United Nations A/C.6/70/SR.20

General Assembly
Seventieth session

Official Records

Distr.: General
13 November 2015

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Wednesday, 4 November 2015, at 3 p.m.

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

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15-19319 (E)

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

Statement by the President of the General Assembly

1. **Mr. Lykketoft** (Denmark), President of the General Assembly, said that the seventieth anniversary of the United Nations should inspire all delegations to reflect on the immense responsibility entrusted to them. Bearing in mind that the Charter of the United Nations set as an objective the establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained, the development and promotion of international law was one of the Organization's primary goals and had been at the centre of its work since its foundation. Over the past seven decades, the Sixth Committee had proved time and again how its work could change the international legal order for the better. The work of the Committee and the International Law Commission had provided some fundamental international reference points, including instruments on the law of treaties, consular and diplomatic relations and terrorism. As the international community renewed its commitment to further action, it needed to demonstrate that the immense global challenges currently faced were neither intractable nor unconquerable.

2. The recently adopted 2030 Agenda for Sustainable Development showed what was possible when delegations listened to each other and other stakeholders and kept their focus on the ultimate objective. In making voluntary commitments to the 17 Sustainable Development Goals, world leaders had recognized the interlinkages between economic development, global poverty and inequality, environmental degradation and peaceful, inclusive and just societies. They had also underlined the interrelationship between the three pillars of the United Nations, as well as the ever-increasing interdependency of all people.

3. The work of the Committee to date in the current session showed that all Member States agreed on the importance of discussing their differences and taking action on the various items before them. In that regard, efforts should be made to resolve outstanding issues, particularly those concerning the draft comprehensive convention on international terrorism. He hoped that the expertise and commitment of all involved would finally result in substantive advances on that issue and urged all delegations to embrace the momentum generated to date.

4. Legal advisers, both in the Committee and in States' capitals, had the primary responsibility for placing international law at the centre of the political and diplomatic decision-making process. As guarantors of the equal application of the rule of law to all States and to international organizations, including the United Nations, they were responsible for ensuring that respect for, and promotion of, the rule of law and justice guided the activities of States and international organizations alike, giving their actions predictability and legitimacy. As the Committee considered the remaining items on its agenda at the current session, he encouraged it to take confidence from its past achievements, to recognize current challenges and to advance with a spirit of consensus. He and his Office stood ready to support the Committee to ensure a successful outcome to its deliberations.

5. A high-level thematic debate focusing on the role of the United Nations in the field of human rights — the third of three high-level events to be held during his Presidency of the General Assembly — would take place on 12 and 13 July 2016, providing an opportunity to discuss how best to make progress on issues related to governance, the rule of law, gender equality and institution-building as a contribution to the overall goals of the 2030 Agenda. He encouraged the active participation of all Member States and other interested actors in that debate.

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

6. **Mr. Rönquist** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) said that the first report of the Special Rapporteur for the topic "Crimes against humanity", and the first draft articles provisionally adopted by the Commission on that important topic, provided an encouraging basis for further work. The Nordic countries welcomed the Special Rapporteur's general approach in maintaining the definition of crimes against humanity in article 7 of the Rome Statute as the material basis for any further work, and also agreed that the topic should be addressed in a way that was complementary to the Rome Statute system. A possible treaty could reinforce the International Criminal Court and the Rome Statute system as a whole through its focus on the obligation of States to prevent and punish crimes against humanity. The

emphasis on robust inter-State cooperation was therefore to be welcomed. Work could benefit from a legal analysis of the obligation to extradite or prosecute with a view to identifying its scope with regard to crimes against humanity. In that respect, the Commission's 2014 final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" provided an excellent starting point.

7. The Nordic countries strongly endorsed the focus on the obligation of prevention and, in order to make that obligation more precise and effective, suggested including additional wording as to the concrete nature and methods of prevention. In particular, an additional article based on paragraph (17) of the commentary to draft article 4 could be included so as to lay down the obligation to adopt national laws and policies to establish awareness of crimes against humanity and to promote early detection of any risk of their commission, as well as an obligation to pursue initiatives to educate and inform governmental officials in order specifically to prevent crimes against humanity. While welcoming developments towards further recognition of a duty of prevention and obligations of inter-State cooperation, the Nordic countries underlined that no such obligations could be construed to limit similar obligations in place vis-à-vis other crimes or existing legal obligations in the field.

8. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Nordic countries fully endorsed the view put forward by the United Nations High Commissioner for Human Rights in his statement to the Commission that the work of the United Nations human rights treaty bodies greatly contributed to the development of international human rights law, not only through their jurisprudence, following consideration of many individual cases, but also through important general comments. General comments of treaty bodies could be viewed as interpretative statements contributing to a normative consensus and could serve to ensure the dynamic nature of international human rights law. All human rights treaties must be regarded as living instruments whose interpretation developed over time; in particular, the Human Rights Committee had over the years brought about general acceptance of its pronouncements. Treaty bodies should take special care when drafting their views in individual cases. The legal basis for such views should be grounded in the treaty text. More detailed legal reasoning would facilitate the State party's consideration of implementation measures and also thereby promote consistent interpretation. The legal significance of the views was to a large extent dependent on their content, quality and legally persuasive character.

9. On a more general point, the Nordic countries would like to stress that, as confirmed by the jurisprudence of the International Court of Justice, an interpretation of the individual treaty establishing an international organization and an assessment of the conduct of that particular organization were needed in order to establish the legal effects of subsequent agreements or practice in relation to it.

10. The topic of identification of international customary law, although somewhat theoretical in nature, was of great practical importance; an outcome in the form of conclusions would be the most appropriate tool to assist practitioners. Concerning the issue of particular custom, the Nordic countries agreed that a customary rule might under certain circumstances develop among a limited number of States. The narrow geographical or thematic scope of such a particular custom required very clear identification of which States had participated in the practice and accepted it as law. Special attention should be paid to the importance of acquiescence for the identification of a particular custom, not in order to establish different criteria for general custom and particular custom but to stress the importance of the element of acquiescence when establishing the scope of application of a particular custom.

11. The Nordic countries welcomed the efforts to include the persistent objector rule in the draft conclusions. They shared the view that a State that had persistently objected to an emerging rule of customary international law and had maintained its objection after the rule had crystallized was not bound by the rule, though the category of rule to which the State objected should be taken into account. Particular consideration must be given to universal respect for fundamental rules, especially those relating to the protection of individuals.

12. With regard to the relationship between the two constituent elements of practice and acceptance as law, and the question of whether the same evidence could be used to ascertain both elements, the Nordic countries concurred with the view that the separate assessment of the two requirements did not mean that

the same material could not be evidence of both elements. Furthermore, they agreed that, in some instances, the practice of international organizations could in itself contribute to the formation, or be the expression, of rules of customary international law, particularly in cases where such organizations had been granted powers by member States to exercise competence on their behalf, for example in international negotiations. The practice of States themselves acting within international organizations could also serve as evidence or an expression of custom.

13. The Nordic countries concurred with those Commission members who had urged caution when assessing the evidentiary value of resolutions of international organizations and, in particular, those of the United Nations General Assembly. A number of factors should be taken into consideration in that context, such as the voting and procedure used in adopting the resolution in question, as well as its particular wording. Lastly, the Nordic countries agreed that the decisions of national courts should be viewed with some caution in the context of customary international law.

14. **Mr. Alabrune** (France) said that his delegation commended the members of the Commission for the breadth of their work and their detailed examination of all topics before them. With regard to the topic of the Most-Favoured-Nation clause, a number of questions of interpretation remained unanswered. International investment law was a relatively young branch of law, characterized by major controversies; competence over the issue was shared among several different bodies and organs. Priority should therefore be given to joint studies, especially between the International Law Commission and the United Nations Commission on International Trade Law.

15. Concerning the topic "Protection of the atmosphere", the general approach that the Special Rapporteur and the Commission wished to take, subject to the understanding arrived at when the topic had been included on the programme of work in 2013, remained somewhat unclear. Nonetheless, his delegation welcomed the three draft guidelines and four preambular paragraphs provisionally adopted, as well as the decision to place the content of the Special Rapporteur's proposed draft guideline 3 (Common concern of humankind) regarding the legal status of the atmosphere in the preamble. The new formulation "pressing concern of the international community" seemed preferable to "common concern of humankind".

16. Turning to the topic of identification of customary international law, he said that his delegation agreed with the two-element approach followed by the Special Rapporteur, namely, the material element — State practice — and the psychological element — acceptance as law. Each of the two elements must be separately ascertained and specific evidence should be assessed for each element. However, it could be specified in the commentary to draft conclusion 3 [4], in relation to paragraph 2, that in some cases the same documentation could serve as evidence for both elements. While inaction seemed relevant for the identification of rules of customary international law, it should be assessed with caution, taking into account the specific circumstances of the inaction, especially in the context of the assessment of acceptance as law.

