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Chair: Mr. Kohona . . . . . (Sri Lanka)

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13-54572 (E)

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

Statement by the President of the General Assembly

1. **Mr. Ashe** (Antigua and Barbuda), President of the General Assembly, said that the Sixth Committee had made a signal contribution to the key role of the United Nations in developing and promoting international law. By facilitating dialogue on emerging international legal issues and furthering the codification of international law, its work brought the Organization closer to a goal articulated by its founders in the preamble to the Charter. Specifically, the Committee's work sought, within a normative framework, to ensure that justice and respect for the obligations arising from treaties and other sources of international law could be maintained. He welcomed the Committee's progress during the current session on issues relating to the promotion of justice and international law and also wished to commend the United Nations Commission on International Trade Law and the International Law Commission for their accomplishments.

2. Work remained to be done, however. The finalization of a draft comprehensive convention on international terrorism was a high priority for the United Nations. While he appreciated Member States' unequivocal condemnation of terrorism in all its forms and manifestations and their continued support for the United Nations Global Counter-Terrorism Strategy, he encouraged them to strive vigorously, both prior to and during the next session, to address outstanding issues so as to move forward towards finalizing a comprehensive convention and thereby ensuring a robust legal framework for combating the scourge of terrorism.

3. The high-level meeting on the rule of law at the national and international levels held during the previous session of the General Assembly had been historic, and the Declaration adopted by consensus had marked a major milestone for the United Nations. It had confirmed the fundamental role of the rule of law in furthering international peace and security, human rights and development. It had also confirmed that the rule of law must be central when the international community responded to complex political, social and economic transformations and that it was the foundation of friendly and equitable relations between States and the basis on which just and fair societies were built. The Committee had been an important forum for bringing about a common understanding of the rule of law at the national and international levels. World leaders had acknowledged that the rule of law must become deeply integrated into other global processes, including, the post-2015 development agenda. As he had announced previously, he intended to convene a thematic debate aimed at fostering a better understanding of how the rule of law could be incorporated in the post-2015 development agenda. His hope was that it would be recognized that the advancement of the rule of law at the national and international levels was essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development.

4. As the Committee moved into the final stages of its work during the current session, he encouraged members to continue working in a constructive and cooperative spirit, with a firm focus on consensus-building. He also urged the Committee to continue respecting the time and resources allocated to it, which was crucial for the overall success of the session. He and his team stood ready to support the Committee in reaching a successful conclusion to its work.

5. **The Chair**, thanking the President for his statement, said that the Committee would certainly bear in mind the concerns he had highlighted, especially with respect to the rule of law.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (*continued*) (A/66/10, A/66/l0/Add.1 and A/68/l0)

6. **Mr. Niehaus** (Chairman of the International Law Commission), introducing chapters VI to XI and annex A of the Commission's report on the work of its sixty-fifth session (A/68/10), said that the work on the topic of protection of persons in the event of disasters had proceeded in two stages. First, the Commission had adopted draft articles 5 bis and 12 to 15, which it had considered at its sixty-fourth session. Next, it had considered the sixth report of the Special Rapporteur on the topic (A/CN.4/662), which dealt with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law and international cooperation on prevention, and

contained proposed draft articles 5 ter (Cooperation for disaster risk reduction) and 16 (Duty to prevent). The Commission had subsequently adopted those draft articles on the basis of revised texts proposed by the Drafting Committee.

7. Draft article 5 bis (Forms of cooperation) was drawn from draft article 17 (Emergency situations) of the draft articles on the law of transboundary aquifers and sought to clarify the various forms that cooperation between affected States, assisting States, and other assisting actors might take in the context of the protection of persons in the event of disasters. While it highlighted specific forms of cooperation, the list was not meant to be exhaustive but rather illustrative of the principal areas in which cooperation might be appropriate. Humanitarian assistance had intentionally been placed first among the forms of cooperation mentioned, as the Commission had considered it of paramount importance in the context of disaster relief. Other forms of cooperation not specified in the draft article included financial support, technological assistance in areas such as satellite imagery, training, information-sharing and joint simulation exercises and planning. While draft article 5 bis dealt with cooperation in the disaster relief or post-disaster phase, draft article 5 ter (Cooperation for disaster risk reduction) indicated that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 5, also encompassed the pre-disaster phase. Draft article 5 ter had been provisionally adopted on the understanding that its adoption was without prejudice to its final location in the set of draft articles, including, in particular, the possibility of its being incorporated, along with draft article 5 bis, in a newly revised draft article 5.

8. Draft article 12 (Offers of assistance) acknowledged the interest of the international community in the protection of persons in the event of disasters, which was to be viewed as complementary to the primary role of the affected State as established in draft article 9 (Role of the affected State). The commentary clarified that draft article 12 concerned only offers of assistance, not the actual provision thereof, and that such offers could not be discriminatory in nature or be made subject to conditions unacceptable to the affected State. Furthermore, offers of assistance that were consistent with the draft articles could not be regarded as interference in the affected State's internal affairs. A distinction was drawn between offers of assistance made by States, the United Nations and other competent intergovernmental organizations and those made by non-governmental organizations, which was the subject of the second sentence of the draft article. The former were considered to be not only entitled but encouraged to make offers of assistance. As for non-governmental organizations, the Commission had adopted a formulation that stressed the distinction, in terms of nature and legal status, that existed between their position and that of States and intergovernmental organizations.

9. Draft article 13 (Conditions on the provision of external assistance) affirmed the right of affected States to place conditions on the provision of assistance, in accordance with the draft articles and applicable rules of international and national law. It also indicated that such conditions were to be determined taking into account the identified needs of persons affected by disasters and the quality of the assistance, and it required the affected State, when formulating conditions, to indicate the scope and type of assistance sought. Draft article 14 (Facilitation of external assistance) aimed to ensure that national law would accommodate the provision of prompt and effective assistance. Paragraph 1 provided examples of areas of assistance in which national law should enable the taking of appropriate measures. Subparagraph (a) referred to relief personnel, while subparagraph (b) addressed goods and equipment, which encompassed all supplies, tools, machines, foodstuffs, medicines and other objects necessary for relief operations. Paragraph 2 called for all relevant legislation and regulations to be made readily accessible to assisting actors, the intent being to facilitate access to such laws without imposing on the affected State the burden of physically providing such information separately to all assisting actors.

10. Draft article 15 (Termination of external assistance) provided that the affected State, the assisting State and, as appropriate, other assisting actors must consult each other concerning the termination of external assistance and the modalities of termination. The second sentence set out the requirement that parties wishing to terminate assistance must provide appropriate notification. Draft article 16 (Duty to reduce the risk of disasters) established the basic obligation to reduce the risk of disasters by taking certain measures and provided an indicative list

of such measures. It had been included in the draft articles in recognition of the importance attached by the international community to current disaster risk reduction efforts.

11. On the topic of formation and evidence of customary international law, the Commission had had before it the first report of the Special Rapporteur (A/CN.4/663) and a memorandum by the Secretariat on the topic (A/CN.4/659). The Commission had decided to change the name of the topic to "Identification of customary international law", which more clearly indicated the proposed focus of the Commission's work, namely, the method of identifying rules of customary international law. That decision had largely been prompted by confusion over the scope of the topic caused by the reference to "formation" in the title. Nevertheless, it was understood that work on the topic would include an examination of the requirements for the formation of rules of customary international law and of the material evidence of such rules.

12. The first report of the Special Rapporteur, which was introductory in nature, aimed to provide a basis for future work and discussions on the topic, and set out in general terms the Special Rapporteur's proposed approach. The report presented, inter alia, a brief overview of previous work relevant to the topic, the proposed scope and outcome of the topic, the relationship of customary international law with other sources of international law and the possible range of materials to be consulted by the Commission in its work. It concluded by proposing a future programme of work. The Special Rapporteur had included two draft conclusions in his report, but had considered them premature for consideration and referral to the Drafting Committee, a view shared by members of the Commission.

13. In the Commission's debate on the report, the general view with regard to scope and methodology had been that the work of the Commission should be of an essentially practical nature, with a focus on identifying rules of customary international law. There had been general agreement that the Commission's work should aim to spell out a common, unified approach to the identification of such rules by considering both the formation of customary international law — the elements that gave rise to the existence of a rule of customary international law — and the requisite criteria for proving their existence. Broad support had been expressed for the Special Rapporteur's proposal to examine the two widely accepted constituent elements of customary international law: State practice and *opinio juris sive necessitatis*, although it had been recognized that the two elements might sometimes be closely intertwined, and that the relative weight to be given to each might vary with the context.

14. Several members had expressed the view, however, that a system-wide or unitary approach to the identification of customary international law should not be assumed, as the approach might vary according to the substantive area of international law concerned. Some members had also been sceptical that the largely theoretical questions relating to the formation of customary international law were necessary or relevant to the Commission's work on the topic. There had been general agreement that the Commission should study the relationship between customary international law and other sources of international law, but should not undertake a study of *jus cogens*, as it presented its own peculiarities in terms of formation and evidence.

