental" was seen as begging the question. The question had arisen as to whether the language of the 2001 articles on State responsibility was necessarily the most appropriate in the context of the immunity of State officials, owing, in particular, to developments concerning individual criminal responsibility.

93. On balance, the debate on draft article 6 (Scope of immunity *ratione materiae*), which set out the material and temporal elements of immunity *ratione materiae*, had been largely uncontroversial. Some Commission members had indicated the importance of stressing the functional nature of immunity *ratione materiae* before dealing with the temporal element. Draft article 6 should be read together with draft article 5 provisionally adopted by the Commission at its sixty-sixth session, according to which State officials acting as such enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

94. The consideration of limitations and exceptions to immunity was believed by Commission members to be a key aspect of the topic. In that regard, some members had stressed the importance of conducting a thorough analysis of the comments received from Governments, not only in order to serve as evidence of State practice but also in order to explain nuances in the positions taken, including whether they viewed international law in that area as being generally settled. Others had noted that the question of limitations and

exceptions was bound up with many of the issues that were dealt with in the fourth report and that it was therefore regrettable that the Commission would deal with them only at its sixty-eighth session. Some members had encouraged the Special Rapporteur to tackle the question of limitations and exceptions together with questions of procedure, not only because the two aspects were interrelated but also because doing so might help to resolve some of the thorny issues related to the topic as a whole. Since the Commission would be dealing with the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction at its next session, it would appreciate receiving information from Governments on their legislation and practice, in particular judicial practice, in that respect by 31 January 2016.

95. Regarding to chapter XI of the Commission's report, the Commission had had before it the third report of the Special Rapporteur on the topic "Provisional application of treaties" (A/CN.4/687), which included proposals for six draft guidelines. It had also had before it a memorandum, prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (A/CN.4/676).

96. Following the plenary debate, the Commission had decided to refer the six draft guidelines as proposed by the Special Rapporteur to the Drafting Committee but had been unable to conclude its work on the topic at its sixty-seventh session owing to time constraints. The Commission had received an interim progress report from the Chairman of the Drafting Committee, which had been made available on the Commission's website.

97. The Special Rapporteur's third report continued the analysis of State practice and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention; it also addressed the question of provisional application in relation to international organizations. The report dealt with several additional aspects, such as international organizations or international regimes created through the provisional application of treaties; the provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations; and the provisional application of treaties of which international organizations were parties.

98. In addressing the relationship of provisional application to other provisions of the 1969 Vienna Convention, the Special Rapporteur had chosen to focus on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), 24 (Entry into force), 26 ("*Pacta sunt servanda*") and 27 (Internal law and observance of treaties) because of their natural and close relationship to provisional application. The Commission had generally welcomed the Special Rapporteur's treatment of that relationship, and it had been pointed out that other provisions of the Vienna Convention, such as article 60, were also relevant. However, the view had been expressed that the focus ought to remain on article 25, and that it was not strictly necessary to undertake an exhaustive analysis of the relationship of provisional application to other rules of the law of treaties.

99. Regarding the provisional application of treaties between States and international organizations, or among international organizations, in his report the Special Rapporteur observed that the Secretariat's memorandum clearly demonstrated that States had accepted the validity of the formulation set out in the 1969 Vienna Convention. Nonetheless, he reiterated his view that an analysis of whether article 25 of the 1969 Vienna Convention reflected customary international law would not affect the general approach to the topic.

100. In the debate on the topic, there continued to be a range of views concerning the need to undertake a study on the internal laws and practices of States relating to the provisional application of treaties. There also continued to be general agreement that the provisional application of treaties had legal effects and created rights and obligations; however, the Special Rapporteur had been called upon to further substantiate his conclusion that the legal effects of the provisional application of a treaty were the same as those produced after the entry into force of that treaty and that such effects could not subsequently be called into question on the basis of the provisional nature of the treaty's application. The view had been expressed that, while the legal effects of provisional application might be practically the same as those produced after the entry into force of the treaty, provisional application was merely provisional, produced legal effects that were

binding only on those States that had agreed to apply the treaty provisionally and produced such effects only in relation to those parts of the treaty on which there had been such agreement.

101. Concerning the provisional application of a treaty with the participation of international organizations, doubts had been expressed regarding the assertion that the 1986 Vienna Convention in its entirety reflected customary international law. Commission members had called for more analysis into the question of the customary law basis of article 25 of that treaty. Reference had also been made during the debate to some of the peculiarities of the provisional application of treaties to which international organizations were a party, and it had been suggested that it might be worth investigating whether international organizations had considered or were considering provisional application to be a useful mechanism, and if that was the case, whether they had incorporated it in their constituent instruments.