17. With regard to Part Five (Significance of certain materials for the identification of customary international law), it would be helpful if specific examples of resolutions adopted by international organizations or at international conferences could be included in the commentary to draft conclusion 12 [13]. The approach taken by the Drafting Committee in distinguishing between the role of decisions of courts and tribunals and the role of teachings in the identification of customary international law, and its decision to draft a separate conclusion for each of them, seemed appropriate. The differentiated treatment of decisions of international courts and tribunals and decisions of national courts in draft conclusion 13 [14] and the particular importance accorded to the International Court of Justice, were justified. However, in draft conclusion 14 (Teachings) it seemed overly restrictive to limit relevant teachings to those of the "most highly qualified publicists of the various nations", based on the wording of article 38, paragraph 1, of the Statute of the International Court of Justice, given that the Commission's work could also relate to private international law. Moreover, a separate conclusion should be drafted on the role of the work of the International Law Commission as evidence of a rule of customary international law since, in view of its status as the subsidiary body of the General Assembly responsible for the promotion of the progressive development of international law and its codification, and its dialogue with States within the Sixth Committee, its work did not seem comparable to academic writings.

18. Concerning draft conclusion 15 [16] (Persistent objector) and draft conclusion 16 [15] (Particular customary international law), it would be useful if specific examples could be included in the corresponding commentary, as those provisions related to subjects that were generally presented as being of more theoretical than practical relevance. His delegation hoped that the Commission could adopt on first reading a full set of draft conclusions and commentaries by the end of its sixty-eighth session.

19. With regard to the topic of crimes against humanity, the Commission's proposals were interesting but gave rise to a number of questions. First, although the decision to consider the obligation of prevention in a separate draft article was to be welcomed, the exact scope of the obligation should be more precisely identified. The wording used in draft article 4, paragraph 1 (a), with regard to "effective legislative, administrative, judicial or other preventive measures" seemed to reflect a broad understanding of the concept of "prevention" but did not adequately clarify its scope. For example, it was unclear whether educational measures, training programmes and measures to combat the glorification of crimes against humanity were covered by the draft article. It might also be useful to specify in the commentary that the obligation to punish and prevent crimes against humanity assumed the existence of a customary obligation for States not to commit such crimes.

20. The formulation of draft article 2 as provisionally adopted, according to which crimes against humanity were "crimes under international law" was somewhat ambiguous. Although the same formulation was used in article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, no international crimes other than those now listed in the Rome Statute had been recognized at the time of that Convention's conclusion in 1948. Other "crimes under international law", such as transnational organized crime, had been defined since then, however, and it was for that reason that the expressions "the most serious crimes of international concern" and "the most serious crimes of concern to the international community" were used in the Rome Statute. The wording of draft article 2 should therefore refer to crimes against humanity as "the most serious crimes of international concern". With regard to the definition of crimes against humanity in draft article 3, the reproduction in extenso of article 7 of the Rome Statute seemed to be the best way to avoid any risk of contradictions. The inclusion in draft article 3, paragraph 4, of a clause that provided for existing domestic or international legal regimes to be taken into account was an appropriate safeguard.

21. With regard to the future work of the Commission on the topic of crimes against humanity, it was not necessarily appropriate to consider establishing a treaty-based monitoring mechanism. The establishment of such a mechanism was justified when the treaty on which it was based created individual rights, as with human rights treaties. That was not the case with the draft articles in question, which essentially sought to criminalize crimes against humanity and provide mechanisms for judicial cooperation among States.

22. On the topic of protection of the environment in relation to armed conflicts, concerns should be raised regarding the apparently inconsistent use of the terms "environment" and "natural environment". Furthermore, while the draft principles were clearly intended to apply to both international armed conflicts and non-international armed conflicts, it seemed vital to identify the differences in the approach to and treatment of those two types of conflict.

23. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation welcomed the decision of the Drafting Committee to set aside the term "exercising elements of the governmental authority" in draft article 2 (Definitions), subparagraph (f). In terms of methodology, the distinction between acts performed in an official capacity and acts performed in a private capacity seemed sufficiently clear. In order to exclude certain acts from the scope of immunity, it seemed preferable to address the issue of exceptions in a separate draft article, rather than mentioning those acts as part of the definition of an act performed in an official capacity. A separate study of exceptions to immunity would also allow the Commission to include certain procedural safeguards for cases where State officials were subject to prosecution.

