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## Sixth Committee

**Summary record of the 24th meeting**
Held at Headquarters, New York, on Monday, 4 November 2013, at 3 p.m.

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| *Chair*: | Mr. Stuerchler Gonzenbach | (Switzerland) (Vice-Chair) |
| *later*: | Mr. Kohona | (Sri Lanka) (Chair) |
| *later*: | Mr. Silva | (Brazil) (Vice-Chair) |

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13-54727 (E)

*In the absence of Mr. Kohona (Sri Lanka), Mr. Stuerchler Gonzenbach (Switzerland), Vice-Chair, took the Chair.*

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

**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/66/10/Add.1 and A/68/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI to XI of the report of the International Law Commission on the work of its sixty-fifth session (A/68/10).

2. **Mr. Politi** (Italy) said that his delegation supported the inclusion of the topic of protection of the environment in relation to armed conflicts in the Commission's programme of work. In that connection, he noted that rules pertaining to different areas of international law, including international environmental law, the law of armed conflict, and norms for the protection of cultural property were by their very nature complex and interdependent. As a result, dealing with the protection of the environment in relation to armed conflicts required a thorough and comprehensive examination of those bodies of law. The Special Rapporteur had suggested considering the topic in a temporal perspective. In substance, the Commission would be called upon to address "legal measures taken to protect the environment before, during and after an armed conflict"; to identify legal issues relating to each stage of an armed conflict; and to develop concrete conclusions or guidelines. However, his delegation was not convinced that a strict dividing line between temporal phases of the conflict was required. It might be preferable to examine the interrelationship between the different bodies of law concerned, bearing in mind existing legislation and trends in further development.

3. For example, it had already been noted that the law of armed conflict, including international humanitarian law, consisted of rules which were applicable before, during and after an armed conflict, with some principles (in particular, the protection of the civilian population) representing a common element in all phases. The same applied to international environmental law, where leading features such as the precautionary principle, the principle of mutual assistance in case of massive environmental damage and the "polluter pays" principle often needed to be considered together in order to assess their effectiveness for the purposes of the topic.

4. The concept of protection of the environment should be understood in a broad sense that included areas such as the protection of cultural property, which was at grave risk during international and internal conflicts. Recent examples of destruction, looting and illegal trafficking in cultural goods during or after conflicts had shown how important it was for the international community to focus its attention on that phenomenon and its lasting negative effects, both economic and spiritual, on the communities concerned.

5. His delegation agreed with the Special Rapporteur's suggestion that the topic was more suited to the development of non-binding guidelines. The Commission should not attempt to elaborate a draft convention. Rather, it would useful to provide a handbook to reflect existing basic norms in the relevant fields of law and elements indicating a possible evolution of State practice.

6. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), a number of elements in the Working Group's report, contained in annex A to the Commission's report (A/68/10), were of great relevance for the Commission's future work, namely the close connection between the obligation to extradite or prosecute and the duty to cooperate in the fight against impunity; the review of the different types of provisions in multilateral instruments containing the formulation "*aut dedere aut judicare*", with special emphasis on the separate opinion of Judge Yusuf in the 2012 Judgment of the International Court of Justice in the case concerning *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*; and the identification of gaps in the current conventional regime. The annex also contained a detailed reading of *Belgium v. Senegal* with regard to the implementation of the duty to extradite or prosecute, including the alternative of surrendering a person suspected of having committed grave international crimes to a competent international criminal tribunal in accordance with the provisions of the relevant statutes.

7. His delegation remained convinced of the usefulness of the Commission's work on the topic. That normative mechanism, which was rooted in a long-standing tradition of treaty instruments to combat the

most serious crimes, was aimed at filling the lacunae that might allow those responsible for those crimes to escape prosecution and punishment.

8. His delegation expressed appreciation for the Study Group's work on the topic of the most-favoured-nation clause and shared the view that the final report, while focused on the area of investments, should also address broader aspects of international law of relevance to such clauses. As an alterative to developing guidelines and model clauses, it might be useful, as suggested by the Study Group, to catalogue the examples of clauses contained in relevant treaties and to draw the attention of States to the interpretation given to them by various arbitral awards.

9. **Mr. Joyini** (South Africa) said that, as a country that over the past year had experienced many natural disasters, South Africa was well aware of the importance of the topic of protection of persons in the event of disasters, and it was actively involved in efforts to protect persons in the event of disasters at national, regional, continental and international level. Its domestic legislation on disaster management, the Disaster Management Act 2002, was a comprehensive, legally binding instrument containing mandatory provisions for the national, provincial and local spheres of government and focusing on disaster prevention, mitigation and preparedness, as well as effective response and post-disaster recovery.

10. The National Disaster Management Centre, which facilitated coordination and cooperation between the three spheres of government in the event of disasters as well as with other assisting parties, was the cornerstone of South Africa's disaster management. The importance of the role it played in disaster risk detection, response and relief management had been demonstrated during the recent floods in the Eastern Cape Province. As a result of the cooperation between the Centre and the South African weather services, early warnings had been issued and thousands of people had been evacuated.

11. At regional level, South Africa had ratified the Southern African Development Community's Protocol on Politics, Defence and Security, which advocated an increase in regional disaster management capacity and coordination of international assistance.

12. With regard to the draft articles adopted by the Commission, draft article 5 ter on its own merely provided a broad, somewhat vague requirement for States and other stakeholders to cooperate, and therefore could not be seen as a stand-alone article. To give proper credibility to draft article 5 ter, it should be incorporated into draft article 5.

13. On draft article 16, the use of the word "shall" in paragraph 1 and "duty" in the title created a legal obligation for States to take concrete measures to reduce the risk of disasters. Thus, draft article 16 recognized the need to make provision for the pre-disaster duties of a State.

14. The draft articles acknowledged that many States recognized their obligation to reduce the risk of disasters. That was evident in the multilateral, regional and bilateral agreements that dealt in one way or another with aspects relating to prevention, preparation and mitigation of disasters. Further recognition of that obligation could be gauged by examining whether a State's national legal framework addressed its capacity and resources to reduce the risk of disaster.

15. Pursuant to draft article 16, paragraph 1, the primary obligation to reduce the risk of disasters by enacting and implementing a relevant legal framework rested with the State. However, not all States had the capacity or resources to take the necessary and appropriate measures and thus would not be able to comply with their obligation under that provision, especially if they lacked a national legal framework that regulated disaster risk reduction.

16. The Commission had decided to retain the phrase "including through legislation and regulations" in paragraph 1. His delegation urged the Commission to insert the words "in particular" after "including"; that would place an obligation on States by emphasizing that, apart from any other options available, domestic legislation formed the cornerstone of disaster risk management. The failure to include "in particular", thereby allowing a State discretion in deciding which option and/or legal framework to use in attaining the objective of reducing the risk of disasters, would defeat the purpose of paragraph 1 if the State lacked the will to enact a national regulatory framework.

17. Although it had been asserted that the word "including" did not purport to be exhaustive, it should be followed by the words "among others" in order to provide absolute clarity with regard to the possibility of alternative measures that might be available, or become available in the future, to States that lacked efficient and effective mechanisms to reduce the risk of

disasters at national level. For the same reason, the words “among others” should also be inserted after “include” in paragraph 2.

