United Nations A/C.6/69/SR.22

General Assembly
Sixty-ninth session

Official Records

Distr.: General
11 November 2014

Original: English

Sixth Committee

Summary record of the 22nd meeting
Held at Headquarters, New York, on Wednesday, 29 October 2014, at 3 p.m.

Chair: Ms. Millicay (Vice-Chair) . . . . . (Argentina)

Contents

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

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

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

14-63553 (E)

In the absence of Mr. Manongi (United Republic of Tanzania), Ms. Millicay (Argentina), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 77: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*) (A/69/516 and A/69/516/Add.1; A/C.6/69/L.7)

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

1. **Ms. Abayena** (Ghana), introducing the draft resolution on behalf of the Bureau, said that the text closely resembled that of General Assembly resolution 68/110 and most of the changes were technical updates. However, the draft resolution also contained a number of new provisions, namely paragraphs 6, 7 and 8.

2. Paragraph 6, reflecting the views expressed by the Advisory Committee on the Programme of Assistance in paragraphs 8 and 9 of the addendum to the report of the Secretary-General (A/69/516/Add.1), recognized that the programme budget for the biennium 2014-2015 did not provide sufficient resources for the Programme of Assistance, in particular the United Nations regional courses in international law and the United Nations Audiovisual Library of International Law, notwithstanding successive General Assembly resolutions requesting such resources. It provided that the Assembly would revisit the matter of funding for the Programme of Assistance under the programme budget for the biennium 2014-2015, in particular for the regional courses that had been cancelled and for the Audiovisual Library, which might have to be discontinued.

3. Paragraph 7, reflecting the recommendation of the Advisory Committee contained in paragraph 10 of the addendum to the Secretary-General's report and representing a significant departure from the ineffective provisions in previous resolutions, requested the Secretary-General to include additional resources under the proposed programme budget for the biennium 2016-2017 to ensure the organization of the three regional courses each year beginning in 2016, as well as the continuation and further development of the Audiovisual Library in the biennium 2016-2017. The matter would require further consideration and action by the committees providing guidance to the Secretary-General on the preparation of the proposed programme budget for the next biennium.

4. Paragraph 8, reflecting the recommendation of the Advisory Committee contained in paragraph 11 of the addendum, requested the Secretary-General to include in the regular budget, for the General Assembly's consideration, the necessary funding for the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea with effect from the biennium 2016-2017, should voluntary contributions be insufficient for granting at least one fellowship a year. The legislative mandate for the Fellowship would need to be amended in order to provide for funding through the regular budget, since General Assembly resolution 36/108 explicitly stated that the Fellowship was to be financed by the voluntary contributions specifically made for its endowment. The draft resolution would have no programme budget implications for the current biennium.

5. It was to be hoped that all Member States would continue to work together in the coming months to provide the necessary additional funding through the regular budget for the Programme of Assistance, in particular the regional courses and the Audiovisual Library, in order to guarantee the future of the Programme ahead of its fiftieth anniversary in 2015.

Agenda item 76: Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session (*continued*) (A/69/17; A/C.6/69/L.5 and A/C.6/69/L.6)

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

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

6. **Mr. Koppanyi** (Austria), introducing draft resolution A/C.6/69/L.5 on behalf of the sponsors, said that they had been joined by El Salvador, Jordan and New Zealand. The text of the draft resolution, which was the omnibus resolution on the report of the United Nations Commission on International Trade Law (UNCITRAL), in most respects followed that of the previous year's resolution. The Preamble, as in

previous resolutions, stressed the importance of international trade law and recalled the mandate, work and coordinating role of UNCITRAL. Paragraphs 1 to 5 referred to the progress made by the Commission in its work during the previous year, notably the finalization of the draft convention on transparency in treaty-based investor-State arbitration. Paragraph 13 noted the rule of law briefing and the rule of law panel discussion held at the forty-seventh session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law, in particular through facilitating access to justice. Paragraph 21, recalling previous resolutions that had affirmed the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment, commended the Commission's website in the six official languages of the United Nations.