15. As to the range of materials to be consulted, there had been broad support for a careful examination of the practice of States, including materials on State practice from all regions of the world. Several members had suggested that the Commission should research the decisions of national courts and statements of national officials as well as State conduct. There had also been general support for the proposal to examine the jurisprudence of international courts, particularly the International Court of Justice, and of regional and subregional courts. The general view had been that the role of the practice of international and regional organizations merited consideration as well.

16. With regard to the possible outcome of the Commission's work on the topic, there had been broad support for the development of a set of conclusions with commentaries, which would be of practical use to lawyers and judges, particularly those who were not experts in international law. Several members had also expressed support for the development of a glossary of terms in all languages in order to build a common understanding and usage, while others had been of the view that a rigid lexicon was not advisable. General support had also been expressed for the plan of work for the quinquennium proposed by the Special Rapporteur, although several members had indicated that the plan might not be feasible given the difficulties inherent in the topic. There had been general support

for a renewed call to States for information on their approach to the identification of customary international law, and in chapter III of the report the Commission had therefore requested States to provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in (a) official statements before legislatures, courts and international organizations and (b) decisions of national, regional and subregional courts.

17. With regard to the topic of provisional application of treaties, the Commission had had before it the first report of the Special Rapporteur (A/CN.4/664), which sought to establish, in general terms, the principal legal issues arising in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission had also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the Vienna Convention on the Law of Treaties and included a brief analysis of some of the substantive issues raised during its consideration.

18. In introducing his report, the Special Rapporteur had indicated a preference for not considering the question of the provisional application of treaties by international organizations, as envisaged in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Commission had held a preliminary exchange of views on the question of the legal effects of provisional application, during which the Special Rapporteur, while indicating that much depended on the content of the substantive rule of international law being provisionally applied, had recalled that both Special Rapporteurs on the law of treaties, Fitzmaurice and Waldock, had been of the view that the provisional application of a treaty gave rise to the same obligations that would arise upon its entry into force. Several members had been of the opinion that, unless the parties agreed otherwise, agreement to provisionally apply a treaty implied that the parties concerned were bound by the rights and obligations under the treaty in the same way as if it were in force.

19. Regarding issues to be considered in future reports, the Special Rapporteur had highlighted the key features of the legal regime applicable to provisional application of treaties, namely that it might be envisaged expressly in a treaty or provided for by means of a separate agreement between the parties; that States might indicate either expressly or tacitly their intention to apply a treaty provisionally; and that termination of provisional application might be undertaken unilaterally or by agreement between the parties. The Special Rapporteur had been encouraged to ascertain whether the rules in article 25 were applicable as rules of customary international law or otherwise in cases where the Vienna Convention did not apply and to consider the extent to which the provisional application of a treaty might contribute to the formation of rules of customary international law. Several other suggestions for future consideration were recorded in paragraph 123 of the Commission's report.

20. The debate had revealed differences of opinion with regard to the purpose of provisional application of treaties, and, by extension, the nature of the Commission's task. The view had been expressed that it was inappropriate, as a matter of legal policy, for the Commission to seek to promote the provisional application of treaties, and examples had been cited in which provisional application had discouraged ratification of the treaty. Some members had been of the view, however, that it was not for the Commission to encourage or discourage recourse to provisional application — which had been seen as essentially a policy matter for States — and that the drafters of article 25 had viewed it not as a means of undermining treaties but as a practical way of ensuring legal certainty. A further concern raised had been that the provisional application of treaties might circumvent established domestic procedures, including constitutional requirements, for a State's participation in treaties. Not all members had shared that concern; it had been pointed out that States were free to establish rules under their respective internal legal systems and that the Commission had to proceed from the assumption that States would undertake the provisional application of treaties in conformity with their internal laws. Accordingly, the Commission's task would be simply to consider the extent to which contemporary international law was required to take into account limitations under domestic laws, without considering those limitations themselves.

21. With respect to the final outcome of the work, the Special Rapporteur had expressed his preliminary view that the topic was best suited for the development of

guidelines or model clauses aimed at providing guidance to Governments. Commission members had generally felt that it was too early to take a position on the eventual outcome of the topic, although some suggestions had been made, including the formulation of conclusions with commentaries or the development of a practical guide for use by States in negotiating new clauses on provisional application or in interpreting and applying existing clauses.

22. In future reports, it was the Special Rapporteur's intention to consider the relationship between article 25 and other provisions of the Vienna Convention, including those on the expression of consent; the entering of reservations; the effects on third States; the applicability of the rules on interpretation, application and termination of treaties; the invalidity of treaties; and the temporal component of provisional application. An analysis of the legal effect of provisional application in the context of treaty rules establishing the rights of individuals was also planned. To assist the Commission in its further work on the topic, States were asked to provide information by 31 January 2014 on their practice concerning the provisional application of treaties, with examples, in particular in relation to (a) the decision to provisionally apply a treaty, (b) the termination of such provisional application and (c) the legal effects of provisional application.

23. On the topic of protection of the environment in relation to armed conflicts, the Special Rapporteur had presented a series of informal working papers with a view to initiating an informal dialogue with Commission members on a number of issues that could be relevant to the work on the topic. A preliminary exchange of views had been held in the framework of informal consultations, which had afforded members an opportunity to reflect and comment on the way forward. Those consultations had focused mainly on the scope and methodology, the timetable and the possible outcome of the Commission's work, as well as on a number of substantive issues relating to the topic. With regard to scope and methodology, the Special Rapporteur had proposed to address the topic holistically, rather than considering each relevant legal regime individually as a distinct category, but in temporal phases, it being understood that there could not be a strict division between the different phases. Accordingly, the legal measures taken to protect the environment in the phases before, during and after an armed conflict would be studied, including, in the first phase, obligations of relevance to a potential armed conflict; in the second phase, an analysis of the relevant existing laws of war; and, in the third phase, obligations relating to reparation for damage, reconstruction, responsibility, liability and compensation. The Special Rapporteur had also proposed a three-year timetable, with reports focusing successively on the phases to be submitted for the Commission's consideration each year. As to the final outcome, the Special Rapporteur had indicated that she considered the topic more suited to the development of non-binding guidelines than to a draft convention.

24. To assist in the consideration of future work on the topic, as noted in chapter III, the Commission would appreciate receiving information from States on whether, in their practice, international or domestic environmental law had been interpreted as applicable in relation to international or non-international armed conflict. It would be particularly useful if the Commission could receive examples of (a) treaties, particularly relevant regional or bilateral treaties; (b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties; and (c) case law in which international or domestic environmental law was applied to disputes arising from situations of armed conflict.

25. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), during its sixty-fourth and sixty-fifth sessions the Commission had dealt with the topic primarily in the context of a Working Group with the aim essentially of evaluating the progress and work of the Commission thus far on the topic, particularly in the light of the judgment of the International Court of Justice of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*). The Working Group had held seven meetings and its report, which appeared as annex A to the Commission's report, summarized and highlighted particular aspects of the Commission's work on the topic. It placed the topic within the broader framework of efforts to combat impunity while respecting the rule of law. It also recalled the importance of the obligation to extradite or protect in the work of the Commission, summarized the work done thus far and offered suggestions that might be useful for States parties to conventions containing the obligation. The report addressed the issues relevant to the topic against the background of the study by the Secretariat, "Survey of multilateral conventions which

may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'" (A/CN.4/630) and the judgment of 20 July 2012 of the International Court of Justice. The Working Group had not considered it necessary to delve further into the question of customary international law.

26. The report presented a typology of provisions containing the obligation to extradite or prosecute in multilateral instruments, taking into account the Secretariat's survey and the separate opinion of Judge Yusuf in *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*). Given the diversity in the formulation, content and scope of the obligation to extradite or prosecute in treaty practice, it was considered of doubtful utility to seek to harmonize the various treaty clauses containing the obligation, as each would have been negotiated within the context of a particular treaty regime. Hence, the scope of the obligation under the relevant treaty regimes should be analysed on a case-by-case basis. However, there were some general trends and common features in the more recent instruments containing the obligation, especially those modelled on the "Hague formula". Accordingly, the report, predominantly drawing upon *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), offered a set of considerations regarding the implementation of the obligation to extradite or prosecute which might be useful for States in evaluating the kinds of obligations that might be assumed when they became parties to particular treaty regimes containing it. Those considerations related to criminalization of the relevant offences at the national level and the attendant consequences of delay in enacting the necessary legislation, the establishment of jurisdiction, the obligation to investigate, the obligation to prosecute, the obligation to extradite and the consequences of non-compliance.