18. On the whole, South Africa accepted the provisions of paragraph 2. Its own Disaster Management Act contained all the elements of draft article 16 but was more comprehensive and progressive in nature, in that it defined disaster management as a continuous and integrated multisectoral, multidisciplinary process of planning and implementation measures aimed at preventing or reducing the risk of disasters, mitigating their severity and consequences and ensuring emergency preparedness. That aim had been accomplished by the establishment of disaster management centres throughout the country that acted as the repository of, and a conduit for, information concerning impending and ongoing disasters. The disaster management information system consisted of an electronic database that collected, processed and analysed information regarding disaster risk reduction, which was then disseminated to all relevant agencies in the southern African region. The database had repeatedly proved to be a crucial instrument in the prevention and mitigation of disasters, as it generated early warning systems.

19. In finalizing and adopting the draft articles, the Commission must take account of current international practices; the recommendations of the International Federation of the Red Cross and Red Crescent Societies and similar institutions active in the area of disaster management; regional and continental instruments and bilateral agreements between States and other organizations or actors; and domestic mechanisms and legislation on cooperation between States and other institutions in disaster prevention, mitigation and preparedness. The views expressed by Member States on previously adopted draft articles should be taken into consideration when the Commission finalized the draft articles. In particular, the concern voiced by many States, including South Africa, regarding the inter-State right/duty approach should be borne in mind when the draft articles were adopted on second reading.

20. His delegation welcomed the progress made on the topic of the formation and evidence of customary international law. It would have liked to see draft conclusions already in the Special Rapporteur’s current report. He agreed that if the title were to be changed, it was important for the scope of the topic to include both formation and evidence of customary international law. His delegation understood the reason for changing the title of the topic to “Identification of customary international law”, but the Commission should address both aspects: how customary international law was created, and how its existence was shown, i.e. State practice and *opinio juris* both as formative elements and as evidence.

21. Customary international law remained an important source of international law despite the great increase in the number and scope of treaties. Treaty law also had an impact on the formation and evidence of customary international law, and his delegation therefore supported the Commission’s view that the relationship between customary international law and treaty law should be addressed, although care should be taken not to stray into certain aspects of treaty law, such as the role of customary international law in treaty interpretation or that of customary international law in the abrogation of treaty obligations. Thus, to the extent that treaty law might contribute to the formation of, or serve as evidence for, customary international law, it should form part of the Commission’s work.

22. His delegation was largely in agreement with the Commission on the question of whether there were differences in approaches in the formation and evidence of customary international law depending on the specific field of international law. However, the Commission should not ignore the different approaches that courts, in particular the International Court of Justice, took with respect to how the evidence was presented. That might be merely a reflection of *iura novit curia*. However, differences in the approach, particularly when occurring in the same judgment, such as in the *Arrest Warrant* case, might require closer study.

23. There was a need to engage Governments from the outset and to examine the jurisprudence of international, regional and subregional courts. South Africa would respond to the Commission’s request to provide information on the formation and evidence of customary international law in its domestic courts. In accordance with section 232 of South Africa’s Constitution, customary international law was automatically part of the domestic legal system unless it was inconsistent with the Constitution or an act of parliament. That made the Commission’s study particularly important for his country. His delegation

supported the Commission's decision to exclude the study of *jus cogens* from the scope of the topic.

24. With regard to the topic of protection of the environment in relation to armed conflicts, his delegation noted that damage to the environment in war-torn societies was not limited to immediate effects, but also had an adverse impact on post-conflict reconstruction and development. In southern Africa, landmines continued to make large areas uninhabitable. That explained why South Africa was such a strong supporter of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. His delegation welcomed the inclusion of the topic on Commission's current agenda. A sound foundation existed for building on, namely articles 35 and 55 of the First Additional Protocol to the 1949 Geneva Conventions, which contained specific provisions on the protection of the environment in international armed conflicts. The effect of warfare on the environment had also been acknowledged in the 1992 Rio Declaration on Environment and Development, which recognized that warfare was inherently destructive of sustainable development and called upon States to respect international law providing protection for the environment in times of armed conflict and to cooperate in its further development.

25. Other work in that area had been done by the International Committee of the Red Cross, the United Nations Environment Programme (UNEP), the Environmental Law Institute, the International Law Association, the International Union for Conservation of Nature and other civil society groups. The most important conclusions drawn from the Commission's preparatory work was that, although considerable progress had been made through the implementation of a number of instruments on international humanitarian law, other bodies of law were also applicable. The 2009 UNEP report entitled *Protecting the Environment During Armed Conflict — An Inventory and Analysis of International Law* had found that international criminal law, international environmental law and human rights law were also applicable. The Rome Statute of the International Criminal Court had criminalized the disproportionate causing of widespread, long-term and severe damage to the environment as a war crime and had concluded, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that international humanitarian law might be applicable in situations of armed conflict as *lex specialis* and that human rights law might also be applicable. It was therefore to be welcomed that the topic referred to the protection of the environment in relation to, and not only during, armed conflict.

26. Some authors argued that since the early 1990s a new rule of customary international law had developed which specifically prohibited excessive collateral damage to the environment during international armed conflict. That rule was a positive development, given that some commentators were of the view that the threshold requirement of widespread, long-term and severe damage to the natural environment under articles 35 and 55 of the First Additional Protocol was too vague and too high. The relationship between those treaty provisions and a possible rule of customary international law might require further investigation.

27. Some commentators believed that rules of customary international law were developing which required the means and methods of warfare to be employed with due regard for the environment, and that there was an emerging legal obligation to cooperate in the post-conflict restoration of elements of the environment damaged by warfare.

28. In addition to the Special Rapporteur's proposal on aspects on which the Commission should focus in further work on the topic, it would also be useful to consider refugee law and the law applicable to internally displaced persons, individual criminal responsibility and non-international armed conflict.

29. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the Working Group's report made clear that the obligation to extradite and the obligation to prosecute were inextricably linked. His delegation agreed with the Commission that the harmonization of multilateral treaty regimes would be a futile exercise because of the complex nature of multilateral treaties on the subject, and that an assessment of the actual interpretation, application and implementation of clauses on the obligation to extradite or prosecute in particular situations, such as *Belgium v. Senegal*, would not be useful to the development of the topic, since the interpretation of a specific *aut dedere aut judicare* obligation would be subject to the specific context in which the clause occurred.

30. It had been suggested that the Commission might undertake a survey and analysis of State practice to establish whether a customary rule existed that reflected a general obligation to extradite or prosecute for certain crimes and whether such an obligation was a general principle of law. It had also been argued that such an exercise would be futile since the Commission had already completed, in 1996, the draft code of crimes against the peace and security of mankind, article 9 of which already contained an obligation to extradite or prosecute. Ultimately there had been a general consensus that exploring whether the obligation to extradite or prosecute was a general principle of international law would not advance the work on the topic.

31. The Working Group's report touched on the question of universal jurisdiction. Clearly, an effective *aut dedere aut judicare* obligation must involve universal jurisdiction in some form or another. This was the case in particular with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which placed a primary obligation on the State to exercise jurisdiction. The continuation of the topic, as with any topic in which the intention would be to create a classical *aut dedere aut judicare* obligation, should thus include, as a major element, universal jurisdiction or, at the very least, aspects thereof.

32. His delegation wondered whether there was any point in continuing with the topic if the Commission decided to include in its agenda the topic of crimes against humanity, whose primary "hard obligation" would be an *aut dedere* obligation for crimes against humanity.