24. On the topic "Provisional application of treaties", his delegation took note of the three draft guidelines provisionally adopted by the Drafting Committee. It was not convinced that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, in its entirety, reflected customary international law.

25. With regard to the future programme of work, there seemed to be no pressing need for the Commission to address the still controversial topic of *jus cogens*, on which States remained divided. As for the Commission's working methods, his delegation considered it vital for both States and Commission members to avoid a proliferation of working groups and projects, which did not facilitate a thorough study of each subject and slowed down the progress of work. Similarly, the list of specific issues on which comments were requested from States by the Commission in its report was once again much too long, making it impossible for most States to prepare and submit relevant comments on all subjects within the specified time limits.

26. The Commission's working conditions in Geneva were ideal and there did not seem to be any reason to hold any of its future sessions in New York. His delegation welcomed the Commission's efforts to ensure respect for the principle of equality of the official languages of the United Nations and the commitment of the Legal Counsel in that regard. By comparing different language versions, the members of the Commission were able to improve the quality and precision of their work, which served as a reference for international and national courts. In order to give delegations the necessary time to inform themselves about the Commission's work and to prepare comments ahead of the annual session of the Sixth Committee, the dates of the Commission's sessions should be brought forward, thereby enabling its report to be made available earlier in all language versions.

27. **Mr. Reinisch** (Austria), referring to the topic "Identification of customary international law", said that his delegation supported the Commission's aim to clarify important aspects of public international law by formulating draft conclusions with commentaries. Although several members of the Commission had indicated that the Commission's work could not be equated to writings or teachings of publicists, the Special Rapporteur had not been convinced of the need to formulate a separate conclusion. However, the Commission's work, which normally fed into General Assembly resolutions, was of special importance in the identification of customary rules of international law, as reflected in draft conclusion 12 [13] (Resolutions of international organizations and intergovernmental conferences) provisionally adopted by the Drafting Committee. While significant aspects of the Commission's work were covered in that draft conclusion, the remaining aspects would fall under draft conclusion 14 (Teachings). It was, however, difficult to apply the expression "teachings of the most highly qualified publicists of the various nations", contained in the draft conclusion, to the Commission or other international expert bodies and international scientific institutions. A specific reference to the role of the Commission and other expert bodies and institutions should therefore be included in the draft conclusions, or at least in the commentary.

28. The wording of draft conclusion 4, paragraph 3, to the effect that conduct of other actors was not practice that contributed to the formation, or expression, of rules of customary international law, but might be relevant when assessing required practice, did not do justice to the important contribution of the International Committee of the Red Cross to international practice.

29. Austria welcomed the fact that draft conclusion 15 [16] had addressed the issue of the persistent objector, and that it contained an explicit stipulation that a persistent objection was applicable only to the opposing State, such that the opposing State was not in a position to prevent the creation of a rule of customary international law. Nevertheless, some issues related to the persistent objector rule, such as the fact that persistent objections had no effect on *jus cogens* rules or obligations *erga omnes*, deserved further clarification.

30. With regard to the topic of crimes against humanity, his delegation welcomed the Special Rapporteur's conclusions regarding a future convention on the topic that would exist independently of the Rome Statute of the International Criminal Court. It also welcomed the stipulation in draft article 1 (Scope) that the draft articles as a whole applied to both the prevention and the punishment of such crimes. In its commentary, the Commission stated that the draft articles avoided any conflict with the obligations of States arising under the constituent instruments of international or "hybrid" criminal courts or tribunals, including the International Criminal Court. While that was an important point, it would be useful if the legal relationship was explicitly reflected in the final draft articles; otherwise, the *lex posterior* regime of the Vienna Convention on the Law of Treaties could generate different results.

31. Draft article 2 (General obligation) recognized crimes against humanity as "crimes under international law". Although the expression "crimes under international law" had been used in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, it had not yet been clearly understood in international law and was not used in the Rome Statute. In the commentary the Commission noted that crimes against humanity were crimes under international law and punishable as such, whether or not they were punishable under national law. However, that applied only to international courts. In order to be punishable at the national level, those crimes needed to be incorporated in national law, a point which should be clearly spelled out in both the draft article and the commentary. Although various legal instruments made reference to "international crimes", the difference between "international crimes" and "crimes under international law" remained unclear. If the two expressions could not be distinguished clearly, then the expression "crimes under international law" should be avoided.