27. The topic of the most-favoured-nation clause remained a work in progress. At the current year's session the Commission had reconstituted the Study Group on the topic, which had held four meetings. The Study Group had had before it working papers entitled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements", by Mr. S. Murase, and "Survey of MFN Language and the Maffezini-related Jurisprudence", by Mr. M.D. Hmoud. It had also continued to examine contemporary practice and jurisprudence relevant to the interpretation of most-favoured nation clauses, including recent arbitral awards, together with separate concurring and dissenting opinions. Particular attention had been paid to an analysis of two awards: *Daimler Financial Services AG v. Argentine Republic*, dispatched to the parties on 22 August 2012, and *Kılıç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, dispatched to the parties on 2 July 2013. Although the Study Group had been aware of the of 3 July 2013 decision of the International Centre for Settlement of Investment Disputes on the objection to jurisdiction for lack of consent in *Garanti Koza LLP v. Turkmenistan*, it had not had sufficient time to analyse it. The Daimler and Kılıç awards addressed issues similar to those raised in the case of *Emilio Agustín Maffezini v. Kingdom of Spain* and therefore shed some additional light on the various factors that tribunals took into account in the interpretation of most-favoured nation clauses; the elements taken into account in the awards had been considered to be of potential relevance to the work of the Study Group. The interpretative approaches of the arbitral tribunals to most-favoured-nation clauses and the relevance of the Vienna Convention on the Law of Treaties for that purpose had been considered of particular interest.

28. It might be recalled that the overall objective of the Study Group had been to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions in the area of investment, particularly in relation to most-favoured-nation provisions. The Study Group continued to work towards ensuring greater certainty and stability in the field of investment law and intended to produce an outcome that would be of practical use to those involved in the field and to policymakers. While its focus was in the area of investment, it was recognized that the issues under discussion would best be located within a broader normative framework. Accordingly, the final report would provide a general background to the work within the broader framework of general international law and in the light of subsequent developments since the Commission's adoption of the 1978 draft articles on most-favoured-nation clauses. The report would also seek to address contemporary issues concerning such clauses, analysing aspects such as the current relevance of most-favoured-nation provisions, the work on such provisions done by other bodies and the different approaches taken in interpreting them. It might also broadly address the

question of the interpretation of most-favoured-nation provisions in investment agreements in respect of dispute settlement, analysing various relevant factors and presenting, as appropriate, guidelines and examples of model clauses for the negotiation of such provisions, based on State practice. The Vienna Convention on the Law of Treaties would continue to serve as a useful point of departure.

29. The development of guidelines and model clauses for the final report was considered desirable, although due account had been taken of the risks associated with an overly prescriptive outcome. One possibility might be to catalogue the examples that had arisen in practice relating to treaties and to draw the attention of States to the interpretation that various awards had given to a variety of provisions.

30. **Ms. Cujo** (Observer for the European Union), speaking also on behalf of the candidate countries Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process countries Albania and Bosnia and Herzegovina; and, in addition, Armenia and the Republic of Moldova, said that she would highlight only a few points in relation to the topic of protection of persons in the event of disasters; more detail could be found in her delegation's written statement. The Commission had focused on the pre-disaster phase and in particular on disaster prevention, mitigation and preparedness. Those issues had long been an integral part of European Union legislation and action and it therefore had much experience to share. The European Union welcomed the focus on cooperation for disaster risk reduction and considered it of utmost importance not to lose sight of the fact that protection in relation to disasters should be people-focused.

31. The European Union therefore welcomed draft article 5 ter (Cooperation for disaster risk reduction), with its emphasis on the need for cooperation in the pre-disaster phase. It should be clear from a full reading of draft articles 5, 5 bis and 5 ter, that cooperation extended *ratione temporis* not only to the response phase of a disaster, but also to the pre- and post-disaster phases. In addition to measures intended to reduce the risk of disasters, cooperation in the pre-disaster phase should also be directed at enhancing the resilience of affected populations and communities. The European Union would therefore suggest that, in line with the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, the words "and to build resilience thereto" should be added at the end of draft article 5 ter. In addition, while the commentary to draft article 5 ter made reference to the measures envisaged in draft article 16 (Duty to reduce the risk of disasters), it might be advisable to include such a reference in the draft article itself.

32. The reference to early warning systems in draft article 16 was particularly welcome. The draft article would, however, benefit from the inclusion of the word "systematic" in relation to the measures to be taken; systematic measures were essential in order to ensure a meaningful reduction in the risk of disasters. In addition, the wording concerning the duty to prevent should be more people-focused. Risk assessments should include the identification of people or communities at risk and the infrastructure necessary to their well-being, and specific language to that effect should be incorporated in the draft article. Moreover, a reference to regional integration organizations should be included in the draft articles or in the commentaries.

33. Turning to the topic of provisional application of treaties and speaking also on behalf of the candidate countries Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process countries Albania and Bosnia and Herzegovina; and, in addition Georgia and the Republic of Moldova, she said that the Commission's work on the topic was of great interest to the European Union. The possibility of provisional application of international agreements was envisaged in its founding treaties, and it had concluded numerous agreements that provided for provisional application of all or part of the agreement. Provisional application was an area in which flexibility was essential owing to the differences in the institutional and legal circumstances of treaty-makers in different parts of the world. Consequently, although it was premature to discuss the possible outcome of the Commission's work, the development of model clauses would appear to be of limited interest. Given the need for flexibility, the Commission should instead aim to produce guidelines that would be of use to decision-makers in the treaty process.

34. Provisional application of treaties raised many practical and theoretical questions, and an in-depth study of article 25 of the 1969 Vienna Convention on the Law of Treaties, which regulated the matter, would therefore be useful and appreciated. Matters worth

studying included the extent to which provisions involving institutional elements, such as provisions establishing joint bodies, might be subject to provisional application or whether there were limitations in that respect; whether provisional application should extend to provisions adopted in implementation of a provisionally applied treaty by a body of States parties established under the treaty; whether there were limitations with regard to the duration of provisional application of a treaty; and how article 25 of the Vienna Convention related to the Convention's other provisions and to other rules of international law, including responsibility for breach of international obligations.

35. Turning to the topic of formation and evidence of customary international law and speaking also on behalf of the candidate countries Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process countries Albania and Bosnia and Herzegovina; and, in addition, Armenia, Georgia and the Republic of Moldova, she said that one of the reasons for taking a careful look at customary international law was the importance of the interplay between customary international law and treaties. The European Union welcomed the approach suggested by the Special Rapporteur with regard to the scope of the work on the topic. While it would generally favour the formulation of conclusions with accompanying commentaries, further consideration of the final outcome should be postponed until the work had reached a more advanced stage.

36. The usefulness of a practical tool to provide guidance in identifying evidence of customary international law was obvious. In developing such a tool, which might indeed take the form of conclusions with commentaries, it would be important to avoid unwarranted limitation of possible sources of evidence. The aim should be to identify all forms of evidence and possibly also to provide guidance on methodology.

37. The European Union noted with appreciation that the Special Rapporteur proposed to consider the role of intergovernmental actors and international organizations. The Union acted on the international plane on the basis of competences conferred upon it by its founding treaties. It was a contracting party to a significant number of international agreements, alongside States. Moreover, in several areas covered by international law it had exclusive competences. Those special characteristics gave it a particular role in the formation of customary international law, to which it could contribute directly through its actions and practices.

38. The Union also noted with satisfaction that the Special Rapporteur intended to consider the practice of the Court of Justice of the European Union. The Court's jurisprudence often involved international issues, including aspects of customary international law. The European Union stood ready to contribute to the work on the topic by reviewing the relevant practice of the Court.

39. **Ms. Valjento** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and noting that her full statement would be available on the PaperSmart portal, said that the Commission had made good progress with the topic of protection of persons in the event of disasters. The Nordic countries attached great importance to risk reduction as a way of preventing, mitigating and preparing for disasters and shared the Commission's view that it was the obligation of each State to reduce the risk of disasters by taking the necessary and appropriate measures. That duty was based on principles of international human rights law and environmental law, including the principle of due diligence, which was well established in international law and reflected in the case law of international tribunals.

40. In draft article 16 (Duty to reduce the risk of disasters), the reference to "each State" underlined the obligation for every State to act on an individual basis, while the word "shall" rightly pointed out the existence of a legal obligation to take measures. It was appropriate to highlight the importance of national legislation in the draft article, but legislation was not enough. There was also a need for effective practical measures to reduce the risk and consequences of disaster. In the disaster and post-disaster phases, the affected State had the primary duty to ensure the protection of persons and the provision of disaster relief. In the pre-disaster phase, the responsibility for disaster risk reduction also belonged to each State. Nevertheless, there was also a duty to cooperate in the pre-disaster phase, as was reflected in draft article 5 ter.

41. With regard to the identification of customary international law, the Nordic countries agreed with the Special Rapporteur on the topic that the aim should be

to offer guidance on how to identify rules of customary international law and, to that end, supported the idea of drafting conclusions or guidelines with commentaries. In developing them, it would be important not to limit unduly the sources or approaches, but rather to identify as many forms and as much evidence as possible and eventually provide practical guidance on methodology. The conclusions or guidelines should have a practical and operational focus; the Commission should not seek to clarify theoretical issues or attempt to redefine the notion of customary international law.