33. **Ms. Telalian** (Greece), noting that her country had often been hit by natural or environmental disasters, said she had been following with great interest the Commission's work on the topic of protection of persons in the event of disasters. The Commission had rightly identified the need for a provision on international cooperation in draft article 5 ter. It had also followed a pragmatic approach as to the specifics of the duty to reduce the risk of disasters through domestic legislation (art. 16, para. 1) and/or other measures and actions (art. 16, para. 2). However, the duty to cooperate under article 5 ter was not entirely clear. It would be preferable for a straightforward reference to article 5 ter to be included in article 16. The linkage between those two provisions was somewhat indirect, since draft article l6 did not specify any right to ask for cooperation on the part of the State which had the duty to reduce the risk. The importance of the measures that each State must take in order to reduce the risk of disasters, but also the technically advanced and specific character of such measures, called for cooperation between all stakeholders, namely the State whose duty it was to reduce the risk and the assisting actors (international organizations and/or non-international organizations such as universities with expertise on the specific issue), in order to fulfil the object and purpose of draft article 16. Therefore, the wording of draft article 16 should include a explicit reference to article 5 ter, which would read that each State, in the performance of its duty to reduce the risk of disasters, might "ask and seek the cooperation provided for in article 5 ter, where appropriate".

34. Her delegation commended the Commission on its pragmatic approach to the content of draft article 5 bis and draft articles l2 to 15, in particular that of draft article 14 and draft article 15, which might prove instrumental in removing administrative or other obstacles to the timely provision or termination of assistance.

35. Turning to the topic of the formation and evidence of customary international law, her delegation agreed with the Commission's decision to change its title to "Identification of customary international law". The identification process was crucial for judges and practitioners who were called upon to apply or to rely on rules of customary international law, at both domestic and international level. While not underestimating the importance of the process of formation of international customary rules, her delegation considered the identification of customary law to be of crucial importance for judges and international law practitioners seeking to establish the existence of a particular customary rule of international law, and thus they should be provided with the tools allowing them to assess whether a certain legal process had been concluded and had led to the creation of such a rule.

36. The Special Rapporteur's open-ended approach concerning the materials to be taken into consideration, which ranged from views of States to scholarly writings, was consistent with the inherent flexibility of what was one of the most theoretical topics ever to be placed on the Commission's agenda. Opinions

expressed by the Commission in the past were extremely valuable in assessing the overall approach to the issue.

37. Since the topic was novel, normative guidance was needed, and it would be useful for the Special Rapporteur and the Commission to place more emphasis on less traditional and thus less obvious means of custom formation, such as the practice of international organizations or the formation of customary law in fields such as international human rights law, where a differentiation could be observed with regard to the weight attributed to the two constitutive elements of customary law, namely State practice and *opinio juris*.

38. On the relationship between customary international law and treaty law, two issues should be clearly distinguished: the influence of treaty law on the formation or crystallization of customary law, and the interplay between the application of a treaty provision and that of a parallel, already established customary rule. The relationship between customary law and the general principles of international law deserved a thorough examination, which should also include work on definitions, given the differing meanings attributed to the term "general principles of international law" in the literature. The Commission should describe the specific features of such principles without pursuing the investigation beyond the needs of the topic. She also agreed with the Special Rapporteur that *jus cogens* should not be covered, as particular difficulties arose in connection with the process of its formation and with the identification of evidence that a given rule had acquired that status.

39. While it was premature to refer to the outcome of the Commission's work, the option to produce a set of conclusions with commentaries seemed appropriate, as it would allow for flexibility and leave the door open for future developments. In addition, the future work on the topic would not only clarify matters in relation to international custom, but would also revitalize the debate over its importance within the international normative process.

40. On the topic of the provisional application of treaties, her delegation was pleased that the Commission had opted for a neutral approach, seeking neither to encourage nor to discourage States from having recourse to such a possibility. Some States might be reluctant to provisionally apply international treaties, both for policy reasons and because of constitutional constraints relating to procedural requirements for accession to treaties. Thus, the Commission's task should be to clarify the legal issues associated with provisional application without taking a position on policy matters.

41. The study undertaken by the Commission on provisional application should be based on its previous work on the law of treaties, in particular article 25 of the 1969 Vienna Convention on the topic. However, given the disparity of State practice and the divergence of views expressed with regard to provisional application as an autonomous institution of public international law, there seemed to be no reason to believe that the rules embodied in article 25 reflected customary international law. Moreover, the variety of situations occurring in practice inevitably gave precedence to the treaty itself and the relevant provisions contained therein and might therefore call for a more in-depth consideration of the feasibility and the appropriateness of the Commission's study.

42. As already mentioned by the Special Rapporteur, flexibility was one of the key features of the concept of provisional application, and it might be preferable to let States decide whether and to what extent recourse should be had to provisional application and to determine the legal consequences of such recourse in each particular case. For that reason, her delegation shared the view that it was too early to take a position on the final outcome of the Commission's work. Regardless of whether it took the form of guidelines or model clauses, it should focus on assisting States in the negotiation and drafting of international agreements and providing them with guidance on how to interpret and give those agreements full effect. Within that framework, questions should be highlighted which had not been sufficiently addressed by the Vienna Convention and could be further explored in the framework of the Commission's current work.

43. The most important of those questions was that of the legal effects of provisional application. Taking into account that article 25 of the Vienna Convention used the term "provisional application" instead of "provisional entry into force", as initially suggested by the Commission, it seemed reasonable to assume that the former was a question of fact rather than an issue of law. Accordingly, the Special Rapporteur's view that such effects "could depend on the content of the substantive rule of international law being

provisionally applied" needed to be further clarified. Nor was it clear whether, in terms of the rules of State responsibility for international wrongful acts, it was accurate to claim that a State might be found responsible for the "breach of an obligation" arising from a rule being provisionally applied. That said, account should also be taken of the situation of individuals, which might be affected by the rule provisionally applied.

44. Another important issue was the termination of provisional application, including in connection with its temporal scope. The text of article 25 of the Vienna Convention, which provided that a treaty might be provisionally applied "pending its entry into force" suggested that provisional application of treaties was a transitional institution of limited duration which should not be indefinitely extended.

45. A distinction between multilateral and bilateral treaties could be of relevance in the context of the Commission's work on the topic. On the basis of existing State practice, some of the parties to a multilateral treaty might agree *inter se* to apply it provisionally. It would therefore be interesting to determine the relations between those parties and those which did not apply it provisionally, especially if the treaty itself did not provide for provisional application and such application was agreed by means of a separate agreement, which might be tacit. Moreover, with regard to the position of non-signatory or acceding States wishing to apply a multilateral treaty provisionally, article 25 implied that it was up to the "negotiating States", i.e. States "which took part in the drawing up and adoption of the text of the treaty" to decide to provisionally apply it or not.