7. Introducing draft resolution A/C.6/69/L.6 on behalf of the Bureau, he said that paragraph 1 commended UNCITRAL for preparing the draft convention which, under paragraph 2, the General Assembly would adopt as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. Paragraph 3 authorized a ceremony for the opening for signature of the Convention, to be held in Port Louis on 17 March 2015, and recommended that the Convention should be known as the "Mauritius Convention on Transparency". Paragraph 4 called on those Governments and regional economic integration organizations that wished to make the Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules applicable to arbitrations under their existing investment treaties to consider becoming a party to the Convention.

8. He was confident that both draft resolutions could be adopted without a vote.

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

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

10. **Mr. Liisberg** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Commission's final report on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) contained a good summary of the work done. Its analysis of the Judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* confirmed the key role played by that obligation, together with the closely linked principle of universal jurisdiction, in the enforcement of international criminal law. The fight against impunity for perpetrators of serious international crimes was an important legal policy objective for the entire international community. The many conventions containing provisions on the obligation to extradite or prosecute aimed to ensure that the perpetrators of such crimes were denied any safe haven; the implementation of those provisions therefore remained as important as ever.

11. The Nordic countries were aware that divergent views had been expressed, including within the Commission, on a number of important issues, including the question whether the obligation to extradite or prosecute had attained the status of international customary law. They had nonetheless hoped that the Commission's work on the topic could have yielded a more detailed outcome and thus a stronger basis for further codification and progressive development.

12. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Nordic countries, which had previously underlined the importance of uniform and coherent interpretation of treaties, welcomed the draft conclusions provisionally adopted by the Commission at its sixty-sixth session. As noted by the Commission in draft conclusion 6, subsequent agreements and subsequent practice could take a variety of forms. For example, the general comments issued by treaty bodies consisting of independent experts and the views they expressed in individual cases were valuable for States' implementation, interpretation and follow-up of international conventions at the national level. However, such comments and views should be regarded as means of interpretation; they should not be seen as legally binding or as having the purpose of amending a treaty. With regard to draft conclusion 8, it was important to note that the weight of a subsequent agreement or subsequent practice as a means of interpretation depended on its clarity and specificity.

Concerning draft conclusion 9, the Nordic countries supported the requirement that an agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties required the awareness and acceptance of the parties.

13. International environmental law was an increasingly important subject of international law that merited the Commission's consideration. The Nordic countries had therefore welcomed the inclusion of the topic "Protection of the atmosphere" in the Commission's programme of work. The Commission's contribution would be to identify common principles in existing treaties and practice for the protection of the atmosphere. In that regard, the Nordic countries supported the understanding on the scope of the topic set out in the Commission's previous report (A/68/10, para. 168). The distinction between the atmosphere and airspace must also be maintained.

14. Lastly, with regard to the topic of immunity of State officials from foreign criminal jurisdiction, the Nordic countries welcomed the Commission's provisional adoption at its sixty-sixth session of the draft articles defining the term "State official" and the subjective scope of immunity *ratione materiae*, respectively. The Commission's work represented a further step towards a common understanding of the relevant international legal norms, bearing in mind that no general legal text set out the immunity regime in that area of international law. The analytical approach pursued by the Commission, drawing systematic distinctions between criminal and civil jurisdiction, between immunities *ratione personae* and *ratione materiae*, and between different circumstances that might give rise to particular rules of immunity from criminal jurisdiction, had contributed to a better understanding of the various aspects of immunity. However, it was important to ensure that the outcome of the Commission's work did not lead to fragmentation.

15. With regard to the concept of an "official", the Nordic countries largely agreed with the identifying criteria listed in the Special Rapporteur's third report (A/CN.4/673) and shared her view that those individuals who might be termed "State officials" for the purpose of immunity *ratione materiae* would have to be determined on a case-by-case basis. As the definition indicated, there must be a specific link between the State and the official; in other words, the official must represent the State or exercise State functions. The character of the act in question would be the determining factor. For certain members of Government or other key senior officials who represented the State at the international level as a regular part of their functions but did not fall within the so-called "troika" of Heads of State, Heads of Government and Ministers for Foreign Affairs, who enjoyed immunity *ratione personae*, there could be a presumption that they acted on behalf of the State. However, circumstances must be considered in each case.

