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Chair: Mr. Kohona. . . . . (Sri Lanka)
later: Mr. Silva (Vice-Chair) . . . . . (Brazil)

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13-54837 (E)

The meeting was called to order at 10.05 a.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. **Mr. Martín y Pérez de Nanclares** (Spain), commenting on the topic of protection of persons in the event of disasters, said that it was vital to maintain the required balance between the need to safeguard the national sovereignty of affected States and the need for international coordination. Furthermore, the Commission's work on disaster prevention, which had been the main focus of its deliberations on the topic at its sixty-fifth session, should not divert its attention from the key issue of disaster assistance.

2. Although his delegation welcomed the Commission's decision to include the topic of protection of the environment in relation to armed conflicts in its programme of work, its consideration would give rise to a number of major difficulties. In particular, it would not be easy to delimit the purpose of the topic or establish the dividing line between the three temporal phases proposed by the Special Rapporteur; the proposed timetable was also likely to prove too ambitious. It was therefore premature to decide what form the final outcome of work should take; however, prima facie it seemed clear that a draft convention was unlikely to be appropriate.

3. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation remained unsure about the issues to be addressed and the viability of the topic, owing to the different ways in which the obligation operated under the various treaty regimes and the uncertainty as to whether it was to be considered a norm of customary law or a general principle of law. The judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* did not significantly affect that view.

4. With regard to the topic of formation and evidence of customary international law, the content and quality of the Special Rapporteur's first report (A/CN.4/663), which was based on a thorough analysis of case law, augured a positive outcome, although the timetable could prove overambitious. His delegation agreed that the Commission's work should ensure that the flexibility of the customary process was preserved and should include a thorough analysis of the constituent elements of customary international law. The outcome should therefore be of an essentially practical nature, in the form of a set of conclusions with commentaries.

5. With regard to the scope of the topic, the relationship between customary international law and other sources of international law should be fully examined, since the distinction between customary law and general principles of law had not always been clear either in the jurisprudence of the International Court of Justice or in the legal literature. It might also be interesting to examine the relationship between custom and acquiescence and the interplay between non-binding instruments or norms and the formation and evidence of customary international law. A clear distinction should be drawn between methods of identifying customary law and determining the grounds for judgments, particularly in the case of the International Court of Justice. In that regard, attention should also be paid to bilateral custom as a basis of reciprocal international rights and obligations, since it was highly significant in territorial and maritime delimitation disputes, as well as in disputes relating to navigational rights, such as the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* brought before the International Court of Justice.

6. Furthermore, it would be important to study the relationship between general and regional customary international law, paying particular attention to the practice of regional organizations. The emerging jurisprudence of the Court of Justice of the European Union might be of interest in that regard. The temporal aspect, in particular the possibility of formation of customary international law in a short period of time, should also be examined.

7. The topic of provisional application of treaties was of the great practical significance, in view of the increasingly frequent use of the provisional application mechanism by States — and some international organizations — and the major problems it posed at the domestic level, since it was often used as a means of circumventing internal constitutional requirements. Instances in which States sought to maintain provisional application indefinitely were particularly problematic. Nonetheless, his delegation shared the view that, ultimately, the consent of a contracting State was decisive; consequently, the Commission should not either encourage or discourage recourse to provisional

application, nor, probably, should it engage in analysing or evaluating the internal laws of States.

8. Once a State had provisionally applied a treaty, it was subject to the provisions of article 27 of the Vienna Convention on the Law of Treaties. For that reason, his Government had included some limitations on recourse to provisional application in the draft law on international treaties and other international agreements that was currently before the Spanish Parliament. Among the key issues to be addressed in the Commission's future work, the relationship between article 25 and other provisions of the Vienna Convention, and the question of whether the rules set forth in article 25 reflected customary law, were of particular interest. In that regard, it was important to distinguish between bilateral and multilateral treaties.

9. It was essential to analyse relevant practice on the part of subjects of international law other than States. Although the Special Rapporteur had indicated a preference for not considering the question of the provisional application of treaties by international organizations until a later stage, the issue could hardly be avoided because it directly affected States, as was clearly shown by the use of provisional application by States and international organizations such as the European Union of the so-called mixed agreements concluded with third-party States. The problems posed in that regard deserved particular consideration.