46. While topics such as the protection of cultural property in times of war or the applicability of human rights norms in case of armed conflict had been given particular attention in case law, both international and domestic, as well as in legal theory, that had not been true for the topic of protection of the environment in relation to armed conflicts, despite the increasing number of normative instruments aiming to protect the environment in peacetime. Thus, the Commission's decision to consider the topic responded to a real need, at a time when both international and non-international armed conflicts often raised questions in public opinion about their adverse impact on the environment and natural resources. Her delegation endorsed the Special Rapporteur's proposal to avoid an approach to the subject consisting of a successive consideration of the various fields of international law, such as environmental law, the law of armed conflict or human rights law, because any other course of action would result in a fragmented and incomplete picture of applicable norms. Instead, the proposed temporal perspective, which favoured a pragmatic identification of the issues raised before the legal responses to them were examined, allowed for a unified approach to the principles concerned, taking also into consideration the possible interactions among them.

47. **Ms. O'Brien** (Australia), welcoming the continuing discussion of the topic of the protection of persons in the event of disasters, said that protecting people from serious harm during disasters was both a challenge and a co-responsibility for all humanitarian actors. Australia had a longstanding commitment to the protection of affected populations, recognizing that delivering humanitarian assistance in the absence of safety and security had a limited or even detrimental effect. To that end, it continued to encourage humanitarian agencies to adopt an anticipatory approach to managing the risks inherent in crisis situations. Her delegation believed that the draft articles provided useful guidance to both affected and assisting States on responding effectively to the significant challenges posed by disasters.

48. Australia supported the International Disaster Response Law Guidelines and draft Model Act for the facilitation and regulation of international disaster relief and initial recovery assistance of the International Federation of Red Cross and Red Crescent Societies (IFRC), including through the IFRC Asia-Pacific Disaster Law programme, which built the capacity of national societies to deal with legal issues involved in disaster response. The Commission's work in that area contributed to the development of a normative legislative framework for humanitarian action in disaster-affected communities.

49. With regard to the topic of formation and evidence of customary international law, her delegation noted the Commission's decision to change the title to "Identification of customary international law". Nevertheless, the Commission should maintain a broad scope and continue to explore both the formation of customary international law and evidence of its existence. The development of a set of conclusions with commentaries would be the most appropriate

outcome of the topic and would prove to be of significant practical utility.

50. Her delegation shared the view that the topic of provisional application was best suited for the development of guidelines or model clauses. Such an approach reflected the divergent domestic positions of States on the subject and the fact that States were free to establish rules under their respective legal systems on how to deal with the provisional application of treaties. For example, Australia underwent a two-step domestic process before it formally consented to be bound by international law. Accordingly, its practice was not to provisionally apply treaties. Guidelines or model clauses could provide States with useful guidance on the question, without impinging on their domestic and constitutional requirements.

51. The Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied; it need not take a stand on whether provisional application should be encouraged or discouraged. Individual States would be best placed to consent to provisional application in the light of the purpose, scope and content of the treaty concerned, as well as domestic legal and political considerations. The Commission should strive to provide clarity to States when they negotiated and implemented provisional application clauses. Her delegation looked forward to the consideration of the relationship between article 25 and other provisions of the Vienna Convention and of the temporal component of provisional application. It noted the Commission's request for information on the practice of States and intended to contribute to the discussion.

52. Her delegation welcomed the report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*). Australia was committed to ensuring that impunity was not tolerated for crimes of international concern. The obligation to extradite or prosecute was an important tool in the fight against impunity, as seen by the increasing number of multilateral treaties which sought to apply that obligation to a growing range of crimes. Bearing in mind the divergent views of States regarding the obligation to extradite or prosecute and the need for flexible approaches to reflect the differing purpose, objective and scope of treaties containing that obligation, Australia welcomed the exploration of existing formulas. The Commission's work on the issue would serve as a useful resource for States to draw upon in the drafting of future treaties.

53. Her delegation also noted the Commission's consideration of the Judgment of the International Court of Justice in the *Belgium v. Senegal* case and welcomed the Commission's examination of the implementation of the obligation to extradite or prosecute. That work was helpful in guiding State practice.

54. Australia supported the work of the Study Group on the most-favoured-nation (MFN) clause. In particular, it welcomed the Study Group's efforts to ensure greater certainty and stability in the field of investment law, and it endorsed the Study Group's emphasis on the importance of greater coherence in the approaches taken in arbitral tribunals in relation to MFN provisions. Her delegation noted that the Study Group's final report would probably address the question of the interpretation of such provisions in investment agreements in respect of dispute settlement. Australia's position regarding MFN provisions and dispute settlement remained unchanged. In interpreting a treaty where the ambit of the MFN obligation with respect to dispute settlement was not specified, it was not appropriate to assume that MFN obligations applied broadly in a manner that would negate the negotiated procedural requirements. The inclusion of both an MFN obligation and procedural requirements in a treaty that included dispute settlement procedures was evidence that the parties did not intend MFN principles to apply to those dispute settlement procedures.

55. The Study Group should examine whether "less favourable treatment" could be defined with greater clarity in the context of investment treaties, whether the MFN principle required treatment on exactly the same terms and conditions when it was extended to investors and investments of the treaty partner, or substantively the same treatment, or whether the phrase "less favourable treatment" should be accorded some other meaning.

56. Her delegation noted the Study Group's consideration of an informal paper on model MFN clauses post-*Maffezini* and the possibility that the Study Group might develop guidelines and model clauses. Such work would be helpful in promoting greater clarity and stability in the field of investment law.

57. *Mr. Kohona (Sri Lanka), Chair, took the Chair.*

58. **Mr. Ney** (Germany) welcomed the two draft articles introduced under the topic of the protection of persons in the event of disasters. His delegation supported the reference in draft article 16 to the duty of each State to reduce the risk of disasters by taking the necessary and appropriate measures. It had been helpful to see the clarification that disaster risk reduction measures included the conduct of risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems. As for draft articles 14 and 15, more scope should be given to the discretion of the States concerned.

59. With regard to the report's assessment of practice by States and international organizations, his delegation pointed out that article 222 of the Treaty on the Functioning of the European Union referred to the political obligation of the Union and its Member States to act jointly in a spirit of solidarity if a Member State was the object of a terrorist attack or the victim of a natural or man-made disaster. Seen in that light, the report's focus on the Union's ordinary legislative procedure seemed out of place.

60. Given the enormous challenge of collecting and analysing existing practice in order to elucidate *lex lata*, the Commission should refrain from attempting to elaborate new rules of *de lege ferenda*. Such an attempt would be highly controversial, and third States and international organizations were under no legal obligation to provide the affected State with assistance. On the other hand, the importance of voluntary assistance in case of natural or made-made disaster was indisputable. The final outcome of the project could only be a set of recommendations supporting domestic legislation to establish effective national systems of disaster prevention, preparedness and response rather than a proposal for a binding international instrument.

61. His delegation noted that the title of the topic on the formation and evidence of customary international law had been changed to "Identification of customary international law". Despite the new title, however, the Commission's work should include an examination of the requirements for the formation of rules of customary international law as well as the material evidence of their existence.

62. His delegation agreed that *jus cogens* should be excluded from the identification of customary international law, because it was too broad a subject for all its aspects to be properly covered. The two basic elements of customary international law, namely State practice and *opinio juris*, and the relationship between them were crucial for achieving the desired outcome of the project, namely to be of assistance to those practitioners, particularly judges and lawyers, who might not be well versed in public international law. Germany would provide information on its domestic practice relating to customary international law, and it encouraged other States and international organizations to do likewise.