16. For the most serious crimes that concerned the international community as a whole, no State officials should be shielded by rules of immunity; otherwise, such rules would effectively become rules of impunity. The Nordic countries looked forward to exploring evidence for the identification of prospective customary international law in that regard, taking into account landmark treaties and international jurisprudence dating back to the Nuremburg and Tokyo tribunals. It would be reasonable to suggest that crimes such as genocide, crimes against humanity and serious war crimes should not be included in any definition of acts covered by immunity. However, the Nordic countries stood ready to discuss those and other aspects of exceptions to immunity during the seventieth session of the General Assembly.

17. **Mr. Tichy** (Austria) said his delegation had consistently maintained that there was no duty to extradite or prosecute under customary international law and that such obligations resulted only from specific treaty provisions. In that light it was difficult to establish a common legal regime for the obligation to extradite or prosecute (*aut dedere aut judicare*). A report such as the final report of the Commission now before the Committee — which provided a valuable presentation of the full scope of the topic — therefore seemed to be the only possible outcome. His delegation did not object to the Commission's decision to conclude its consideration of the topic. The gaps that existed in the current conventional regime regarding most crimes against humanity, as mentioned in paragraph (14) of the final report, should be addressed by the Commission in the framework of the topic "Crimes against humanity".

18. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation agreed that, as expressed in the first sentence of draft conclusion 7, paragraph 3, it was

presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of a treaty, intended to interpret the treaty, not to amend or to modify it. That presumption aptly reflected the principle of *pacta sunt servanda*. The second sentence of draft conclusion 7, paragraph 3, indicating that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized, raised some questions. Strict adherence to the statement was possible on the basis of the proposed definition of "subsequent practice" in draft conclusion 4, paragraph 2, in which it was regarded only as "an authentic means of interpretation"; on that basis, subsequent practice would not extend to amendment or modification. However, draft conclusion 7, paragraph 3, raised the more general issue of whether subsequent practice by parties to a treaty might modify the treaty. In his delegation's view, such an effect could not be generally excluded. Notwithstanding the decision taken at the 1969 United Nations Conference on the Law of Treaties to delete former draft article 38 (Modification of treaties by subsequent practice) of the Vienna Convention, it seemed clear that subsequent practice establishing an agreement to modify a treaty should be regarded as a modification of the treaty and not merely as an interpretation exercise. Furthermore, where no such intention of the parties could be established, general international law did not exclude the possibility that States parties to a treaty could establish customary international law through their subsequent practice, if accompanied by *opinio juris*, and could thereby modify the rights and obligations contained in the treaty. That consequence was further reinforced by the absence of any hierarchy of sources in international law. Changes in customary international law based on treaty rules and vice versa were a generally accepted phenomenon that the formulation of the second sentence of draft conclusion 7, paragraph 3, should not be understood to exclude.

19. His delegation agreed that, as set out in draft conclusion 9, paragraph 1, an agreement under article 31, paragraph 3 (a) and (b) of the Vienna Convention "need not be legally binding"; it was required only to be an understanding and did not need to be a treaty within the meaning of the Vienna Convention. Informal agreements and non-binding arrangements could also amount to relevant subsequent agreements. With regard to the first sentence of draft conclusion 9, paragraph 2, his delegation emphasized that the subsequent practice of fewer than all parties to a treaty — and, in particular, silence on the part of one or more parties, as mentioned in the second sentence of draft conclusion 9, paragraph 2 — could serve as a means of interpretation only under very restrictive conditions.