42. The Special Rapporteur's intention to study the interplay between multilateral work and the emergence of new rules of customary international law was welcome. Treaties could be reflective of pre-existing rules, generate new rules and serve as evidence of their existence or crystallize emerging rules. The Nordic countries would caution, however, against only looking at multilateral work in the form of legally binding treaties that had entered into force. State practice and *opinio juris* that could in due course be capable of forming rules of customary international law might find expression through other means in the multilateral context. The Nordic countries supported the Special Rapporteur's proposal to focus in his next report on the two elements of customary international law and to consider the effects of treaties on customary international law and the role of international organizations.

43. The topic of provisional application of treaties was well suited for consideration by the Commission. Questions to be dealt with in relation to the topic included the legal effect of provisional application, its customary international law character and the relationship of article 25 to the other provisions of the Vienna Convention on the Law of Treaties. While provisional application was often necessary in order to enable speedy implementation of newly established treaties, the Commission should neither encourage nor discourage it, as it was for States to decide whether and when provisional application was appropriate. Such a decision was essentially a constitutional and policy matter. However, the Commission's analysis could identify strengths and weaknesses of different models of provisional application, including partial provisional application.

44. The topic of protection of the environment in relation to armed conflicts was a logical continuation of the Commission's recent work on the closely related topics of effects of armed conflicts on treaties and fragmentation of international law. A natural starting point for the work would therefore be that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. The effects of warfare on the natural environment could be severe and have a lasting impact. Not only might the actual force applied in a combat situation lead to the physical destruction of vulnerable natural environments and the killing of wildlife, but related military activities, including large-scale transportation and operations, could also cause pollution, destruction of plant life and disruption of water flows, leaving ecosystems out of balance. The use of certain types of weapons might also lead to the contamination of large areas. The resulting harmful effects on the environment might have a serious impact on the civilian population living in the affected areas, an impact that might continue to be felt for decades after the conflict had ended. More emphasis should therefore be placed on environmental matters in post-conflict situations.

45. It was important to recognize, however, that existing legal rules, notably in the areas of international humanitarian law, international environmental law and international human rights law, already established significant legal obligations that had a direct or indirect bearing on the protection of the environment during armed conflict. Those obligations might need to be further developed, however. In order to decide whether that was the case, several issues needed to be clarified, in particular the legal scope of the existing obligations and how they should be interpreted and the relationship between the various applicable legal frameworks. It should also be determined whether legal instruments in the field of international environmental law continued to apply in situations of armed conflict.

46. Another important question was whether the severe damage inflicted on the natural environment during armed conflict was primarily a result of a lack of clear legal obligations to protect the natural environment, a lack of effective implementation of existing obligations or a combination of the two. An assessment of that question would be of paramount importance when discussing how to improve the protection of the natural environment in relation to armed conflicts. If it was found that existing obligations were not being properly fulfilled, it would need to be determined whether measures could be

taken to enhance their implementation. During the 31st International Conference of the Red Cross and Red Crescent in 2011, the Governments of Denmark, Finland, Norway and Sweden and the National Red Cross Societies of those States had made a joint pledge to conduct an empirical study of those two issues, drawing on experience gained from a select number of recent armed conflicts. The report resulting from the study would form the basis for an international expert meeting to discuss possible further steps to be taken to improve the protection of the natural environment during armed conflicts.

47. **Mr. Simonoff** (United States of America), referring to the topic of protection of persons in the event of disasters, said that his delegation appreciated the Commission's continued work on draft article 12 (Offers of assistance) and, in particular, the affirmation in the commentary that offers of assistance were essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist and that offers made in accordance with the draft articles could not be discriminatory in nature, nor could they be regarded as interference in the affected State's internal affairs. However, additional consideration should be given to the distinction between the relative prerogatives of assisting actors. Draft article 12 provided that States, the United Nations, and other competent intergovernmental organizations had the right to offer assistance, whereas relevant non-governmental organizations might do so. The commentary suggested that the different wording was used in order to stress that States, the United Nations and intergovernmental organizations were not only entitled but encouraged to make offers of assistance, whereas non-governmental organizations had a different nature and legal status. His delegation would suggest eliminating the distinction. While non-governmental organizations clearly had a different nature and legal status, that fact did not affect their capacity to offer assistance to an affected State in accordance with applicable law; indeed, they should be encouraged to do so. Accordingly, the draft article could be reworded to provide that States, the United Nations, intergovernmental organizations, and non-governmental organizations "may offer assistance to the affected State, in accordance with international law and applicable domestic laws".

48. More generally, his delegation remained concerned with the overall approach to the topic, which appeared to be based on legal rights and obligations, and would continue to emphasize its view that the Commission could best contribute by focusing instead on providing practical guidance to countries in respect of disaster relief. For example, although the United States greatly valued individual and multilateral measures by States to reduce the risk of disasters and had implemented such measures domestically, it did not accept the assertion in draft article 16 (Duty to reduce the risk of disasters) that each State had an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters was impressive and valuable, but his delegation did not believe that it established widespread State practice undertaken out of a sense of legal obligation. National laws were adopted for national reasons, and the relevant international instruments typically were not legally binding; hence, there was no basis for inferring from them rules of customary international law. If draft article 16 reflected progressive development of the law, that should be explained in the commentary. The practical impact of establishing such a rule was questionable, however, inasmuch as it would be for each State to determine what risk reduction measures were necessary and appropriate. Moreover, the draft article should be re-titled "Reduction of risk of disasters" to align it with similar articles, such as draft articles 14 (Facilitation of external assistance) and 15 (Termination of external assistance).

49. His delegation had similar concerns regarding draft article 14, although it commended the emphasis on the importance of an affected State taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods, and equipment, in particular with respect to customs requirements, taxation and tariffs. Such steps could address a major and avoidable obstacle to effective assistance. Exempting external disaster-related assistance goods and equipment from tariffs and taxes could reduce costs and prevent delay of goods, and his delegation would suggest eliminating from the commentary any language that might encourage affected States instead simply to lessen such tariffs and taxes. With regard to the illustrative list of measures for facilitating the prompt and effective provision of external assistance, without prejudice to his

delegation's views about whether the article should be framed as being based on legal rights and obligations, it would suggest adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors might be more likely to offer assistance if they were confident that their personnel, goods and equipment would be able to exit without unnecessary obstacles.

50. With respect to the identification of customary international law, the first report of the Special Rapporteur on the topic (A/CN.4/663) provided an important review of relevant authority in the area, in particular regarding decisions of international courts and tribunals, which would serve as a valuable foundation for future work on the topic. The report explored a diverse array of views on questions related to the formation and evidence of customary international law; it was to be hoped, however, that that diversity of views would not obscure the importance of State practice and *opinio juris*, which were critical in the formation of customary international law. The practice of the United States with respect to the formation and development of customary international law was currently being reviewed with a view to providing information that might be useful to the Commission. His delegation shared the Special Rapporteur's view that it would be better not to deal with *jus cogens* as part of the topic; it also agreed that the results of the Commission's work should not be overly prescriptive.

51. As to the topic of provisional application of treaties, his delegation's view was that provisional application meant that States agreed to apply a treaty, or certain of its provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty during the period of provisional application could be terminated more easily than was the case after entry into force. That basic definition should be clear in the result of the work on the topic. His delegation urged caution in putting forward any proposal that could create tension with the clear language in article 25 of the Vienna Convention on the Law of Treaties as it related to provisional application.

52. The Special Rapporteur's first report (A/CN.4/664) touched on the interaction between domestic law and the international law regarding provisional application and noted that domestic law was not, in principle, a bar to provisional application. It seemed equally plain, however, that a State's domestic law might indeed determine the circumstances in which provisional application was appropriate for that State. The Special Rapporteur had also alluded to concerns that provisional application might be used to sidestep domestic legal requirements regarding the conclusion of international agreements. The appropriateness of provisional application under a State's domestic law was a question for that State to consider. In that regard, his delegation did not agree with the Special Rapporteur's characterization of the provisional application of a certain maritime boundary treaty mentioned in the report. His Government examined its ability under domestic law to implement a given provision or agreement pending its entry into force before it agreed to apply it provisionally, and it did so only when provisional application was consistent with domestic law.

53. The Special Rapporteur had said that the goal of his work on the topic was to encourage and provide incentives for the use of provisional application, which appeared to reflect his conclusion that provisional application was rarely used and that therefore States were unaware of its potential. However, whether or not States made use of provisional application would depend on the particular circumstances of a given agreement or situation. The frequency of its use was an issue that was separate and secondary to that of clarifying the nature of provisional application and how to make use of it clearly and effectively. Although bringing that clarity might indeed result in more frequent use, the Special Rapporteur should focus on provisional application itself rather than on increasing its use.