63. Germany welcomed the inclusion of the topic of provisional application of treaties in the Commission's programme of work and endorsed the Special Rapporteur's approach. The provisional application of treaties as provided for in article 25 of the Vienna Convention was a valuable and flexible tool. States might decide to limit its extent to certain parts of a treaty. That had been done in many treaties concluded with Germany's participation. The extent of provisional application was determined either in the treaty itself or in the instrument containing the agreement on provisional application.

64. In certain cases provisional application had permitted some of the negotiating States to put into effect a number of the treaty's intentions while allowing others time to evaluate the functioning of a nationally disputed treaty project. In many States — including Germany — constitutional and internal law determined to what extent provisional application of a treaty could be agreed or a treaty provisionally applied. States had found several ways to agree on the provisional application of a treaty while allowing for constitutional requirements.

65. It was Germany's understanding that the provisional application of a treaty meant that its rules would be put into practice and would govern relations between the negotiating States, i.e. the prospective parties, to the extent that provisional application was agreed. At the same time, provisional application in itself was not in any way the expression of consent to be bound, nor did it lead to an obligation to declare consent to be bound. An in-depth analysis of State practice and case law regarding the legal effect of provisional application of treaties, as provided for in article 25 of the Vienna Convention, would be most valuable.

66. **Mr. Salinas** (Chile), referring to the new draft articles in the report on the topic of protection of persons in the event of disasters, said that his delegation welcomed the inclusion of draft article 5 ter, because the duty to cooperate should also cover the period prior to a disaster, i.e. the reduction of the risk of disaster. With regard to draft article 16, which represented an acknowledgement of the need to cover not only the response phase of a disaster, but also the pre-disaster duty of States, said that his delegation concurred with the Special Rapporteur that the general principle of prevention was at the root of international law and that another important legal foundation for draft article 16 was the widespread practice of States reflecting their commitment to reduce the risk of disasters through multilateral, regional and bilateral agreements. Recognition of that commitment was further shown by the States' incorporation of disaster risk reduction measures into their national policies and legal frameworks.

67. In paragraph 1 of draft article 16, his delegation endorsed the decision to begin the wording with the phrase "Each State shall reduce the risk of disasters", thus clearly establishing that that obligation was a State's individual responsibility. Although each State had the same obligation to reduce the risk of disasters, the paragraph resolved the question of a State's capacity to comply with that obligation when it stipulated that States were to reduce the risk of disasters "by taking the necessary and appropriate measures". The words "including through legislation and regulations" were an appropriate reference to the fact that mechanisms to implement the duty to reduce the risk of disasters would be defined within domestic legal systems. His delegation also endorsed the reference to the ultimate aim of measures taken by States, namely "to prevent, mitigate, and prepare for disasters".

68. Paragraph 2 made it clear, through the word "include", that the list contained therein was not exhaustive. It also emerged from paragraph 2 that the obligation to reduce the risk entailed the adoption of measures primarily at national level. However, if the measures required interaction between States or with other international actors, the applicable norm was draft article 5, taken together with draft article 5 ter.

69. Clarifying the legal framework applicable in the event of disasters would help improve the effectiveness and quality of humanitarian assistance and mitigate the consequences of disasters. His delegation was pleased that the draft articles thus far approved were based on the premise that the legal regulation of the protection of persons in the event of disasters must respect the principles of international cooperation, national sovereignty and non-interference in the internal affairs of affected States.

70. Turning to the topic of formation and evidence of customary international law, he stressed that the legal aspects associated with sources of international law were of great importance in the international legal order; hence the appropriateness of addressing them in connection with international custom. For the exercise to be useful, the proposed topic must be clearly defined in exact terms. Basically, the point was to establish the most relevant elements for identifying the existence of customary norms, including how to determine the set of elements that comprised custom, namely practice and *opinio juris*, and the role of General Assembly resolutions in the process of the formation of custom and as evidence of the elements that comprised custom. It would also be necessary to determine the contribution that treaties made to the customary law process, whether as an element of practice or as evidence of the existence of a customary rule, or through the crystallization of emerging customary rules in the codification process. Furthermore, it would be important to analyse the characteristics of comity in order to distinguish it from custom. The same applied to the criteria for understanding what was meant by generality, uniformity and constancy of practice, and the question of where *opinio juris* could be obtained.

71. It would be useful, in that incipient process, to provide elements that helped distinguish between customary rules and general principles of law, which were interrelated. However, the exercise should not lead to a revision of that source of international law as a whole by attempting to resolve the various issues on which doctrine was often divided. International custom as a source of international law must continue to operate within the margins of flexibility inherent in that normative process, without prejudice to the contribution that that process might make.

72. The topic should not address the relationship between treaties and custom. That subject was important, but it went beyond the topic's mandate. On the other hand, consideration should be given to the question of treaties as evidence of the existence of a custom or as elements of practice in the process of the

formation of that source. Equally important was an analysis of the role of resolutions of international organizations, in particular those adopted by the United Nations, in the formation of custom and as a factor that helped serve as evidence of elements constituting custom.

73. Although *jus cogens* had an important relation to custom in that such a rule could become a peremptory norm, it had no place in the current exercise, because it posed questions inherent in its nature that went beyond the component of custom that it might contain. Nor should the Commission address controversial issues concerning the nature of customary law or theoretical questions which had been associated with customary law from the very beginning and gave rise to heated doctrinal debates.

74. Dialogue with States through questionnaires and debates in the Sixth Committee was particularly important for the topic of customary law. Subjects such as the requirements of generality, uniformity and constancy of practice over time should be analysed and commented on, the aim being to identify basic elements of the process of the formation of custom that provided criteria for discerning the existence of a custom. Instead of focusing on the various branches of international law (human rights, international criminal law or international humanitarian law), it would be preferable to be guided by a general, unified vision of customary law. Conclusions with commentaries would be an appropriate outcome of the project. Rather than enunciating a set of inflexible rules for identifying norms of customary international law, the Commission should attempt to cast light on the general process of its formation and documentation.

75. With regard to the topic of the provisional application of treaties, his delegation was of the view that the rule set out in article 25 of the Vienna Convention, notwithstanding its brevity, contained the essential elements thereof and did not require new treaties. Content and scope would mainly depend on the terms in which the treaty itself provided for provisional application or on terms agreed in some other manner. Thus, there was no point in seeking to regulate in advance the many and varied manifestations that the provisional application of treaties might take from a legal point of view. Accordingly, the Special Rapporteur's work should focus not on the elaboration of draft articles, but on the formulation of guidelines of an interpretative nature that dealt with the legal regime of provisional application, including forms of manifestation of the will of States, their legal effects and their termination. As noted by the Special Rapporteur, such guidelines could serve as a guide for Governments. His delegation agreed with the Special Rapporteur that future work should be guided by State practice during the negotiation, implementation and interpretation of provisionally applied treaties.

76. He drew attention to the domestic difficulties, in particular in a constitutional context, to which the provisional application of treaties might give rise, especially in cases where the treaty in question required parliamentary approval or its implementation entailed legislation to amend the domestic legal system. The Special Rapporteur should examine that aspect in future reports on the basis of information provided by Governments.

77. His delegation agreed with the Special Rapporteur on the need to examine the relationship between article 25 and other provisions of the Vienna Convention, in particular those referring to the manifestation of consent, the formulation of reservations, the effects on third parties, and the interpretation, application and termination of treaties and their invalidity. The transitory nature of a provisional application did not exempt it from the manifestation of free consent nor did it mean that the rules and principles governing treaties from their genesis to their termination did not apply.