20. With regard to the topic "Protection of the atmosphere", while several legal regimes already existed, as described in the first report of the Special Rapporteur (A/CN.4/667), they regulated only individual issues, resulting in a piecemeal approach. More general conventions, such as the Convention on Long-range Transboundary Air Pollution, excluded the topic of liability for breaches of their provisions. An all-encompassing regime for the protection of the atmosphere, under hard or soft law, would be desirable in order to avoid fragmentation; however it seemed that States would be reluctant to accept such a regime. In view of that situation, it would be useful to identify the rights and obligations of States that could be derived from existing legal principles and rules applicable to the protection of the atmosphere.

21. Concerning the individual draft guidelines, his delegation wondered why the proposed definition of the atmosphere in draft guideline 1 (Use of terms) included the troposphere and stratosphere but excluded the mesosphere and thermosphere, which also formed part of the atmosphere. Neither the Convention on Long-range Transboundary Air Pollution nor the United Nations Framework Convention on Climate Change limited their scope of application in such a way. It was also unclear how the text of the Special Rapporteur's proposed draft guideline 2, subparagraph (b), according to which the draft guidelines referred to the basic principles relating to the protection of the atmosphere, related to the Commission's understanding that, inter alia, the topic would not deal with questions such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. It was his delegation's view that the understanding might be too narrow to permit any meaningful work on the matter. With regard to proposed draft guideline 3, the rights and obligations of States in relation to the protection of the atmosphere should perhaps be determined before defining the legal status of the atmosphere, since the qualification of the atmosphere as a natural resource whose protection was a common concern of humankind still left open the

question of which particular obligations could be derived therefrom.

22. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, the definition of "State official" in draft article 2, subparagraph (e), as provisionally adopted by the Commission, required further explanation. For example, the term "State functions" itself lacked a clear definition. In particular, the commentary to the draft article did not specify whether the scope of State functions was determined only by the internal law of the State, as provided in article 4 of the articles on responsibility of States for internationally wrongful acts, or relied on an internationally agreed definition. Moreover, it was unclear whether there was a distinction between the expression "State functions" and the term "governmental authority", as used in article 5 of the articles on State responsibility. It should be asked whether personnel contractually mandated by a State to exercise certain security functions would fall under the definition of "State official". It would also be useful to examine the relationship between the articles on State responsibility and the current topic in order to clarify the extent to which acts giving rise to State responsibility would be covered by immunity *ratione materiae*.

23. In addition, draft article 5 (Persons enjoying immunity *ratione materiae*) raised a number of questions. There was no definition of "State officials acting as such". For instance, it was unclear whether persons exceeding their authority (*ultra vires*) or acting in contravention of instructions should enjoy immunity. The expression "from the exercise of foreign criminal jurisdiction" also needed further clarification. In particular, it should be made clear that it included the criminal jurisdiction exercised by administrative authorities. Furthermore, measures to ascertain the facts of a case were not precluded by immunity. The procedural bar of immunity was only relevant once formal proceedings against a person were to be instituted. Lastly, additional clarifications were needed with regard to so-called hybrid courts and acts of judicial authorities on the basis of an arrest warrant issued by an international criminal tribunal.

24. **Ms. Chigiyal** (Federated States of Micronesia) said that the protection of the atmosphere was perhaps the most pressing challenge currently facing humankind, since the atmosphere was indispensable to life on Earth. The unprecedented emission of carbon dioxide and other greenhouse gases was undermining the ability of the atmosphere to regulate the Earth's temperature, leading to a warmer planet, rising sea levels and many other environmental ills. Her delegation therefore strongly agreed with the Special Rapporteur that the protection of the atmosphere was a common concern of humankind. While each State had sovereign rights to the airspace above it, airspace and the atmosphere were two legally distinct concepts. The atmosphere was a unitary whole that all States must strive to protect; it did not consist of discrete zones whose protection was divided up among individual States.

25. Her delegation firmly supported the Special Rapporteur's proposal to focus on air pollution, ozone depletion and climate change. Those three issues were the subject of robust but separate international environmental law regimes, from which the Commission could glean core rules and principles that would be useful in crafting a unified regime. The Commission should consider the precautionary principle, the principle of sustainability and the principle of international cooperation as key elements in its review.