102. As regards future work on the topic, proposals had been made for the Special Rapporteur to focus on the legal regime and modalities for the termination and suspension of provisional application; to seek to identify the types of treaties and provisions in treaties that were often the subject of provisional application; to determine whether certain kinds of treaties addressed provisional application in a similar manner; to identify the beneficiaries of provisional application; and to carry out an analysis of limitation clauses that were used to modulate the obligations being undertaken in order to ensure compliance with internal law or to condition the operation of provisional application on respect for internal law.

103. Commission members had supported the approach taken by the Special Rapporteur of preparing draft guidelines that would serve as a practical tool for States and international organizations. Others had expressed a preference for presenting the draft guidelines as draft conclusions, as the Commission had done in relation to other topics under consideration.

104. In chapter III of the Commission's report, the Commission had indicated that it would appreciate being provided by States with information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to the decision to provisionally apply a treaty; the termination of provisional application; or the legal effects of provisional application.

105. *Mr. Charles (Trinidad and Tobago) took the Chair.*

106. **Mr. Hernes** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that, with regard to the topic "Protection of the environment in relation to armed conflicts", the Nordic countries considered it vital to enhance the protection of the environment before, during and after armed conflicts, and considered that clarifying the relevant existing rules and principles of international law could help to achieve that aim. They stressed the obligation of States, under existing international law, to respect and protect the environment in situations of armed conflict, adhering in particular to the general principles of and rules relating to the distinction between civilians and combatants, proportionality in attack, military necessity and precautions in attack.

107. The Nordic countries supported the proposed provisions on scope, purpose and use of terms, and draft principle II-1 (General protection of the [natural] environment during armed conflict), draft principle II-2 (Application of the law of armed conflict to the environment) and draft principle II-3 (Environmental considerations), which reflected some of the most pertinent obligations under international humanitarian law for the protection of the environment in relation to armed conflicts. They supported the inclusion of draft principle II-4 (Prohibition of reprisals), which established that attacks against the environment by way of reprisals were prohibited. While expressing interest in draft principle II-5 (Protected zones), they took the view that the parties to an armed conflict might find it challenging in some situations to establish agreements designating certain areas of major environmental and cultural importance as protected zones. However, to the extent that such agreements were concluded and respected by the parties, such an approach could contribute significantly to the increased protection of the environment in the context of armed conflicts and thus merited further discussion.

108. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the Nordic countries fully agreed with the methodological approach taken by the Special Rapporteur by basing her analysis of the issues on treaty practice,

international and national case law, the previous work of the Commission and the written comments submitted by Governments.

109. Certain aspects of the topic were legally complex and raised important issues of inter-State relations. It was important to seek legal clarity concerning the role of national courts in combating the impunity of perpetrators of serious crimes of international concern, such as war crimes, crimes against humanity and genocide, while simultaneously seeking to preserve a stable legal framework of inter-State cooperation. That exercise should be governed by an effort to maintain legal consistency with the rules pertaining to the immunity of State officials for the same categories of crimes that were tried by international courts, in particular the rules set out in the Rome Statute of the International Criminal Court. The gravity of serious crimes of international concern was an argument against the award of any form of immunity to State officials for those crimes by national courts. Moreover, it was difficult to identify any real functional need for upholding the immunity of State officials who committed such crimes.

110. It was necessary to answer the important methodological question of whether to address acts that might not be covered by immunity *ratione materiae* as limitations or exceptions to immunity or to deal with them when defining the term “acts performed in an official capacity”. The categorization of particular acts as private acts, and therefore as falling outside the scope of immunity *ratione materiae*, might serve as a safety valve for ensuring that no one could take advantage of the rules of immunity to obtain impunity for the most serious international crimes.

111. At all events, consideration of the functional needs of State officials should be taken into account when determining the extent of immunity *ratione materiae.* Without taking a final stance on that methodological issue at the current stage, the Nordic States wished to reiterate their view that crimes such as genocide could not be considered to fall within the definition of an “official act”, and no State official should be able to take shelter in the rules of immunity for the most serious crimes of concern to the international community as a whole. At the same time, it was necessary to accompany such limitations of immunity with appropriate procedural safeguards and due process guarantees in order to prevent any misuse of power or political interference in the jurisdiction of independent prosecutors. Lastly, the Nordic countries supported the reformulation of the definition of an “act performed in an official capacity” in order to remove the criminality requirement.

112. Regarding the topic “Provisional application of treaties”, the Nordic countries expressed their continued support for the Special Rapporteur’s intention not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Whether or not a State resorted to provisional application was essentially a constitutional and policy matter, and the Nordic countries believed that attempts to categorize States and their practice on the basis of whether or not their internal law allowed for provisional application was fraught with difficulty and should approached with caution.