78. The obligation to prosecute or extradite (*aut dedere aut judicare*) was embodied in a number of international conventions, in particular those on human rights and terrorism. Pursuant to the report of the Working Group on the topic, the obligation to prosecute or extradite did not pose major difficulties when it resulted from the application of treaties which were binding for the parties. Hence the need for States to be able to define which conventional formula on that obligation best suited their objective in a particular circumstance.

79. His delegation agreed with the Working Group that States had sovereignty to conclude and define the content of a treaty on the obligation to prosecute or extradite. However, the treaty regime currently governing that obligation had major lacunae which it might be necessary to address, such as the lack of any reference to such a rule in the Vienna Conventions in connection with crimes against humanity and war

crimes. Similarly, it would be useful to improve the wording of the conventions on genocide in order to optimize international cooperation and make those international instruments more effective. In addition to the conclusion of treaties on the subject, it was vital to take steps to give effect to the treaty system in domestic legal systems, such as through the promulgation of legislation, in particular with regard to typology and jurisdiction, so as to ensure the effective implementation of the obligation to prosecute or extradite. Indeed, as pointed out in the Judgment of the International Court of Justice in *Belgium v. Senegal*, as long as the measures needed to comply with an international obligation were not taken, a State was in violation of that duty and thus was committing a wrongful act which would inevitably engage its international responsibility.

80. The Working Group's report had rightly referred to the possibility that a State faced with an obligation to prosecute or extradite an accused person might have recourse to a third alternative — that of surrendering the suspect to a competent international criminal tribunal. Such an alternative, which would be useful, would ultimately require a study of the implications and possibilities thereof in order to determine whether it was feasible. Moreover, the international tribunal concerned must have competence in that regard. Hence there was a need to adopt treaties recognizing the jurisdiction of international criminal tribunals.

81. Some States argued that the obligation to prosecute or extradite could exist only within a treaty system, whereas others maintained that the existence of a rule of customary international law with regard to certain categories of crimes could not be ruled out. That was an aspect which had to be defined by the Working Group, and it was therefore essential to obtain information from States to determine whether or not systematic State practice existed that could be transformed into a customary international rule.

82. **Ms. Mezdrea** (Romania), referring to the topic of protection of persons in the event of disasters, said that that the draft articles should further highlight cooperation between the affected State and the assisting States, competent intergovernmental organizations and relevant non-governmental organizations as far as the terms and conditions of assistance were concerned. Draft articles 13 and 14, in particular, should give greater emphasis to consultations concerning the scope and the type of assistance, the identification of the needs of the persons affected by disasters and any other measures to be taken by the affected State to facilitate the provision of assistance. Draft article 13 should also include provisions relating to the special needs of women and vulnerable and disadvantaged groups. Draft article 15 should better reflect, at least in the commentaries, that the termination of assistance should not be at the expense of the needs of the affected persons, especially when termination was requested by the affected State. Her delegation endorsed the language in draft article 5 bis and its open-ended character.

83. She welcomed the Commission's work on the topic of formation and evidence of customary international law, which continued to play an important role despite the conclusion of a multitude of bilateral and multilateral treaties and the codification work carried out in several areas of international law. In that regard, she supported the proposal for a practical outcome in the form of conclusions with commentaries. Further clarification was needed, however, as to the relation and interaction between customary international law and treaties, general principles of international law and general principles of law. The Commission should focus on the identification of the formation and evidence of customary international law. Only when necessary should it address the issue of *jus cogens* in the context of the topic.

84. An assessment of State practice was essential. Practice that might lead to the formation of a rule of customary international law should have representativeness and continuity and should be distinct from acts of comity. Her delegation also supported the view that the practice of international and regional intergovernmental organizations, as embodied in resolutions, declarations, decisions and recommendations, might be taken into consideration when assessing the evidence of both State practice and *opinio juris*.

85. On the topic of provisional application of treaties, her delegation agreed with the Special Rapporteur's conclusion that the Commission should not be seen as encouraging or discouraging recourse to that practice, but should simply provide greater clarity regarding the legal regime governing provisional application. While sharing the view that the provisional application of a treaty gave rise, in principle, to the same obligations which would arise upon the entry into force of the

treaty, she believed that provisional application should serve only as a legal tool to be used exceptionally, when circumstances required an urgent application of the provisions of that treaty.

86. The outcome of work on the topic should be guidelines with commentaries in order to underscore the comprehensive legal effects, in terms of treaty law, of provisional application. Romania had provisions in its internal legislation permitting, under certain strictly defined circumstances, the complete or partial provisional application of an international treaty. Her delegation would provide information on those provisions by the end of January 2014.

87. On the topic of protection of the environment in relation to armed conflicts, the Special Rapporteur's temporal perspective was a useful methodological approach that would make the topic more manageable and easier to delineate, but environmental issues could not be easily divided into clear-cut categories. Nor did Romania see a need to address the effects of certain weapons on the environment separately. Her delegation would undertake to identify bilateral or multilateral agreements or national legislation and case law of relevance to the topic.

88. Romania attached great importance to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), given the need to combat impunity and to strengthen inter-State cooperation to that end. The Commission should examine the gaps in the conventional regime governing the obligation to extradite or prosecute in relation to the crimes against humanity, war crimes and genocide to which the Working Group had referred in its conclusion, and should also consider the question of crimes against humanity.

89. Her delegation welcomed the continuation of work on the topic of the most-favoured-nation clause and the expansion of the study to those MFN-type clauses included in headquarters agreements concerning, in particular, the immunities and privileges granted to the representatives of States in international organizations. Her delegation looked forward to the reports under preparation by the Study Group and to the outcome of its work on MFN clauses in investment treaties.

90. **Mr. Kim** Saeng (Republic of Korea) said that the topic of protection of persons in the event of disasters was of great significance, given the rapidly growing number and scale of disasters occurring each year. His delegation hoped that the draft articles on the topic could be adopted at the Commission's next session. It had been confirmed that the topic should include not only disaster response but also the pre- and post-disaster phases in order to establish a comprehensive framework on the issue, and his delegation therefore appreciated that the Commission had for the first time dealt with prevention during the pre-disaster phase and had adopted draft articles 5 ter and l6.

91. Those articles failed, however, to draw a distinction between natural and industrial disasters. Although the two categories of disasters had much in common, they also had many dissimilarities, particularly in the phase of pre-disaster prevention. Industrial disasters often had more obvious causal links which made it easier to identify "perpetrators", and responsibility for prevention might therefore be more significant. Natural disasters, on the other hand, tended to take place unexpectedly and even randomly, and it might not be possible to prevent them, despite a State's efforts. It went far beyond the current public international legal regime to deem the duty to prevent to be a general principle of public international law, other than in certain specific fields, such as environmental law. The attempt to stretch the notion of duty to prevent so that it was generally applicable in relation to disasters was somewhat worrisome, because it might impinge upon State sovereignty.

92. His delegation was also concerned about the post-disaster phase, which comprised not only legal issues, but also economic, political and international cooperation mechanisms, including the United Nations system. Efforts by the latter were necessary in addressing humanitarian concerns, but they should not overlap with the existing mechanism.