26. With regard to air pollution, Micronesia had called for wider use of the Commission's draft articles on prevention of transboundary harm from hazardous activities. With regard to ozone depletion, it had proposed an amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer in order to provide for the phased reduction of the production and consumption of hydrofluorocarbons. In the area of climate change, Micronesia had joined other small island States in pushing for the adoption of a robust climate change agreement in Paris in 2015, in order to move beyond the Kyoto Protocol and curb the current proliferation of climate disasters. In all three areas, Micronesia had embraced the concept of the atmosphere as a single unit, all components of which were affected by the actions of one or a few States.

27. Her delegation was confident that the Special Rapporteur's work on the topic would identify existing or emerging rules of international law, without developing new ones, and would highlight gaps in current regimes, without filling them. It encouraged the Commission to develop and adopt draft guidelines on the protection of the atmosphere in an expeditious manner, in order to assist States and international organizations in their political negotiations under

certain international environmental regimes and to provide the foundation for an all-inclusive international mechanism for the protection of the atmosphere.

28. **Mr. Alabrune** (France) said that the report of the International Law Commission contained much food for thought and that its members were to be commended for the breadth of their work. On the topic "Immunity of State officials from foreign criminal jurisdiction", the issues raised by the Special Rapporteur in regard to persons enjoying immunity *ratione materiae* deserved special attention. In terms of method, it was desirable to treat separately the questions of which State officials could claim such immunity and which acts were covered by such immunity, since its beneficiaries should not be defined by the nature of the act performed. While the two aspects were closely interlinked, the question whether a State official could legitimately claim immunity would have to be resolved in the light of the act under consideration. Only conduct directly linked to the exercise of State sovereignty justified the granting of immunity. Moreover, France considered that the term "*représentant de l´Etat*" ("State official") in the French version was ambiguous and that the Commission might usefully make it clear that it was being used only for the purposes of the study.

29. On the topic of identification of customary international law, his delegation concurred with the Special Rapporteur's view that the so-called two-element approach, combining considerations as to the existence of State practice and the acceptance by States of such a practice as law, should be maintained. The view that a single element, namely, *opinio juris*, could suffice to establish a rule of customary international law was not supported either by State practice or by the case law of the International Court of Justice.

30. As to the relevance of acts of international organizations for the formation of customary international law, a cautious approach was in order. While the acts of such organizations could be a source of useful information, it was primarily the practice of States that attested to the existence of a customary rule, as indeed was noted in the Special Rapporteur's draft conclusion 5 (Role of practice). Nevertheless, the practice of other subjects of international law could also contribute to the creation or expression of such rules. The question could be raised whether international organizations were the only other entities to play a role in the formation of customary international law or whether all subjects of international law could potentially do so.

31. In the case of acts of international organizations, uncertainty might arise from the fact that such acts were mentioned in relation to the material element in draft conclusion 7 (Forms of practice) but not in relation to the psychological element in draft conclusion 11 (Evidence of acceptance as law). Moreover, some of the draft conclusions referred solely to the conduct of States. The question of the weight to be given to the practice of international organizations was of particular concern to the States members of the European Union as they had assigned to it exclusive jurisdiction in some areas. It would be appreciated if the Special Rapporteur could give specific examples of rules of international law for which the practice of the European Union had contributed to the establishment of custom.

32. Concerning the topic of subsequent agreements and subsequent practices in relation to the interpretation of treaties, it should be emphasized that the parties to a treaty could not be presumed to wish to amend or modify it. Such was France's understanding of draft conclusion 7, paragraph 3. However, the use of the term "agreement" in the title of the topic could be confusing insofar as a treaty could also be amended as the result of an agreement. Furthermore, his delegation questioned the assertion in draft conclusion 9 that an agreement of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties did not need to be legally binding; if such an agreement were not legally binding, there would be a risk of purely political acts or decisions being included in that category.

33. On the topic of protection of the environment in relation to armed conflicts, his delegation had doubts about the need to define "environment "and "armed conflict". A specific definition of "armed conflict" — a concept taken from international humanitarian law — might well lend itself to a fragmentation of normative interpretations in that regard. At the current stage, uncertainties regarding such matters of definition could only add to uncertainties as to the feasibility of such a project.