113. They welcomed the fact that the Special Rapporteur’s third report had addressed the question of the provisional application of treaties by international organizations, noting that cooperation agreements entered into by the European Union and its member States with a third State were often applied provisionally. Although both States and international organizations frequently resorted to provisional application and recognized the legal effects of treaties applied provisionally, the subject of the provisional application of treaties by international organizations should not be considered closed, as there were still a number of questions that could benefit from further reflection.

114. With regard to the study of the relationship of article 25 to other provisions of the 1969 Vienna Convention, the Nordic countries welcomed the Commission’s conclusion that the legal effects of a provisionally applied treaty were the same as those produced by a treaty that had entered into force and that provisional application was subject to the *pacta sunt servanda* rule. The question of international responsibility for the breach of a treaty that had been applied provisionally merited further study.

115. The Nordic countries welcomed the six preliminary draft guidelines presented by the Special Rapporteur and the interim report of the Drafting Committee on the progress made on the topic. Bearing in mind the content of article 27 of the 1969 Vienna Convention, they supported the deletion of the reference to internal law when the Drafting Committee

restated the general rule in its draft guideline 3. In response to the Special Rapporteur's call for comments from States with a view to identifying the way forward on the topic, the Nordic countries proposed further study of the relationship of provisional application to other provisions of the 1969 Vienna Convention, such as articles 19, 46 and 60.

116. The Nordic countries supported the intention of the Special Rapporteur and the Commission to continue to formulate draft guidelines, as opposed to draft conclusions, and tended to believe that the former could serve as a practical tool for States and international organizations. It would be useful if, in its future plan of work, the Commission developed model clauses on provisional application, since completion of constitutional requirements for ratification could take some time, and model clauses could make it easier to resort to provisional application. On the other hand, the formulation of such clauses posed a challenge, owing to differences in national legal systems. As a part of the Special Rapporteur's efforts to gather and analyse State practice, it was important to examine the practice of multilateral treaty depositaries, which did not appear to be uniform.

117. **Ms. Cujo** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia, the former Yugoslav Republic of Macedonia and Turkey and the stabilisation and association process country Bosnia and Herzegovina, said that the European Union welcomed the progress made on the topic "Provisional application of treaties", which it considered to be of particular interest. The European Union made regular use of the provisional application of treaties in various fields of law. In fact, some of its practice in relation to multilateral agreements was reflected in the annex to the Special Rapporteur's third report, and the European Union was party to nearly half of the 50 agreements listed in the annex as examples of provisional application by international organizations.

118. The European Union also used provisional application in its bilateral relations with third States, including those based on association agreements and partnership and cooperation agreements, which established broad frameworks for cooperation and integration. Such agreements could be very complex and wide-ranging, and their entry into force entailed a lengthy process of ratification. Provisional application offered a useful way to begin applying them promptly. Recent examples included association agreements concluded in 2014 with Ukraine, Georgia and the Republic of Moldova that provided for provisional application in the areas of trade, political dialogue and institutional reform. The association agreement with Ukraine, in particular, made explicit reference to provisional application, equating the terms "date of entry into force of this Agreement" with "date from which this Agreement is provisionally applied" and required a six-month prior notification for both the termination of the agreement and the termination of provisional application.

119. Those examples showed that the European Union applied treaties provisionally in the same way as other parties to a treaty and that it was an active contributor to shaping practice in that area. On the other hand, when the European Union and its member States were a joint party to an agreement, provisional application covered only matters falling within the competences of the European Union and, from the international legal standpoint, the agreement applied provisionally only between the Union and the respective third State. In such cases, the member States of the Union were bound to apply the agreement provisionally not as a matter of international law, but as a matter of European Union law, in accordance with article 216, paragraph 2, of the Treaty on the Functioning of the European Union.

120. The European Union welcomed the fact that, in his third report, the Special Rapporteur had begun analysing the relationship between provisional application and the other provisions of the 1969 Vienna Convention and envisaged expanding upon that aspect in the Commission's future work on the topic.

121. **Ms. Morris-Sharma** (Singapore) said that the topic "Protection of the environment in relation to armed conflicts" was a complex topic made more complex by the factual circumstances of armed conflict and environmental damage, which were unpredictable. The most productive approach to the topic was to identify how existing international humanitarian law related to the environment, rather than to introduce principles of international environmental or human rights law that complicated the issue. Her delegation shared the Special Rapporteur's view that it was not the task of the Commission to revise the law of armed conflict and took the position that the Commission should not seek to modify existing legal regimes.

122. Draft principle II-1, paragraph 2, and draft principle II-4 should be phrased in less absolute terms. While the draft principles had been inspired by existing treaty obligations, the latter had not been generally accepted as rules under customary international law. In addition, her delegation advised against the broad statement made in draft principle II-2, as there might be differing views over the applicability — and the manner and extent of application — of the principles and rules of the law of armed conflict to the protection of the environment.