93. On the topic of formation and evidence of customary international law, he hoped that the change in title, to "Identification of customary international law", meant that the Commission would focus on the more operational question of identification, i.e. how the evidence of a customary rule was to be established. The Commission should seek to strike a reasonable balance between practical needs and academic research. Every effort should be made to avoid abstract and ambiguous expressions. The London Statement of Principles Applicable to the Formation of General Customary Law adopted by the International Law Association was not a good precedent.

94. *Jus cogens* should be dealt with under the topic, because it was closely related to customary international law. The Commission should collect references, academic works, national jurisprudence and other material on the subject from around the world, and not only from European countries.

95. The provisional application of treaties was another topic of great interest to his delegation. The Free Trade Agreement between the Republic of Korea and the European Union, signed in 2010 and applied provisionally as from l July 2011, was an example of provisional application. The question of the legal effects of provisional application should be clarified. The Commission should undertake an in-depth review of whether the legal regime of the 1969 Vienna Convention on the Law of Treaties should be directly applied to the case of provisional application. In addition to article 25, the Commission should examine the application of *pacta sunt servanda* (article 26), internal law and observance of treaties (article 27), provisions of internal law regarding competence to conclude treaties (article 46) and treaties and third States.

96. If the provisional application was accepted as binding, the issue of State responsibility arose when there was a violation of a relevant rule. Given the exceptional nature of provisional application, the probability of a breach of obligation would be low in comparison to the breach of an obligation arising from a treaty which had entered into force. Since the legal effect of the provisional application did not differ from that of a treaty which had entered into force, the breach of the obligation of the provisional application could be considered in the realm of the general rules of State responsibility for internationally wrongful acts and need not be discussed separately. A practical guide to help States legislate, interpret and apply the rules of provisional application would constitute an appropriate final outcome.

97. His delegation appreciated the report of the Working Group on the topic of the obligation to prosecute or extradite (*aut dedere aut judicare*). It considered the final results satisfactory and felt that the Commission should conclude its work on the topic.

98. **Ms. Lennox-Marwick** (New Zealand), referring to the topic of protection of persons in the event of disasters, welcomed the balance that the draft articles sought to achieve between the sovereignty of an affected State and the need to assist affected populations following a disaster, including through external assistance. New Zealand was pleased in particular about the inclusion of draft article 5 ter and draft article 16 and the emphasis that they placed on the responsibility to reduce the risk of disasters.

99. There was compelling evidence that the impact of disasters could be significantly mitigated by building the resilience of communities and addressing the root causes of vulnerability. Preventing a hazard from becoming a disaster would not only save lives but would also save on the cost of response and recovery. Her delegation supported a comprehensive disaster risk management approach that addressed risk reduction as well as response and recovery. New Zealand, like a number of other countries, had legislation on disaster risk management strategies, including risk reduction. As a country still recovering from a devastating earthquake in Christchurch in February 2011, it acknowledged the importance of that aspect of the Commission's work.

100. New Zealand welcomed the first report of the Special Rapporteur on the topic of the provisional application of treaties and placed particular emphasis on the Commission's stated objective, namely "to provide greater clarity to States when negotiating and implementing provisional application clauses". Her delegation shared the view that it was not appropriate for the Commission to seek to promote the provisional application of treaties in general. Provisional application could be a legitimate tool, but domestic procedures for entering into binding international obligations and accepting provisional application were of the utmost importance and were a matter for individual States to determine in the context of their constitutional framework. Provisional application should not be used to circumvent domestic constitutional processes. It was therefore essential, during the negotiation of provisional application clauses, to recognize that domestic procedures might place constraints on certain States.

101. New Zealand also noted the view of some members of the Commission that provisional application of 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. Given the domestic constitutional issues to which she had just referred, the Commission should examine the legal effect of provisional application. That would

assist States in considering the implementation of provisional application.

102. She was pleased that the Commission had decided to include the topic of protection of the environment in relation to armed conflicts in its programme of work. There was a growing need to focus on the topic in the light of continuing technological developments, which placed the environment at greater risk from weapons of mass destruction as well as from conventional methods and means of warfare. Her delegation supported the Special Rapporteur's temporal approach to the examination of the topic as a practical way of isolating the legal issues concerned. The division of the phases should be flexible, since some rules would apply to more than one phase.

103. The Special Rapporteur should take into account the harm caused to the environment of the State or States where the conflict occurred, to third States and to areas beyond national jurisdiction. Consideration should also be given to Principle 13 of the Rio Declaration on Environment and Development, regarding liability and compensation for adverse effects of environmental damage caused by activities within States' jurisdiction or control, and also to the Madrid Protocol on Environmental Protection to the Antarctic Treaty, specifically annex VI on liability arising from environmental emergencies, which included important concepts such as preventative measures, contingency plans and emergency response actions.

104. She stressed the importance of the topic of the obligation to prosecute or extradite (*aut dedere aut judicare*) in examining and interpreting the obligation embodied in multilateral conventions as well as the Judgment of the International Court of Justice in the *Belgium v. Senegal* case. There was merit in examining whether an obligation to extradite or prosecute existed under customary international law in relation to specific crimes; her delegation therefore encouraged further work to be done on the topic, including on its relationship to universal jurisdiction.

105. New Zealand looked forward to the draft report on the topic of the most-favoured-nation clause. It would be of great assistance to States for the draft report to include an overview of the general background, an analysis of the case law and appropriate recommendations. Given the constantly evolving nature of international investment jurisprudence, the Commission's work was a timely and valuable contribution. The final product would provide useful practical guidelines for States on how most-favoured-nation clauses should be interpreted and would add significantly to the coherence of approaches taken in the decisions of arbitral tribunals on investment issues.

106. **Mr. Sarkowicz** (Poland) welcomed the Commission's conclusion that the topic of protection of persons in the event of disasters should comprise not only the disaster response phase but also the pre- and post-disaster phases, thus reflecting a general trend in international documents concerning the activities of the international community in that area. He referred in that regard to the Fourth Global Platform for Disaster Risk Reduction held in May in Geneva. A broadening of the scope of the topic must, however, be reflected in the wording of the draft articles in order to avoid inconsistencies of the kind found in draft articles 6 and 7, which covered only disaster response, and not prevention.

107. His delegation welcomed the adoption of draft articles 12 to 15. In particular, it expressed its support for draft article 12 as an expression of the principle of international solidarity. However, the words "privileges and immunities" in draft article 14, paragraph 1(a), should be deleted: as the list of measures in that provision was not exhaustive, it was inappropriate to refer at the outset to the granting of privileges and immunities for relief personnel.

108. Another important issue that required further consideration was the principle of the responsibility to protect. Although its application had generally been accepted as relating to the protection of civilian populations against genocide, crimes against humanity, ethnic cleansing and war crimes, it should be carefully discussed by the Commission and the Sixth Committee. That would in line with the Commission's criterion for the selection of topics, namely, it should not restrict itself to traditional topics, but should also consider those that reflected new developments in international law and pressing concerns of the international community as a whole.

109. In conformity with its usual practice, the Commission's decision on the form to be recommended to the General Assembly for its draft articles could, in principle, await the completion of

work on the topic. However, given the special nature of such a novel topic, it might be advisable to reach an early understanding of what the final form should be. Taking into account the many international legal regulations referred to in the report and the nature of the draft articles, it would be best for the outcome of the topic to take the form of a set of provisions (principles, rules, norms) that could serve both as a legal framework for the conduct of international disaster activities and as a point of reference for the interpretation of existing international agreements and other instruments. If the draft articles were adopted as guidelines, rather than a convention, they might be more acceptable to States.