54. The topic of protection of the environment in relation to armed conflicts was of great importance, given the deleterious effects that armed conflict had on the natural environment. The United States military had long made it a priority to protect the environment, not only to ensure the availability of the land, water and airspace needed to sustain military readiness, but also to preserve irreplaceable resources for future generations. Protection of the environment during armed conflict was desirable as a matter of policy for a broad range of military, civilian, health and economic reasons, in addition to purely environmental reasons. Nevertheless, his delegation was concerned that the

topic encompassed broad and potentially controversial issues that could have far-reaching ramifications. One such issue was that of concurrent application of bodies of law other than the law of armed conflict during armed conflict. Any effort to come to conclusions about lex specialis in general or the applicability of environmental law in relation to armed conflict in particular, especially in the abstract, was likely to be difficult and controversial.

55. His delegation therefore concurred with the Special Rapporteur's view that the topic was not suited to a draft convention and welcomed her decision to focus on identifying existing rules and principles of the law of armed conflict related to the protection of the environment. Under the principle of distinction, for example, parts of the natural environment could not be made the object of attack unless they constituted military objectives as traditionally defined, nor could they be destroyed unless required by military necessity. Certain treaty provisions relating to the protection of the environment during armed conflict, however, had not gained universal acceptance among States as a matter of either treaty law or customary international law. The Commission should also bear in mind that, as the Special Rapporteur had pointed out, it was not its task to modify existing legal regimes, in particular the law of war.

56. The report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/68/10, annex A) would allow the Commission to bring closure to its work on the topic. His delegation agreed with the Working Group's view that it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute. While such provisions were an integral and vital aspect of collective efforts to deny terrorists a safe haven and fight impunity for heinous crimes, there was no obligation under customary international law to extradite or prosecute individuals for offences not covered by treaties containing such an obligation. Rather, efforts should focus on specific gaps in the current treaty regime.

57. Lastly, with regard to the topic of the most-favoured-nation clause, his delegation supported the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. Most-favoured-nation provisions were a product of specific treaty formation and tended to differ considerably in their structure, scope and language. They were also dependent on other provisions in the agreements in which they were located and thus resisted a uniform approach. Given the nature of such provisions, the inclusion of guidelines and model clauses in the final report on the topic might result in an overly prescriptive outcome and therefore would not be appropriate. His delegation encouraged the Study Group, instead, to study and describe current jurisprudence on questions related to the scope of most-favoured-nation clauses in the context of dispute resolution. Such research could provide a useful resource for Governments and practitioners. His delegation would be interested in learning more about what areas beyond trade and investment the Study Group intended to explore.

58. **Mr. Silberschmidt** (Switzerland), referring to the topic of protection of persons in the event of disasters, said that Switzerland had entered into agreements on mutual assistance in the event of disasters or serious accidents with its five neighbour States; those agreements designated the competent authorities for requesting assistance and receiving assistance requests. The draft articles should encourage States to conclude such agreements, and the Commission should seek information from States and from the United Nations about relevant existing treaties.

59. In November 2011, the 31st International Conference of the Red Cross and Red Crescent had considered the question of strengthening national laws in relation to disasters and had adopted by consensus a resolution on strengthening normative frameworks and lifting regulatory barriers to disaster mitigation, intervention and relief. The Commission should enter into contact with the actors concerned with operational aspects of the topic, such as the International Federation of Red Cross and Red Crescent Societies, the United Nations Office for the Coordination of Humanitarian Affairs and the International Search and Rescue Advisory Group; such contacts could be particularly relevant in relation to draft article 5 bis (Forms of cooperation).

60. The gaps in protection for persons forcibly displaced by disasters, especially those who were obliged to cross an international boundary, were a source of growing concern. In 2012 Switzerland and Norway had launched the Nansen Initiative to develop an agenda for the protection of internationally displaced persons in the context of a natural disaster.

To increase understanding of the problem, information was being gathered through five regional consultations organized in the regions of the world most affected by natural disasters, the results of which would be discussed at a global meeting in 2015. The initiative did not, in principle, seek to create new legal norms, but rather to facilitate the development of standards for the protection of affected persons.

61. With regard to the topic of protection of the environment in relation to armed conflicts, his delegation would appreciate further information on what was understood by "obligations of relevance to a potential armed conflict", which was to be the focus of the first phase of the work on the topic, and in particular whether the Commission's objective was to develop new obligations or only to draw up a set of guidelines. Within the framework of consultations conducted by the International Committee of the Red Cross in connection with the 31st International Conference of the Red Cross and Red Crescent, Switzerland had expressed a special interest in the idea of establishing a form of territorial protection that would apply to zones of major ecological importance, both in peacetime and in wartime. During an armed conflict — the second phase — the natural environment was covered under the general protections that international humanitarian law provided to civilian property, which applied in both international and non-international armed conflicts. Moreover, Additional Protocol I to the 1949 Geneva Conventions, articles 35 and 55, provided for special protection of the natural environment in international conflicts and prohibited the causing of widespread, long-term and severe damage to the natural environment. That special protection might need to be clarified or enhanced, as the terms were imprecise, and the question of whether the general rules governing the protection of civilian property were adequate to ensure effective protection of the natural environment in practice should be considered. If no specific rule protected the environment in non-international armed conflicts, customary international law provided some rules whose scope could be made more precise or suitably developed. In addition, it would be interesting to clarify the contribution that other bodies of law, in particular human rights law and international environmental law, might make with regard to the protection of the environment in relation to armed conflicts.

62. **Mr. Reinisch** (Austria), referring to the topic of protection of persons in the event of disasters, said that there seemed to be no need to retain draft article 5 bis (Forms of cooperation), since, as the commentary itself stated, it did not contain any normative substance, only a demonstrative enumeration of possible forms of cooperation. On the other hand, the stipulation of a right to offer assistance in draft article 12 was necessary, as the affected State was thus precluded from considering such an offer either as an unfriendly act or as an intervention in its internal affairs. The differentiation between States and intergovernmental organizations on the one hand and non-governmental organizations on the other was appropriate. The second sentence took account of the important role of non-governmental organizations in disaster response, but was not to be understood as endowing such organizations with international legal personality. On that understanding his delegation supported the current version of draft article 12 (Offers of assistance).

63. As to draft article 13 (Conditions on the provision of external assistance), the conditions under which assistance might be provided should not be the result of a unilateral decision by the affected State but of consultations between that State and the assisting States, taking into account the general principles governing assistance and the capacities of the assisting States. Draft article 16 on the duty to reduce the risk of disasters seemed to exceed the original mandate of protection of persons in the event of disasters. Such a duty would be very far-reaching, especially in view of the broad definition of disasters in draft article 3, which included all kinds of natural and man-made disasters. Such a broad duty could interfere with existing legal regimes regarding the prevention of certain kinds of disasters, in particular man-made disasters, including those caused by terrorist attacks. If the Commission envisaged addressing the issue of prevention, it should concentrate on prevention and reduction of the effects of disasters.

64. Concerning the topic of formation and evidence of customary international law, his delegation supported the decision to emphasize the methodology of finding evidence for custom by changing the name of the topic to "Identification of customary international law". Regarding the scope of the topic, it supported the Special Rapporteur's recommendation not to deal with *jus cogens* for pragmatic reasons. While customary international law rules might have a

jus cogens character, the topic was already highly complex and should not be complicated further.

65. With regard to the case law that could potentially help to identify customary international law, the relevant practice of international, regional and domestic courts and tribunals should be scrutinized. The Special Rapporteur rightly planned to be cautious in assessing the reliability of domestic courts in identifying custom. However, domestic court practice might constitute relevant State practice and express *opinio juris* and thereby contribute to the formation of customary international law, regardless of the accuracy of its identification of existing custom in specific cases. The development of jurisdictional immunities served as a clear example of domestic courts not only identifying but actually forming customary international law. In any event, the practice and legal opinion of State organs competent with respect to international relations should be duly reflected. His delegation reiterated its view that the topic was not suited to the drafting of a convention or similar form of codification and was pleased with the Special Rapporteur's proposal to provide guidance in the form of a set of conclusions with commentary.

66. The importance of the topic of provisional application of treaties had been demonstrated by recent developments relating to the Arms Trade Treaty and the Chemical Weapons Convention. With regard to the form envisaged for the work, the development of guidelines or model clauses could be of help to States wishing to apply a treaty provisionally. The provisional application of treaties by international organizations should be included in the topic, since the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also referred to the possibility of provisional application. The expression "provisional application" was preferable to the expression "provisional entry into force". As to the legal effects of provisional application, the work of the Commission should explain whether it encompassed the entire treaty or whether certain clauses could not be applied provisionally. It should also clarify how provisional application could be initiated and terminated and, in particular, whether unilateral declarations were sufficient for that purpose. While article 25 of the Vienna Convention on the Law of Treaties left no doubt as to the possibility of unilateral termination, there was no uniform view concerning unilateral activation. More generally, the Commission would have to examine to what extent the rules contained in the Vienna Convention — such as those regarding reservations or invalidity, termination or suspension, and the relationship to other treaties — also applied to provisionally applied treaties. In any case, once a treaty was being applied provisionally, any breach of the resulting obligations would lead to State responsibility.