123. With regard to the designation of protected zones in draft principle I-(x), although the Special Rapporteur had originally had demilitarized zones in mind, the use of the words “protected zones” suggested something broader. Her delegation was concerned that that formulation might give rise to considerable uncertainty over how the designation of such zones, particularly in peacetime, overlapped with other related regimes. As for the concept behind the principle, her delegation looked forward to the Special Rapporteur’s further analysis and elaboration of the proposed rule in her next report.

124. Regarding the form that the work of the Commission should take, her delegation continued to maintain that non-binding draft guidelines were the most appropriate. It did not share the view expressed by certain Commission members that it should take the form of draft articles on the grounds that it corresponded better to the prescriptive nature of the terminology used in the current draft principles. Such a view put the matter backwards. As a matter of principle, her delegation preferred an approach whereby the Commission first considered the purpose of its work, recommended the form most suited to that objective and then drafted provisions accordingly.

125. Turning to the topic “Immunity of State officials from foreign criminal jurisdiction”, she said that, while the temporal scope of immunity *ratione materiae* was not controversial, the material scope could still benefit from further study and elucidation. Although it was not easy to draw a distinction between the notions of “acts performed in an official capacity” and “acts performed in a private capacity”, the definition given in draft article 2 (f), as provisionally adopted by the Drafting Committee, provided an elegant and workable solution by stating that such acts were “any act performed by a State official in the exercise of State authority”. Her delegation looked forward to the preparation of the commentary to that draft article; until then, its preliminary view was that the definition offered a way of addressing the scope of immunity *ratione materiae* with regard to certain acts, such as *ultra vires* acts, *acta jure gestionis* and acts performed in an official capacity but exclusively for personal benefit.

126. Her delegation further took the view that the criminal nature of the act did not need to be included in the definition. The central issue for determining whether a State official had acted in an official capacity for the purposes of immunity was not the nature of the act itself but the capacity in which the person in question had acted. Although the question of immunity might become relevant because of the commission of an alleged criminal act, to extrapolate from that eventuality that the criminal nature of the act was a definitional element would confuse matters. It would also confuse other aspects of the analysis, such as whether the official had exercised governmental authority when the act had been performed. Moreover, to omit the reference to the criminal nature of the act in the definition of “acts performed in an official capacity” was consistent with her delegation’s understanding of the question of immunity as one that was procedural in nature.

127. Although it was important for the Special Rapporteur’s report to address the question of the attribution of the act to the State, such attribution was not a helpful criterion in determining what constituted an act that was performed in an official capacity. It would be useful for the commentary to deal with the relationships and distinctions between acts performed in an official capacity and those performed in a private capacity; *acta iure gestionis* and *acta iure imperii*; and lawful and unlawful acts. It would also be useful for the Commission to address the acts of persons operating under governmental direction and control, such as private contractors.

128. On the topic “Provisional application of treaties”, her delegation recognized that the provisional application of a treaty was capable of giving rise to legal obligations as if the treaty were in force. It nevertheless considered there to be a need to further substantiate that conclusion, as well as to resolve the question of whether it was automatic, and if not, to determine what criteria had to be met in order to reach it. It would be useful to take up the question of whether the various processes governing treaties were the same for treaties that had been provisionally applied as for

those that had entered into force. In that regard her delegation supported the Special Rapporteur's intention to consider in his next report processes such as termination, suspension and reservations, as well as the provisions of internal law regarding the competence to conclude treaties, and it continued to be interested in the Commission's study of whether or not the provisional application of a treaty could have the effect of modifying the content of that treaty. Her delegation supported the Commission's decision to consider the position of States first and to return to the question of international organizations at a later stage.

Agenda item 81: Report of the United Nations Commission on International Trade Law on the work of its forty-eighth session (*continued*) (A/C.6/70/L.9)

Draft resolution A/C.6/70/L.9: Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session

129. **Ms. Kalb** (Austria), introducing the draft resolution, announced that Australia, El Salvador, Israel, Madagascar, Russian Federation, Romania, Switzerland, Slovenia and Thailand had become sponsors, and she invited other interested delegations to do so as well. The resolution reflected updates regarding the work of the United Nations Commission on International Trade Law (UNCITRAL) and its discussions in such areas as the implementation of the 2030 Agenda for Sustainable Development, the promotion of the rule of law and strengthening support to Member States in the implementation of sound commercial law reforms. In addition, the draft resolution contained language regarding the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration that had been adjusted with a view to the repository becoming fully operational as soon as possible. Austria invited all delegations to adopt the resolution by consensus.

The meeting rose at 1.05 p.m.