32. His delegation supported the definition of crimes against humanity contained in draft article 3, since it largely mirrored that contained in article 7 of the Rome Statute, which was considered to reflect customary international law. Any other approach would create major obstacles, both to further work on the topic and to the practice of States, since a number of States had based their legislation on article 7. The Government of Austria, for example, had introduced new provisions on international crimes into the Austrian Criminal Code, including a definition of crimes against humanity based on article 7.

33. His delegation also supported the obligation expressed in draft article 4, paragraph 1 (a), for each State to prevent crimes against humanity, including through effective legislative, judicial or other preventive measures in any territory under its jurisdiction or control. Similar language concerning the geographical scope of prevention could be found in various judgements of the European Court of Human Rights, including in the case of *Jaloud v. The Netherlands*.

34. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation welcomed the provisional adoption of draft conclusion 11 (Constituent instruments of international organizations), which reflected the growing importance of the role of international organizations as both actors in their own right and important forums for the collective action of their member States. The practice of international organizations was of particular importance in the interpretation of their constituent instruments, including the possibility of applying the implied powers doctrine.

35. Indeed, the special nature of the constituent instruments of international organizations had been acknowledged in the jurisprudence of the International Court of Justice. However, some clarification was still needed. First, the term "international organizations" should be understood to refer only to intergovernmental organizations, as was the case when used by the Commission in texts for conventions such as the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Second, for the purposes of the draft conclusions, the term "constituent instruments" comprised only treaties; however, organizations could be based on constituent instruments other than treaties.

36. His delegation would welcome an explanation as to the relationship between the expression "the practice of an international organization in the application of its constituent instrument" used in draft conclusion 11, paragraph 2, and the expression "established practice of the organization" used in article 2, paragraph 1 (j), of the 1986 Vienna Convention in defining the "rules of the organization". It was difficult to determine the exact meaning of "the practice of an international organization", in particular whether that practice included all acts attributable to the organization. In its commentary, the Commission called for caution in making that determination, but did not provide any clarification.

37. His delegation appreciated the Commission's extensive consideration of the existing judicial and other dispute settlement practice which had formed the basis of draft conclusion 11. Although the discussion of the World Trade Organization in the commentary to draft conclusion 11 was welcome, an express reference to article IX, paragraph 2, of the Agreement establishing the World Trade Organization (WTO), which dealt with the interpretation of the Agreement itself and the multilateral trade agreements, would have been helpful. While the case of *United States — Measures Affecting the Production and Sale of Clove Cigarettes* discussed in the commentary was reflective of some of the problems involved, the WTO Agreement demonstrated fully the difficulty of reconciling the

institutionalized rules of an organization on interpretation with the role of member States as parties to the constituent instrument of an organization in interpreting that instrument.

38. Lastly, the Austrian delegation was in favour of reflecting the practice of international organizations as such in other draft conclusions. Draft conclusion 4, paragraph 3, which currently only referred to "conduct by one or more parties" in the application of a treaty, should be broadened to refer also to the conduct of an international organization established by such a treaty, to bring it in line with draft conclusion 1, paragraph 4, which referred to "other subsequent practice" without limiting it to States parties.

39. **Ms. Telalian** (Greece), referring to the topic "Identification of customary international law", said that the Commission should be commended for bringing clarity to rather complex issues, such as the circumstances under which treaties or resolutions of international organizations and conferences might generate customary international law. The Commission had provided useful guidance on the complex relationship between custom and written texts, drawing clear conclusions from a mass of relevant case law and scholarly writings. Her delegation welcomed draft conclusion 10 [11], paragraph 3, as provisionally adopted by the Drafting Committee, which differentiated between inaction in general and inaction in circumstances that called for some reaction, which might serve as possible evidence of *opinio juris*.

40. In its commentary to draft conclusion 3 [4], the Commission should make a distinction between two separate, albeit interrelated, variants in the assessment of evidence of the two elements. As suggested in paragraph 17 of the Special Rapporteur's third report (A/CN.4/682), in some cases a particular form of practice or particular evidence of acceptance as law might be more relevant than in others. For instance, relevant State practice in the identification of customary international law in the field of diplomatic privileges and immunities was based primarily on international agreements and diplomatic correspondence, while in other fields, such as the law of naval warfare, it might take the form of both written texts and physical action.