67. The relationship between provisional application and domestic law had not yet been sufficiently explored. His delegation did not share the Special Rapporteur's view that domestic law did not constitute a barrier to provisional application. In fact, provisional application raised a number of problems in relation to domestic law, particularly if the Constitution of a State was silent on the possibility. Moreover, as a matter of principle, not only in the context of constitutional law but also of international law, the Commission should give serious consideration to the need to ensure that democratic legitimacy was preserved, even in the case of provisional application. For that reason Austria applied treaties provisionally only after their approval by Parliament.

68. His delegation had taken note with interest of the Commission's decision to place the topic of protection of the environment in relation to armed conflicts on its agenda and commended the Special Rapporteur's broad approach to the topic, which would encompass not only the phase during the armed conflict, but also the phases prior and subsequent to it. It also supported the inclusion of non-international armed conflicts in the work on the topic. Nevertheless, the question remained whether riots and internal disturbances should also be included.

69. As the phase during an armed conflict (phase II) was already subject to certain treaty regimes, the Commission's work on the topic would need to be coordinated with the International Committee of the Red Cross in order to avoid duplication of work or different results. His delegation welcomed the decision to start with phase I, the pre-conflict period, which had not yet been addressed; in considering phase I, the effects on phase II and III would have to be taken into account. It was his understanding that in phase I the question of protection of the environment would be addressed only insofar as the potential for armed conflict required special measures of environmental protection. His delegation shared the Special

Rapporteur's view that the effects of certain weapons should not be addressed, since such work would require major technical advice and would be subject to further technical development.

70. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation's view was that currently there was no duty to extradite or prosecute under customary international law and that such obligations only resulted from specific treaty provisions. Accordingly, the scope of the duty to extradite or prosecute and the method and form of its implementation would vary considerably, making it difficult to establish a common regime. Nevertheless, it might be possible to identify some common features.

71. The Commission's work on the topic of the most-favoured-nation clause could make a valuable contribution to clarifying a specific problem of international economic law that had led to conflicting interpretations, in particular in the field of international investment law. The extremely contentious interpretation of the scope of such clauses by investment tribunals made it highly questionable whether the Commission's work could lead to draft articles; happily, the current Study Group did not intend to pursue such an outcome. Nevertheless, there was room for an analytical discussion of the controversies regarding most-favoured clauses, and his delegation welcomed the Commission's plan to pursue further studies on such clauses and their practical applications with a view to safeguarding against the further fragmentation of international law in general and to counter the risk of incoherence and lack of predictability in the field of international investment arbitration. It also welcomed the Study Group's intention to broaden its scope of investigation and address not only other fields of economic law where most-favoured-nation treatment played a role, but also to look at problems relating to most-favoured-nation provisions in headquarters agreements.

72. **Mr. Hanami** (Japan), speaking on the topic of protection of persons in the event of disasters, said that Japan was no stranger to disasters and had been on both the providing and the receiving end of assistance. His delegation wished to underscore the importance of disaster risk reduction, which was closely related to the mitigation of disasters that did occur. Draft article 16 provided for a general duty of States to reduce the risk of disasters. That general idea, in spirit, was one that Japan could share. It had several national laws specifically targeting the prevention phase, including one on earthquake disaster management. His delegation understood that the examples of disaster risk reduction measures provided in paragraph 2 of the draft article were not meant to be exhaustive and considered that approach appropriate, since disaster risk reduction measures would necessarily vary depending on the type of disaster, the geographical characteristics and other factors. The discussions on the relationship between domestic measures and the international legal framework concerning disasters were still in a fledgling stage, and his delegation looked forward to continued work on the topic.

73. The Commission's debate on the topic of provisional application of treaties had addressed important issues, including whether it was appropriate for the Commission to seek to promote provisional application and whether provisional application would circumvent domestic procedures, in particular constitutional procedures. His delegation looked forward to further discussion aimed at deepening understanding of the topic and trusted that the Special Rapporteur's second report would explore the issues raised during the Commission's sixty-fifth session, including that of the legal effects of the provisional application of treaties.

74. With regard to the topic of protection of the environment in relation to armed conflicts, the 1949 Geneva Conventions and the Additional Protocols thereto contained some articles relevant to protection of the environment in the second temporal phase identified by the Special Rapporteur, namely the period during an armed conflict. There were, however, some important issues to be discussed in relation to that phase, such as whether those articles could be considered customary law, whether there were any norms for protection of the environment in non-international armed conflicts and whether peacetime environmental law would apply during armed conflicts.

75. With regard to the topic of formation and evidence of customary international law, the title of which the Commission had decided to change to "Identification of customary international law", his delegation had noted favourably that there was general agreement that the outcome of the work on the topic should be practical. As to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), while

it was a positive development that the Commission had taken note of the report of the Working Group, a concrete outcome should be sought in the next few sessions. Lastly, his delegation had taken note of the ongoing work by the Study Group on the topic of the most -favoured-nation clause and looked forward to the reopening of discussions on the matter at the Commission's next session.

76. **Mr. Kowalski** (Portugal), noting that the full written version of his statement would be available on the PaperSmart portal, said that prevention could be considered an established general principle of international law. In its work on the topic of protection of persons in the event of disasters, particularly when delving further into the question of the duty to reduce the risk of disasters dealt with in draft article 16, the Commission should seek to clarify what degree of risk could be anticipated. It was important to clarify when the duty to reduce the risk of disaster and the obligation to take measures to prevent, mitigate and prepare for disasters would arise for States. His delegation welcomed draft article 5 ter, which provided that cooperation extended to measures to be taken with the intent to reduce the risk of disasters. In its future work on the topic, the Commission should always be mindful that the main focus was the individual and therefore should strive to take a rights-based approach.

77. With regard the topic of formation and evidence of customary international law, his delegation was of the view that it would be difficult for the Commission to omit consideration of *jus cogens*, not in and of itself but as an expression of peremptory norms that had their source in customary international law. His delegation encouraged the Commission to take a wide-ranging approach to the research to be done. All relevant case law should be appraised critically; it should not, however, necessarily be considered a definitive revelation of existing law, since it was not certain that there was consistency in judicial pronouncements. The legal literature reflecting different theoretical backgrounds was also relevant for research on the topic.

78. His delegation favoured a flexible and pragmatic outcome. However, achieving such an outcome might require the Commission to take a position regarding the different theoretical approaches to customary international law. The practice to be examined should be contemporary, and attention should be paid to different practices from the various regions of the world. Nevertheless, the Commission should be very careful in assessing State practice since only a few States had a precise repertoire of practice. Practice of international organizations and other relevant non-State actors could also be of value. His delegation would suggest that reference should also be made to *coutume sauvage*, or cases in which the formation of customary law originated with a need for law; in such cases *opinio juris* preceded practice. The case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* touched upon that grey area of customary international law — an area in which the Commission could use its expertise to shed light. His delegation supported the Special Rapporteur's proposal to examine the two elements of State practice and *opinio juris*. In that regard, the conviction that non-compliance with a certain practice would result in international responsibility was a good indicator of *opinio juris*.

79. With regard to the topic of provisional application of treaties, the scope of the work should not be limited to States but should encompass all parties to a treaty subject to provisional application, including international organizations. His delegation encouraged the Commission to study the issue in the light of both the 1969 and the 1986 Vienna Conventions. During the *travaux préparatoires* for the 1969 Vienna Convention there had been some dispute concerning acceptance of the provisional application regime ultimately adopted as article 25, and it remained unclear how a treaty could be applicable if it was not yet in force and had not been subject to democratic domestic approval procedures. In *Yukos v. Russian Federation*, the Permanent Court of Arbitration had held that provisional application was binding and enforceable from the standpoint of international law. However, the *pacta sunt servanda* principle implied that provisional application of treaties also depended on the consent of the parties. Indeed, provisional application was a domestic legal and political option that could not be imposed.

80. The main purpose of the Commission's study should be to ascertain the effects of provisional application, including the effects of breach of the obligations being provisionally applied. Once a signatory had accepted provisional application, failure to apply it as agreed might trigger international responsibility. While the Commission should not deal directly with the regime of international responsibility, it should consider it as an effect of provisional

application. His delegation concurred with most of the suggestions voiced within the Commission concerning the broad range of issues for possible consideration under the topic.

81. With regard to the topic of protection of the environment in relation to armed conflicts, such conflicts, by their nature, had negative impacts on the lives of people and on the ecosystem in which they lived, and the impact on the environment was often lasting and difficult to reverse. Warfare also had a negative impact on sustainable development. While preservation of the environment in the event of armed conflicts was the primary aim, it went hand in hand with disarmament, non-proliferation, conflict prevention and the progressive restriction, legally and politically, of recourse to armed conflict. His delegation agreed with the Special Rapporteur's proposal to approach the topic in three phases: before, during and after the armed conflict. However, that distinction should be made only for analytical purposes, to facilitate the identification of obligations and effects in relation to protection of the environment.