110. Poland welcomed with great interest the inclusion of the topic of formation and evidence of customary international law in the Commission's current programme of work. To be useful for practice, the topic should focus on means of identification of custom and, possibly, on guidelines for its interpretation and application. Although his delegation endorsed the Special Rapporteur's proposal to change the title of the topic to "Identification of international customary law", it disagreed with the view that there were different methods governing the formation and identification of customary rules in self-contained regimes.

111. *Jus cogens* issues should be excluded from the scope of work on the topic, primarily because of its controversial nature and lack of agreement as to its identification. Poland agreed with other delegations that peremptory norms could also be derived from treaties.

112. A distinction should be drawn (or the relationship clarified) between different sources of international law. The relationship between treaties and custom had been the subject of numerous theoretical studies and had been taken into consideration in many judicial decisions, including judgments of the International Court of Justice. The situation was different with respect to other sources, in particular general principles of law (because of problems with the definition) and acts of international organizations (because of their unclear status as a source of international law). Guidelines in that respect would be very useful.

113. His delegation underlined the importance of State practice for identifying customary rules and would support efforts to gather practice in that regard. The practice of non-State actors should also be considered, given their growing role in international relations. That would make future studies more complete. The Commission should be cautious, however, about evaluating the practice of international courts and tribunals, since some cases had been the subject of excessive creativity and imagination.

114. **Mr. Khan** (Pakistan) said that the primacy of the affected State in the provision of disaster relief assistance was rooted in a key principle of international law, namely State sovereignty, which was also highlighted in the Charter of the United Nations, numerous international instruments, the jurisprudence of the International Court of Justice and resolutions of the General Assembly. In the event of an overwhelming natural disaster requiring a response beyond the capacity of the affected State, the latter would certainly seek the assistance of the international community. As such, the assumption in draft articles 10 and 11 that States would not seek assistance from the international community even in such cases was flawed and was not backed by empirical evidence. It could, however, be assumed that, based on its national security concerns, a State might prefer to receive assistance from certain States and external assistance actors rather than from others. A sovereign State had the right and must be free to choose among various external actors offering assistance. A reference to that effect should be included in the draft articles to assure the affected State that humanitarian assistance would not be abused in any way that might undermine its sovereignty or interfere in its domestic affairs.

115. Draft article 12 did not treat non-governmental organizations on a par with States and intergovernmental organizations. Pakistan agreed with the Special Rapporteur that an offer of assistance did not create a legal obligation for the affected State to accept it.

116. His delegation noted the different forms of cooperation between States and other organizations set out in draft article 5 bis. In its view, the affected State had primacy in all forms of cooperation, including humanitarian assistance and coordination of international relief actions. In accordance with draft articles 11 and 13, the consent of the affected State and the conditions placed by it on the provision of external assistance were vital for all forms of cooperation in relief operations. Pakistan agreed that the affected

State must indicate the scope and type of assistance sought.

117. His delegation took note of the suggestion in draft article 5 ter to extend the scope of cooperation to the taking of preventive measures in order to reduce the risk of disasters and stressed that international cooperation was also important in the disaster prevention phase. However, the duty to cooperate as set out in draft article 5 was subject to the qualification of "appropriateness", which would be determined by States and particularly by the affected State, because of its knowledge of its own needs and capacities to deal with a possible disaster.

118. His delegation also took note of the duty of each State to reduce the risk of disasters (draft art. 16). Most of the State practice that had been cited as the legal foundation for draft article 16 had been developed during States' responses to natural disasters, such as earthquakes and floods; the definition of disaster in draft article 3 should be understood in that context.

119. His delegation agreed that a legal framework for preventive measures was vital for disaster preparedness. Equally important were risk assessments and the installation and operation of early-warning systems. The language of draft article 16 implied that, even if prevention and disaster risk reduction might be formulated as a legal obligation for each State, the determination of the scope of that obligation should be left to the State itself, because the affected State was likely to have the most reliable data about risk assessment and its capacity to prevent it. A broad approach to the obligation of States to prevent disasters, and a definition of disaster and resulting obligations, must be avoided.

120. *Mr. Silva (Brazil), Vice-Chair, took the Chair.*

121. **Mr. Rajeeve** (India), referring to the topic of protection of persons in the event of disasters, was pleased that, in draft articles 5 ter and 16, the Special Rapporteur had expanded the model centred on response to include a focus on prevention and preparedness. His delegation also noted with interest that the Commission had relied upon a variety of sources of law to identify the duty to reduce the risk of disasters, including international agreements and instruments, such as the 2005 Hyogo Framework for Action, and regional and national laws on prevention, preparation and mitigation, and that it had cited India's Disaster Management Act (2005) in that regard.

122. Pursuant to draft article 16, the scope of the topic would comprise not only the disaster phase but also the pre-disaster and post-disaster phases. However, it was unclear whether that also applied to industrial disasters. As a State's undertaking of rights and obligations during the pre-disaster phase was largely linked to its economic development, technical know-how and human resources, a balance was needed to ensure that the interests of developing States were not affected by the rights and obligations under draft article 16. Similarly, the principle of common but differentiated responsibility envisaged under environmental law for developing States must to be respected when determining characteristics with regard to due diligence.

123. His delegation welcomed the elaboration of draft article 5 ter, which envisaged extending cooperation to taking measures intended to reduce the risk of disasters. It agreed with the Commission's approach, reflected in paragraph (3) of the commentary thereto, regarding flexibility on the location of draft article 5 ter, including the possibility of grouping together the draft articles dealing with aspects of cooperation.

124. His delegation agreed that the topic of formation and evidence of customary international law should aim to provide practical assistance to practitioners of international law, as well as judges and lawyers in domestic jurisdictions who might not be well versed in public international law, and that the outcome of the work should take the form of non-prescriptive conclusions and commentary to serve as guidance for States.

125. He shared the view that the substance of the rules of customary international law should not fall within the scope of the topic and that *jus cogens* should not be addressed, as the peculiarity of non-derogation distinguished it from the rules of customary international law. He also endorsed the change of the title of the topic to "Identification of rules of customary international law" and agreed that the study should also include the dynamic process of formation, with specific emphasis on objective evidence of the rules of customary international law. In addition, the existence and formation of regional customary international law should be studied. Although the dynamic relationship between customary international law and treaties would form part of the study of the topic, his delegation also looked forward to the study of the relationship between customary international

law and other sources of international law, in particular general international law.

126. State practice and *opinio juris* should be given equal weight in the study. The practice of States from all regions should be taken into account. Developing States that did not publish digests of their practice should be assisted in submitting information on that practice, including, among other things, their statements at international and regional forums and their case law. The Commission must exercise the utmost caution in taking into account the arguments and positions advanced by States before international adjudicative bodies, which should be seen in the context in which they had been made.

127. With regard to the topic of provisional application of treaties, he suggested that it would useful if the study addressed the various legal implications of provisional application and relations between the State parties to the treaty, including the extent of international responsibility incurred by a State vis-à-vis other State parties for violation of an obligation under a provisionally applied treaty. His delegation agreed with the idea that the study should take the form of guidelines with commentaries, to serve as guidance for States.

*The meeting rose at 5.50 p.m.*