34. Similar doubts could be expressed about the work on the topic "Protection of the atmosphere". Such a highly technical matter fell outside the Commission's

mandate for the codification and progressive development of international law. While the deteriorating state of the atmosphere was indeed a pressing concern for the international community, there was no international consensus on a legal expression of that concern; it was not fitting that the Commission, as a group of legal experts, should step into the breach.

35. His delegation also questioned the direction taken by the work of the Special Rapporteur. When the topic had been included in the Commission's programme of work, it had been understood that the object was not to fill the gaps in treaty regimes. The proposal to rank it as one of the common concerns of humankind was not supported by the state of positive law. Were it to be treated as such, protection of the environment would be an obligation *erga omnes*, incumbent on all States, and could thus serve as a basis for international contentious proceedings, which would be unacceptable. As commendable as were the intentions of the Special Rapporteur, they could not be substituted for the sovereign will of States; he should adhere to the framework conditions established for the topic at the time it had been added to the programme of work.

36. With regard to the sensitive topic of expulsion of aliens, the Commission's draft text was currently under interministerial review in France. The draft articles should serve as guidelines for States and not as a basis for the elaboration of a convention in the near future; the convening of a diplomatic conference to adopt a convention on the subject would be premature.

37. Among the topics newly included in the Commission's programme of work, that of *jus cogens* was questionable. States neither required nor really wanted the Commission to make a further contribution to its progressive development. In the report of the Commission's Study Group on the fragmentation of international law (A/CN.4/L.682) it was rightly noted that disagreement about the theoretical underpinnings of *jus cogens*, its scope of application and its content remained widespread. As there had been no significant change in the situation since that time, France remained sceptical about the possibility of reaching a consensus on the topic.

38. On the new topic of crimes against humanity, his delegation questioned the need for a convention, deeming it preferable to encourage universal accession to the Rome Statute of the International Criminal Court and the effective implementation of existing norms; indeed, a draft convention on the subject might well conflict with those norms. It also had doubts about the possible use by the Commission of the draft international convention on the prevention and punishment of crimes against humanity prepared by Washington University in St. Louis as it raised serious concerns from the standpoint of both domestic and international law, particularly on the question of the establishment of universal jurisdiction over such crimes.

39. Concerning the methods of work of the Commission, his delegation considered it desirable for there to be fewer working groups and projects, in the interests of thorough study of each subject and speedier progress of work. It also found that the list of specific issues on which comments were requested from States by the Commission in its report was excessively long, making it difficult for most States to comply within the time limits. In addition, his delegation was against the proposal to discontinue summary records of the Commission's work, as they could serve as supplementary means of interpretation, provide a record of its *travaux préparatoires* on the texts it produced and inform States of its deliberations. It was also against shortening the Commission's sessions, having regard to the long list of topics in its programme of work; it would be preferable first to reduce the number of topics. His delegation also had strong reservations about the possibility of holding part of the Commission's future sessions in New York.

40. In conclusion, he wished to emphasize the importance of the principle of equality of the official languages of the United Nations with respect to the distribution of the Commission's report. If the dates of the Commission's sessions were brought forward, its report would be able to be made available earlier in all languages, giving delegations the necessary time to inform themselves about its work and to prepare comments with a view to the annual session of the Sixth Committee. Consequently, the report would no longer need to be issued in a single language on the Commission's official site, which was contrary to the aforesaid principle. That would be particularly useful given that the Commission's work served as a benchmark for international and national courts. Equal treatment for languages would help to ensure a proper balance between the various legal systems involved in the formation of international law.

41. **Mr. Zaharia** (Romania) said that his delegation welcomed the report of the Commission's Working

Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which was crucial in the fight against impunity for crimes of concern to the international community. Some of its findings should be reflected in the Commission's future work on the topic of crimes against humanity.