82. Without prejudice to an integrated approach, the most important phase was the second one — protection of the environment during an armed conflict — since it was during the conflict that the environmental damage was produced. Destruction of the environment during an armed conflict should not be viewed as inevitable from an international law perspective, however. If existing international legal obligations did not offer sufficient protection, the Commission should embark upon a progressive development exercise. Moreover, since the impact of armed conflicts on the environment depended largely on the type of weapons used, the issue of weapons must necessarily be addressed. The International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, had stated that there existed a general obligation to prohibit methods and means of warfare that were intended, or might be expected, to cause environmental damage. The issue would not be easy to deal with, for both technical and legal reasons, but it was key for the development of the topic, which should be approached without any reservations.

83. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) continued to be relevant. There was no doubt that the obligation arose from States' desire to prevent impunity and deny safe havens to offenders. While commending the conclusions of the Working Group, his delegation urged the Commission to continue to give priority to the topic, as the General Assembly had invited it to do in its resolution 67/92, and to work towards its conclusion.

84. As to the topic of the most-favoured-nation clause, in the *Maffezini* and *Daimler* cases the interpretation of parties' intentions had been seen as the main determinant of whether or not dispute settlement clauses fell within the scope of such clauses. In that connection, three scenarios could be envisaged, particularly in relation to bilateral investment treaties; one was the inclusion of a clause extending the most-favoured-nation clause to dispute settlement, another was a clause barring such an extension and the third was silence. The matter could be approached from two different perspectives: an offensive approach in which the interests of the investor were predominant or a defensive approach which gave primacy to the interests of a State or a regional economic integration organization. To determine the approach chosen by the parties in a bilateral investment treaty, it was necessary to have recourse to the rules of treaty interpretation as established under the 1969 and 1986 Vienna Conventions. However, the contextual evolution and dynamic nature of treaties as instruments of international law should not be forgotten. Treaties were not static, as the International Court of Justice had noted in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. His delegation appreciated the Study Group's willingness to approach the matter within the framework of general international law, which was the most suitable means of avoiding further fragmentation of international law.

85. **Ms. Tomlinson** (United Kingdom), referring to the topic of protection of persons in the event of disasters, said that her delegation had no objection to the substance of the two new draft articles 5 ter and 16. The United Kingdom was already engaging in cooperation for disaster risk reduction, as set out in draft article 5 ter, through the Hyogo Framework for Action, among other means. As for the duty to reduce the risk of disasters, as set out in draft article 16, the United Kingdom had legislation establishing obligations to assess, prepare for and take measures to mitigate risks and providing for a duty to warn and inform. As to the eventual product of the Commission's work, guidelines to encourage good practice would be

more helpful for States than a legally binding instrument.

86. The Commission's work on the topic of formation and evidence of customary international law had real practical value. Both State practice and *opinio juris* were essential elements in the formation of a rule of customary international law, and her delegation therefore agreed with the Special Rapporteur's "two-elements" approach to the topic. It also agreed that *jus cogens* should not be dealt with in detail under the topic, since rules of *jus cogens* and rules of customary international law were not necessarily the same. When parties to litigation before the domestic courts in the United Kingdom sought to make arguments based on customary international law, judges found guidance in the judgments of the International Court of Justice, but there was currently no other authoritative reference to which they could turn. A practical outcome of the Commission's work in the form of a set of conclusions with commentaries would be useful to judges and other legal practitioners in identifying whether or not a rule of customary international law existed. It would not be appropriate for the Commission to be unduly prescriptive in respect of the topic, and any outcome of its work should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law.

87. The topic of provisional application of treaties would be a useful addition to the Commission's work on the law of treaties. The United Kingdom often utilized provisional application in its own treaty practice. Her delegation firmly agreed with the Special Rapporteur's view that flexibility was essential. In order to ensure that flexibility, the Commission should aim to provide guidelines with commentaries to help decision-makers at various stages of the treaty process, rather than model clauses or agreed principles, which might be taken as prescriptive and constrain flexibility. The Commission should not be seen as encouraging or discouraging recourse to provisional application, but rather should provide greater clarity to States when negotiating and implementing provisional application provisions.

88. The study of the topic should focus on the wording of article 25 of the Vienna Convention on the Law of Treaties, looking specifically at how it was applied in practice and how parties expressed the intention to apply a treaty provisionally. The Commission's work on provisional application in the context of multilateral treaties as distinct from bilateral treaties would be of particular interest, as the scenarios and issues that arose in relation to provisional application of such treaties might be different. Her delegation considered that State practice should inform the scope and nature of the Commission's work on the topic and therefore welcomed the Commission's survey of State practice. It would submit information on the practice of the United Kingdom in due course.

89. With regard to the topic of protection of the environment in relation to armed conflicts, her delegation supported the Special Rapporteur's proposal to concentrate on the pre- and post-conflict phases (phases I and III) and to give less attention to the actual conflict phase (phase II) because, although obligations applicable during armed conflict were arguably the most important issue in relation to the topic, a great deal of law relevant to phase II already existed. Her delegation also welcomed the Special Rapporteur's proposal not to address the effects of certain weapons on the environment and shared her view that the topic was more suitable for the preparation of non-binding guidelines than a convention.

90. As to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation's position continued to be that the obligation arose as a result of a treaty, so that the substantive crimes in respect of which it arose and the discretion of the custodial State to decide whether to extradite or prosecute were governed by the terms of the relevant treaty. The obligation to extradite or prosecute could not currently be regarded as a rule or principle of customary international law. As that possibility was not mentioned in the report of the Working Group (A/68/10, annex A), her delegation assumed that the Commission had wisely decided not to give it further consideration in its work on the topic. It welcomed the Working Group's consideration of the Secretariat's excellent survey on multilateral treaty practice (A/CN.4/630) and supported the Group's conclusion that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis. As to the Working Group's observation that there were gaps in the convention regime governing the obligation to extradite or prosecute in respect of certain core crimes, her delegation had already commented during the

Committee's 18th meeting on the proposal for a separate convention on crimes against humanity.

91. The Working Group's analysis of the judgment of the International Court of Justice in *Questions relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)* provided some useful guidance for the interpretation of the relevant treaty provisions. The Commission should not examine the issue of universal criminal jurisdiction; nor should it study the "triple alternative" — the surrender of an individual to an international tribunal — as there were specific rules covering such transfers. No further useful work could be done on the topic at the current stage, and the Commission should therefore conclude its work on the topic.

92. Lastly, with regard to the topic of the most-favoured-nation clause, the Study Group had wisely acknowledged the risks of an overly prescriptive outcome and the importance of not extending the scope of its work too broadly. The development of new draft articles or any revision of the 1978 draft articles on most-favoured-nation clauses would not be appropriate.

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*) (A/68/113)

Oral report by the Chair of the Working Group on the scope and application of the principle of universal jurisdiction

93. **Mr. Ulibarri** (Costa Rica), Chair of the Working Group, recalled that pursuant to General Assembly resolution 67/98 the Sixth Committee had decided to establish a working group, open to all Member States and relevant observers to the General Assembly, to continue to undertake a thorough discussion of the scope and application of universal jurisdiction. The Working Group had had before it four reports of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/65/181, A/66/93 and A/66/93/Add.1, A/67/116 and A/68/113), the record of the oral report of the Chair on the work of the Working Group in 2012 (A/C.6/67/SR.24, paras. 3 to 18), an informal paper of the Working Group (A/C.6/66/WG3/1) containing agreements on the methodology and issues for discussion and a non-paper by Chile (A/C.6/66/WG.3/DP.1). The Working Group had also considered two informal compilations prepared by the Secretariat, one containing relevant multilateral and other instruments and the other containing relevant excerpts from decisions of international tribunals.

94. The Working Group had held three meetings, on 23, 24 and 25 October 2013. During the first meeting, the Chair had reported on discussions held with some delegations since the previous year's session and had noted the continued relevance of the road map laid out in the informal paper of the Working Group (A/C.6/66/WG3/1) and the need to continue with a step-by-step methodological approach to the items on the road map. Accordingly, the Working Group had proceeded with a preliminary discussion first of the scope of universal jurisdiction and then of its application. He had recirculated the informal discussion papers that he had prepared during the sixty-seventh session, one setting out preliminary elements for a working concept of universal jurisdiction and the other containing an informal list of crimes within the scope of universal jurisdiction. Following a preliminary discussion on the application of universal jurisdiction, he had prepared another informal paper identifying relevant elements corresponding to each of the six subsections set out in the road map in relation to the application of the principle of universal jurisdiction. It had been emphasized that those documents were intended to serve as guidance for the Working Group's discussions. Both documents had undergone adjustments to reflect the stage of discussions reached and the suggestions made by delegations. Those and the other informal discussion papers prepared by the Chair were preliminary, illustrative and without prejudice to the positions of delegations; they did not reflect any agreement among delegations or prejudge possible outcomes and would be subject to further examination during any future discussions.