41. The Commission should also note in the commentary to draft conclusion 3 [4] that the relative weight of the two elements of custom, as well as their time sequence, could differ from case to case. For instance, in cases where *opinio juris in statu nascendi* preceded the development of relevant State practice and the latter consisted merely of State acquiescence to the new rule or the absence of conflicting practice, it could be argued that *opinio juris* had played the predominant role in the creation of the new customary rule.

42. Draft conclusion 4 [5], paragraph 3, which provided that conduct by non-State actors other than international organizations was not practice for the purposes of the formation or identification of customary international law, had been appropriately supplemented by the Drafting Committee, which considered that such practice might be relevant when assessing the practice of States and international organizations.

43. With regard to rules of international law whose addressees included non-State actors, such as armed groups in internal armed conflict, or in new fields of international regulation comprising a mixture of customary international law rules and policy guidelines, both applicable to private entities such as private military security companies, it could not easily be argued that the behaviour of the addressees was irrelevant for the formation of customary international law. In that case, the non-State actor's observance of certain rules and principles, if accepted by the community of States as reflecting the law, might constitute practice which might be relevant for the formation of a customary international law rule, even if it could not be equated with State practice. The practice of non-State actors could consolidate already established general international law or facilitate the emergence of a customary international law rule, in particular when it was in conformity with relevant treaty provisions. In fact, such practice might serve as a catalyst and prompt positive or negative State reactions which might count as State practice and evidence of the State's legal opinion.

44. With regard to draft conclusions 13 [4] and 14, her delegation supported the Drafting Committee's decision to deal with decisions of courts and tribunals and scholarly writings as subsidiary means of identification of customary international law in separate conclusions, in view of their different authoritative value. Scholarly writings should be approached with more caution than case law, given that in some of them the distinction between what the law was and what it should be was sometimes blurred.

Draft conclusion 13 [4], paragraph 1, as currently drafted, highlighted not only the evidentiary value of decisions of courts and tribunals for the identification of customary law, but also their contribution to the formulation of the content of a customary law rule.

45. Her delegation found the applicability of the persistent objector rule questionable not only in relation to *jus cogens* rules, as recognized by the Special Rapporteur in his third report (A/CN.4/682), but also in relation to the general principles of international law, which would seem to apply to all members of the community of States, whether they consented to be bound by them or not. It was difficult to imagine how a State could qualify as a persistent objector to uncontested general principles of international law, such as the right of innocent passage, the objective legal personality of international organizations, the principle of sustainable development, and fundamental human rights norms, even if some of those rules did not qualify as *jus cogens*. It would also be advisable to consider, in the commentary, whether a persistent objection might stand the test of time, because, as time passed and the customary rule gained universal approval among States, it would be more and more difficult for an isolated State to uphold its objection *ad infinitum*.

46. Her delegation concurred with the wording of draft conclusion 16 [15] (Particular customary international law). Given the exceptional character of particular customs, it was necessary to have clear and uncontested evidence of a State's participation in the formation of the corresponding practice and its acceptance as law. In that context, a distinction might also be made between novel particular customs, which applied to State behaviour not already regulated by specific rules of international law, and particular customs that derogated from a general rule of customary international law or from a multilateral treaty rule. That standard of proof should be even stricter in the latter case, given that such derogations could not be easily presumed.

47. Turning to the topic "Crimes against humanity", she said that, while her delegation attached great importance to the fight against impunity for the most heinous crimes of international concern, including crimes against humanity, it was not entirely convinced as to the desirability and necessity of a convention devoted exclusively to that category of crimes. It therefore shared the view that the Rome Statute of the International Criminal Court provided a sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity, through both the definition of those crimes in its article 7 — which had broad support among States — and, more importantly, the principle of complementarity underpinning the Statute. Indeed, Greece was a State party to the Statute and a staunch supporter of the International Criminal Court and had enacted implementing legislation to penalize crimes against humanity, as defined in article 7, providing for their imprescriptibility and for a limited extraterritorial jurisdiction of its domestic courts.

48. The entry into force of the Rome Statute and the establishment of the International Criminal Court had largely rendered unnecessary the elaboration of a convention on crimes against humanity. Despite the cautious approach and declared intention of both the Special Rapporteur and the Commission not to change existing conventional regimes and the Rome Statute, there was a risk that the consensus reached on the definition of crimes against humanity in the Statute might be jeopardized in any future negotiations on a convention. Such a convention might indeed hamper efforts to achieve universality of the Rome Statute, since some States might deem it sufficient to ratify the former without adhering to the latter.