42. It also welcomed the Commission's work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, as it would clarify significant aspects of the law of treaties. Although Romania was not a party to the Vienna Convention on the Law of Treaties, it applied most of its provisions as customary international law. His delegation shared most of the Commission's conclusions on the topic. With regard to draft conclusion 7, however, it believed that the second sentence in paragraph 3 ("The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized") should be deleted, as it would be sufficient to refer to the presumption that State practice in the application of the treaty would imply its interpretation and not its amendment or modification. In addition, that sentence might be considered overly restrictive, in view of the thin line between interpretation and modification.

43. Paragraph (23) of the commentary to draft conclusion 9 explained that the parties might replace an agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties by a new agreement as an authentic means of interpretation from the date of its existence, at least with effect for the future. His delegation distinguished between such a situation, where one interpretive agreement replaced another existing interpretive agreement, and the more common situation, where an interpretive agreement was reached without replacing a previous interpretive agreement. In such cases, the later interpretive agreement should be able to clarify the will of the parties at the time the agreement to which its interpretation referred had been concluded. The later interpretation would therefore be relevant not only for the future application of the treaty, but also for disputes as to the interpretation of the treaty arising before the reaching of such a subsequent agreement. The question, also raised in paragraph (23), of the point at which such a subsequent agreement might be considered to be established merited further study.

44. Concerning draft conclusion 10 and the commentary thereto, his delegation suggested including among the many examples of relevant practice of international organizations that of the International Criminal Court, whose 1998 Statute explicitly provided for the powers of the Assembly of States Parties in relation to the interpretation of the Statute. That was one exception to the generally valid statement in paragraph (31) of the commentary to draft conclusion 10 that the legal effect of a resolution of a Conference of States Parties was not usually indicated.

45. Romania welcomed the Commission's decision to include the topic of protection of the atmosphere in its programme of work and commended the approach adopted by the Special Rapporteur, which took due account of the restrictions that had been set on the work on the topic. The Commission's main task was accordingly to identify relevant established and emerging custom and any gaps in existing treaty regimes, without attempting to fill those gaps. It would also be useful to explore possible mechanisms for international cooperation, especially as a tool in ongoing political negotiations on the matter. His delegation hoped that the Special Rapporteur would give special attention to the question of the regulation of transboundary air pollution at the global level, which was not yet provided for, and would for that purpose carefully analyse existing practice under the Convention on Long-range Transboundary Air Pollution of the United Nations Economic Commission for Europe and its Protocols.

46. Lastly, on the topic of immunity of State officials from foreign criminal jurisdiction, his delegation preferred to retain the term "State official" in the definition in draft article 2, subparagraph (e), rather than to replace it by "State organ", and agreed that the beneficiaries of immunity *ratione personae* were covered by that term and therefore did not need to be differentiated from other State officials for purposes of the definition. His delegation also agreed that it was practically impossible to draw up an exhaustive list of the individuals covered by immunity *ratione materiae* and that an indicative list of such individuals might prove inadequate. The most appropriate approach was for State officials to be identified on a case-by-case basis in accordance with the criteria laid down in the definition. With regard to draft article 5, the replacement of the words "State officials who exercise elements of governmental authority" by "State officials acting as such" was an improvement, as the initial

proposal would have been too narrow for the identification of the beneficiaries of such immunity.

47. **Mr. Tiriticco** (Italy), referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that his delegation supported draft conclusions 6 and 8 to 10. However, draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) and the commentary thereto raised questions about the notion of interpretation and the possible effects of subsequent practice as a means of treaty modification. The possible effects of subsequent agreements and subsequent practice on interpretation should be more clearly distinguished from their actual or potential impact in terms of amendment or modification. In paragraph 3 of draft conclusion 7, his delegation proposed the deletion or rephrasing of the sentence "The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized", since the Commission's decision to focus on interpretation made it inappropriate for the time being to take a definite stand on the issue of treaty modification. The ambiguity between interpretation and modification was, in fact, recognized in the commentary, which noted in paragraph (33) that the case law of the International Court of Justice showed that it preferred to accept broad interpretations which might stretch the ordinary meaning of the terms of the treaty.

48. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, his delegation reiterated the importance of comprehensive, in-depth analysis of the topic, which touched upon issues of critical relevance to current State and judicial practice. The definition given in draft article 2, subparagraph (e), of a State official as any individual representing the State or exercising State functions was said in the commentary to apply both to persons enjoying immunity *ratione personae* and to persons enjoying immunity *ratione materiae*. His delegation agreed with that definition, which rested on a specific link between the State and the official. Valuable guidance was provided in that regard by the examples referred to in the commentary of categories of State official recognized in national and international case law on the subject.

49. Military officials were widely acknowledged to fall within the notion of State officials; military personnel while performing official duties by definition exercised State functions. In the debate the previous year, his delegation had voiced the hope that the Commission would, at the appropriate time, deal comprehensively with the issue of immunity of military forces. Its current concern was that, apart from the special rules contained in status-of-forces agreements, and without prejudice to criminal accountability for serious international crimes, the rule on functional immunity from foreign criminal jurisdiction of military personnel for official acts should be considered crystallized in customary international law and therefore generally binding.

50. His delegation also agreed with the content of draft article 5, it being understood that "State officials acting as such" referred to the official nature of the acts in question, emphasizing the functional nature of immunity *ratione materiae*, and that the immunity was from foreign criminal jurisdiction, leaving aside the area of competence of international or mixed criminal tribunals. By referring to "the exercise" of jurisdiction, the draft article indicated that the immunity was procedural in nature and did not exempt the person concerned from the applicable substantive rules of criminal law.

51. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the report properly left it to States themselves to decide, when drafting treaties, whether it best suited their objective in a particular circumstance to include clauses imposing an obligation to extradite, where prosecution became an obligation only after extradition had been refused, or clauses imposing a duty to prosecute, with extradition being an option. Other points of special interest in relation to current and future State practice concerned the so-called "third alternative", consisting in surrendering the suspect to a competent international criminal tribunal, and gaps in the existing conventional regime with respect to crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflicts.

52. On the topic of protection of the atmosphere, his delegation encouraged the Commission to proceed with its work, as yet in its initial phase, in a constructive spirit, notwithstanding differences of approach among its members. The understanding reached by the Commission at its previous session should be sufficient to allow the work to proceed within those limits, with an awareness of the constraints deriving from negotiations in other forums.

53. Italy also continued to support the Commission's work on the topic of protection of the environment in relation to armed conflicts. Between the three-phased approach adopted by the Special Rapporteur and a thematic approach not based on a strict temporal division of phases of the conflict, his delegation continued to favour the latter, bearing in mind that the law of armed conflict and international environmental law were applicable before, during and after an armed conflict. The Commission's main objective should be to identify relevant State obligations under customary and conventional law, taking into account the vast body of legislation that might be applicable. Further development of the topic could also result from a comprehensive survey of State practice. His delegation did not see the need to limit the substantive scope of the topic as some members of the Commission had suggested. In particular, the environment to be protected in situations of armed conflict should include cultural property; the need for such protection was demonstrated by the ongoing destruction of historic sites and trafficking in cultural objects in Syria and Iraq. Furthermore, considerations of human rights should also be included, particularly the right to a safe and satisfactory environment. His delegation continued to hold the view that the outcome of the Commission's work on the topic should be a kind of handbook rather than a draft convention.

54. The Commission's work on the new topic of crimes against humanity should focus on mechanisms to fill any jurisdictional gaps and on the implementation at the national level of international norms relating to such crimes. However, article 7 of the Rome Statute of the International Criminal Court must not be called into question. The Commission should also be mindful of initiatives fostering inter-State judicial cooperation on crimes within the jurisdiction of the Court. His delegation also looked forward to the further development of the topic of *jus cogens*. He reiterated, lastly, its appeal for the Commission to concentrate its work on fewer topics and, in particular, on those that seemed likely to show substantive progress within a reasonable period of time.

The meeting rose at 4.55 p.m.