95. The Working Group had commenced its discussions on the scope of universal jurisdiction by examining the list of crimes within the scope of universal jurisdiction prepared by the Chair. The list had been revised several times in the course of the discussions to reflect comments by delegations. The most recent revised version had been made available as an informal paper by the Chair. It presented a set of possible crimes that could form part of the scope of the principle of universal jurisdiction, it being understood that the list did not reflect consensus among

delegations and was without any prejudice to their positions, that it was merely preliminary and illustrative as opposed to being indicative and/or exhaustive. That approach had appeared preferable to that taken in the first revised version of the list, which had put several crimes in brackets to indicate that there had been disagreement about whether they should be included; it had been considered, however, that retaining the brackets might lead to confusion. As a general comment on the scope of the principle of universal jurisdiction, several delegations had noted that the issue was closely interlinked with and dependent on other elements of the road map. It had been recognized that the separation of the different elements of the road map was preliminary and was mainly intended as a means of facilitating the exchange of views.

96. The last revised version of the informal list presented the crimes in alphabetical order, an approach that had been preferred to two other alternatives discussed. One had been to put the crimes in their chronological order of emergence under international law, but that had been considered difficult, as some crimes had already been recognized under customary international law before being incorporated in an international treaty. The other alternative had been to divide the crimes into the categories of "core crimes" and "treaty-based crimes", based on a classification that the International Law Commission had used in drawing up of the Rome Statute of the International Criminal Court. The category of "core crimes" had consisted of crimes for which there was a greater level of support for inclusion under customary law. The category of "treaty-based crimes" had been intended to refer to crimes mentioned in treaties possessing an "extradite or prosecute (*aut dedere aut judicare*)" clause which, in certain circumstances, might allow or oblige a treaty party to exercise a form of what some commentators considered quasi-universal jurisdiction. The treaty-based crimes initially listed had been intended as examples from a potentially voluminous list of such treaties. Both categories had included a list that was illustrative rather than indicative and/or exhaustive. In the discussion, it had been suggested that the lists should be merged, given that some of the "core crimes" were specifically addressed under an international treaty and could therefore also be regarded as "treaty-based". Examples included genocide, torture and apartheid.

97. The crimes were listed under the heading "Crimes under universal jurisdiction", the expression used in the road map. Since the crimes had been merged into one list in alphabetical order, some delegations had suggested that the heading should read "international crimes under universal jurisdiction" to better reflect the international character of the crimes. It had been understood that future discussions of the Working Group would reflect further upon the nature of the sources of the crimes in the list.

98. It had been noted that there might be a certain overlap and consequent redundancy in the list, as certain crimes were in fact clusters of crimes and comprised other crimes that were listed individually. For example, transnational organized crime included corruption and crimes against humanity included torture. Some delegations had suggested that corruption deserved to be mentioned in its own right, given that it was addressed under the United Nations Convention against Corruption. Likewise, it had been pointed out that torture should be listed as a separate item, as it would only reach the threshold of a crime against humanity if it was widespread or systematic.

99. Delegations had expressed divergent views regarding specific crimes on the list. While delegations had viewed piracy as a crime that fell within the scope of universal jurisdiction on the basis of both the United Nations Convention on the Law of the Sea and customary international law, some had expressed the view that universal jurisdiction could only apply to the crime of piracy, while others had suggested that the list should encompass more than merely that crime. Some delegations had argued for the list to be as inclusive as possible to demonstrate the diversity of already existing State practice, whereas others had emphasized that the list should, as much as possible, reflect common agreement. Several delegations had expressed the view that to draw up an exhaustive list would be inappropriate. Some had recalled that not all States were parties to the international treaties that specifically addressed certain crimes on the list. It had also been suggested that the principle of universal jurisdiction would not necessarily encompass all crimes for which international criminal tribunals had jurisdiction. It had been noted that the concept of universal jurisdiction was not yet reflected in international treaties, but rather was an expanding doctrinal concept which should not be viewed as a panacea for all evils.

100. Some delegations had expressed concern about the inclusion of the item “crimes against peace/crime of aggression” and had noted that the 2010 amendments to the Rome Statute of the International Criminal Court concerning the crime of aggression had not yet entered into force, and that the nature of the latter as an international criminal tribunal must be distinguished from universal jurisdiction as a principle that was exercised by domestic courts. Some delegations had also expressed concern that the powers of the Security Council might be undermined if domestic courts had the possibility of exercising universal jurisdiction over the crime of aggression. Other delegations, however, had supported the inclusion of crimes against peace/crime of aggression on the list, as several States had already established universal jurisdiction for that crime under their domestic laws. The term “crime of aggression” had been preferred to “crimes against peace”. The inclusion of transnational organized crime had been questioned by some delegations as being too broad a concept, while others had suggested the removal of terrorism in the absence of an all-encompassing international treaty on that crime. Other delegations, however, had supported the inclusion of those crimes on the list. In view of the preliminary nature of the list and the fact that delegations had reserved their positions on the list as a whole, the Working Group would continue discussing the scope of the principle of universal jurisdiction at future sessions.

101. During the Working Group’s meetings on 23 and 24 October delegations had raised issues relating to the application of the principle of universal jurisdiction, the other heading in the road map. Several delegations had stressed the need for in-depth discussion of what they described as abuse or misuse of the principle of universal jurisdiction and of the potential for it to be applied in an arbitrary, politically motivated or selective manner, as those issues had been central to the original impetus for bringing the topic to the Sixth Committee. Many delegations had also highlighted the need for universal jurisdiction to be applied with due regard to international law, including the Charter of the United Nations, human rights law and international humanitarian law, the principles of judiciousness and good faith and due process guarantees. Attention had also been drawn to the relevance to the topic of the rules on the immunity of foreign officials, although some delegations had noted that the question of immunity was distinct from that of universal jurisdiction and as such should not be singled out because immunity could be considered and/or invoked in respect of jurisdiction generally.

102. Questions about the interaction of States seeking to exercise universal jurisdiction with other States possessing overlapping jurisdictional ties to an alleged offence had been raised, and the related issues surrounding international assistance and cooperation had also been noted. The importance of understanding the relationship between international and national law had been underlined. Delegations had also pointed out the need for future discussion on the interrelationships with and distinctions between the principle of universal jurisdiction and other concepts of international law, including that of *aut dedere aut judicare*; the complementary but distinct role of the jurisdiction of international criminal tribunals in providing accountability and fighting impunity for international crimes; the potential role that international dispute settlement might play in the practical exercise of universal jurisdiction; and the international legal responsibility that States might incur for the abuse or misuse of universal jurisdiction.

103. As Chair of the Working Group, he had subsequently circulated an informal discussion paper that set out the issues that had been raised during the discussions on the application of universal jurisdiction. The paper reflected comments made within the Working Group and the Sixth Committee as a whole during the current and previous sessions, as well as written contributions. It sought to place all of the issues raised under the appropriate subsections (a) to (f) of part II.3 of the road map. That preliminary informal list, which had been refined in the light of the discussions on 25 October 2013, had been made available as a second informal paper by the Chair. He hoped that that paper would serve as guidance on issues requiring further discussion. It did not pretend to reflect consensus, nor did it preclude further examination and debate on any component of the road map.

104. During the discussions within the Working Group, the delegations of the Czech Republic, Guatemala, Liechtenstein and Switzerland had proposed that the International Law Commission should be requested to undertake a study of certain aspects of the topic that could assist the Sixth Committee and the Working Group in continuing their work. Several delegations had been supportive of or

open to that proposal, with some highlighting that the Commission's study should complement, not supersede, the role of the Sixth Committee. Some delegations had considered the proposal interesting, but had suggested that it was premature at the current stage of the discussions and that more time would be needed to consider and discuss it in future sessions. Other delegations had stressed that discussion of the item should remain within the Sixth Committee exclusively for the time being. Views had differed with regard to whether the presence of related topics on the current agenda of the Commission, including those of immunity of State officials from foreign criminal jurisdiction and of the obligation to extradite or prosecute (*aut dedere aut judicare*), argued for or against requesting the Commission's assistance on this topic. That was an issue that remained within the prerogative of delegations to consider.

105. He was again encouraged by the level of interest shown by delegations during the discussions and was grateful for their useful and insightful comments. The Working Group was making steady progress and he hoped that it would continue to build on its work. Since the Working Group had now undertaken a preliminary discussion of all issues identified in the road map, the intersessional period might be used to ascertain the views of delegations on the way forward. Having a text that dealt with the issues highlighted in a normative way would certainly help to advance discussions, and he hoped that delegations would work towards that goal.

106. **The Chair** said he took it that the Committee wished to take note of the oral report by the Chair of the Working Group.

107. *It was so decided.*

The meeting rose at 1.05 p.m.