49. Her delegation concurred with the Special Rapporteur and the Commission that the Rome Statute did not regulate inter-State cooperation on crimes falling within its jurisdiction. However, the absence of a robust inter-State cooperation system affected not just crimes against humanity but also genocide and war crimes, even though genocide and war crimes were the subjects of specific conventions. The international community should therefore focus its efforts on the promotion of universality and effective implementation of the Rome Statute, and the establishment of relevant mechanisms for inter-State cooperation in the domestic investigation and prosecution of the most serious crimes of international concern. Her Government had already expressed its support for the international initiative to conclude a multilateral treaty for mutual legal assistance and allow for extradition in the domestic prosecution of atrocity crimes. Nonetheless, it would continue to follow closely and with great interest the Commission's work on that topic.

50. With regard to the draft articles on the topic provisionally adopted by the Commission, her delegation welcomed the restructuring the two draft

articles initially proposed by the Special Rapporteur into four draft articles. It agreed with the addition of paragraph 4 to draft article 3, which stated that the draft article was without prejudice to any broader definition provided for in any international instrument or national law. Similar language could be found in existing conventions and the Rome Statute, Her delegation also agreed with the addition of the phrase "in conformity with international law" in the chapeau of draft article 4, paragraph 1, which dealt with the obligation to prevent crimes against humanity, and with the addition of the words "or control" in paragraph l (a) in order which sought to cover situations where a State was exercising de facto jurisdiction over a certain territory.

51. As to the placement of draft article 4, paragraph 2, her delegation was of the view that it should be removed from that draft article, which dealt with the obligation of prevention. It would also be useful if, in the commentary to the draft article, the Commission could provide more clarification and examples as to the content of draft article 4, paragraph 1 (b), which dealt with the obligation of States to cooperate with "other organizations", as appropriate, in the prevention of crimes against humanity.

52. Referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, she said that her delegation welcomed the Commission's reaffirmation of the applicability of articles 31 and 32 of the Vienna Convention to treaties which were constituent instruments of international organizations. Moreover, in view of the variety of international organizations in existence and the fact that constituent instruments of international organizations were treaties of a particular type, the inclusion, in draft conclusion 11, paragraph 4, of a safeguard clause, to the effect that paragraphs 1 to 3 applied without prejudice to any relevant rules of the organization concerned, guaranteed the flexibility required for the interpretation of those treaties.

53. However, for the sake of clarity, it would be appropriate to reintroduce the idea, in draft conclusion 11, paragraph 3, that it was the practice of the international organization itself in the application of its constituent instrument, as distinguished from the practice of its member States, which might, in its own right, contribute to the interpretation of that instrument in accordance with articles 31, paragraph 3, and 32 of the Vienna Convention, as the Special Rapporteur had proposed in his original version of draft conclusion 11. Moreover, given that such practice did not necessarily reflect the agreement of the member States on the interpretation of the constituent instrument of the organization concerned, especially for acts adopted despite the opposition of certain member States, it would be useful to state in clear terms that, when applying the general rule of treaty interpretation enshrined in article 3l of the Vienna Convention, such practice carried less weight than the practice of the organization which was generally accepted by its member States. As stated in the commentary to draft conclusion 11, the practice of an organization itself might contribute to the determination of the object and purpose of the treaty under article 31, paragraph 1, but its relevance for the purpose of interpretation should be merely of a confirmatory nature.

54. Her delegation would welcome more clarification regarding the difference, if any, between the general practice of an international organization and the established practice of an international organization, in particular to the extent that the latter was described by the Commission as a specific form of practice, one which had generally been accepted by the members of the organization, albeit sometimes tacitly. In view of the confusion generated by the term, her delegation was pleased to note that it had been omitted from the version of draft conclusion 11 provisionally adopted.

55. Lastly, her delegation hoped that the Commission would continue considering the topic in an expeditious manner with a view to submitting a complete set of draft conclusions which would be of great value to all States in the interpretation and application of international treaties, and would ultimately strengthen the rule of law. The full text of her statement, which included her delegation's views on the topic "Protection of the atmosphere", would be made available on the PaperSmart portal.

56. **Mr. Válek** (Czech Republic), addressing the topic of identification of customary international law, said that his delegation agreed with the new paragraph 3 proposed by the Special Rapporteur in draft conclusion 4 [5] (Requirement of practice), according to which conduct of actors other than States or intergovernmental organizations was not practice for the purposes of the formation or identification of customary international law. Although the International Committee of the Red Cross, which was often cited in discussions on the issue, was an influential actor in the international arena

whose conduct might affect the conduct of States, it was an exceptional case and did not typify the large and diversified category of "other actors". It would suffice for the Commission to explain in the commentary to the draft article that the activities of non-governmental actors might eventually contribute to the collection of the evidence of practice required under the draft article or to ascertaining such practice.

57. With regard to the Special Rapporteur's proposed draft conclusion 13 (Resolutions of international organizations and intergovernmental conferences), his delegation agreed that resolutions adopted by an international organization or at an intergovernmental conference could not, in and of themselves, constitute customary international law. The same was true for treaties, although that was not mentioned in draft conclusion 12 (Treaties). A comparison of draft conclusions 12 and 13 showed that an effort had been made to underline the difference between treaties and resolutions. Undoubtedly, treaties were legally binding while the resolutions or decisions of international organizations, in principle, were not. In that regard, treaties, as one of the main sources of international law, were at par with international custom, while resolutions were not.

58. However, since neither treaties nor resolutions could, in and of themselves, create a rule of customary law, it was important to determine what kind of evidence could be provided to ascertain whether a rule of customary international law existed. While most treaties and resolutions were of little help in identifying customary international law, some that were designed to codify and progressively develop international law, such as the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space and the 1967 Outer Space Treaty, were part of a continuous process that might eventually generate rules of customary international law. The matter should therefore be considered with caution.

59. The draft articles on crimes against humanity provisionally adopted by the Commission were non-controversial, as they reiterated provisions of legal instruments that were largely adhered to by States and took into account relevant jurisprudence of international courts. His delegation noted with satisfaction that the crimes against humanity listed in draft article 3 mirrored verbatim, except for necessary contextual changes, those listed in article 7 of the Rome Statute. It also welcomed the provisional adoption of draft article 4 (Obligation of prevention), which addressed an important missing piece in global efforts to suppress crimes against humanity. The draft article covered all preventive measures, which were specified and further explained in the commentary to the draft article. Nevertheless, his delegation wondered whether the provision should not be made more robust by incorporating some of those specific preventive measures directly into the text of the draft article.

60. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that his delegation agreed with the premise of draft conclusion 11 (Constituent instruments of international organizations), which reflected two main elements of article 5 of the Vienna Convention on the Law of Treaties. First, the provisions of article 31, paragraph 3 (a) and (b), and article 32 of the Vienna Convention applied also to the interpretation of any treaty which was a constituent instrument of an international organization, and a fortiori to a particular aspect of such interpretation concerning subsequent agreements and practice in the application of those constituent instruments. Second, the provisions were without prejudice to any relevant rules of the organizations in question. Although both elements were contained in draft conclusion 11, they were unnecessarily set out separately in paragraphs 1 and 4. They should instead be addressed together in paragraph 1 of the draft conclusion, to better convey the thrust of article 5 of the Vienna Convention, which would then render paragraph 4 of the conclusion unnecessary.

61. The stipulation in draft conclusion 11, paragraph 2, that subsequent agreements and subsequent practice might arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument did not provide any further guidance for the identification of such subsequent agreements or practice, or for making the distinction between the practice of States as treaty parties — which was the only relevant practice for the purpose of article 31, paragraph 3, of the Vienna Convention — and the practice of the organization as such.

62. With regard to treaties which were constituent instruments of an international organization, subsequent agreements and practice, as defined in article 31, paragraph 3 (a) and (b), might emerge from a rather complex process within an organization. Such agreements or practice might result from developments

within the organization or as part of its activities, and might manifest themselves in various forms. As underlined in the commentary to draft conclusion 11, in that process, States acted as members of the organization but, at the same time, also as parties to the treaty which was the constituent instrument of the organization. It was useful to recall that, as stated in draft conclusion 6, paragraph 1, the identification of subsequent agreements and subsequent practice required, in particular, a determination whether the parties, by an agreement or a practice, had taken a position regarding the interpretation of the treaty.

63. His delegation encouraged the Special Rapporteur and the Commission to further reflect on the elements that still required exploration and to eventually formulate additional paragraphs to draft conclusion 11, building on those elements.

The meeting rose at 4.50 p.m.