10. Concerning the topic of the most-favoured-nation clause, in view of the decisions of the International Centre for Settlement of Investment Disputes (ICSID) in *Emilio Agustín Maffezini v. Kingdom of Spain, Plama Consortium Limited v. Republic of Bulgaria* and *Impregilo S.p.A. v. Argentine Republic*, it was appropriate that the Study Group's objective was to safeguard against the excessive fragmentation of international law and achieve greater coherence in international arbitral decisions in the area of investment. However, the interpretation of bilateral investment treaties by arbitral tribunals clearly reflected the relativism characteristic of international law, although it was not impossible to deduce a certain precedent from arbitral jurisprudence. In view of the intrinsic relativism of international investment law, the outcome of the Commission's work should not be overly prescriptive.

11. **Mr. Sousa Bravo** (Mexico), speaking on the topic of protection of persons in the event of disasters, said that disaster risk reduction, in its broadest sense, was one of the main pillars for the protection of persons in the event of disasters, since the adoption of disaster risk reduction measures affected the extent to which individuals were exposed to or protected against risk. Moreover, the principle of due diligence was fundamental to integrated risk management. His delegation therefore agreed with the Special Rapporteur that the draft articles should take into account pre-disaster scenarios and welcomed the Commission's decision to adopt provisionally draft article 5 ter (Cooperation for disaster risk reduction) and draft article 16 (Duty to reduce the risk of disasters). The concept of the duty to reduce the risk of disasters should also be included in draft article 2 (Purpose), by adding the phrase "including disaster risk reduction measures" at the end of the draft article.

12. With regard to draft article 5 ter, it was appropriate to maintain a specific reference to disaster risk reduction measures either in the text of draft article 5 or in a separate draft article in order to reinforce the unique role of prevention in the protection of persons. Cooperation for disaster risk reduction differed in some respects from cooperation during a disaster, as referred to in draft article 5 bis. While the latter was urgent in nature and intended to ease the suffering of the victims and meet their most pressing needs, cooperation for disaster risk reduction required planning and developed gradually over time. Those characteristics did not obviate the need for flexibility, however, including the requirement for cooperation to be provided in accordance with States' capacities and with the consent of the affected State.

13. With regard to the topic of formation and evidence of customary international law, his delegation welcomed the Commission's decision to change the title to "Identification of customary international law", thereby clarifying the scope of the topic and giving it a practical focus. The development of a set of conclusions with commentaries would serve as a guide to lawyers and judges and give greater clarity to the procedure by which common practice among States became international customary law. It was appropriate for the Commission to focus on the methodology for identifying rules of customary international law, bearing in mind that the context in which that process took place should be analysed, as the perspective of States and other actors could differ from that of courts and tribunals. For example, States, not the International Court of

Justice, were responsible for providing evidence of the existence of rules of customary law. However, the work of the International Court of Justice and other courts carried particular weight because of the well-founded reasoning they followed in deciding whether or not a practice should be considered a rule of customary international law.

14. Article 38 of the Statute of the International Court of Justice was an authoritative statement of sources of international law and a suitable point of departure for the topic. However, the list of sources it contained was not exhaustive. Moreover, it did not mention intergovernmental actors such as the International Committee of the Red Cross that contributed to the formation of customary international law, since only States were parties in cases before the Court. The Special Rapporteur had correctly decided to adopt a traditional "two-element" approach that took into account both general practice and *opinio juris*, rather than modern approaches that did not reflect the doctrine generally accepted in international practice.

15. Lastly, the Special Rapporteur's second report should include a section on the legal value of United Nations resolutions for the formation of customary international law. Earlier studies on that question could be useful, such as the one by Jorge Castañeda, which had used terms such as "accelerated formation" or "accelerated practice" to categorize customary rules according to the time required for their formation. Although the consolidation of practice now took place much more quickly, owing to the current speed of communications and other factors, the traditional elements of customary law still applied.

16. The Commission's work on the topic of provisional application of treaties would provide a practical reference tool for States. His Government had, in fact, formulated a declaration of provisional application to give immediate effect to articles 6 and 7 of the Arms Trade Treaty, in accordance with article 23 thereof, pending the treaty's entry into force for Mexico. The outcome of the Commission's work on the topic should take the form of guidelines or model clauses that would provide guidance to Governments, without excessively regulating the mechanism in order to safeguard the flexibility that it offered to the parties to a treaty. His delegation agreed that it was not the task of the Commission to encourage or discourage recourse to provisional application. States were free to decide whether or not to apply a treaty provisionally; provisional application was transitional and could help facilitate the final entry into force of the treaty. With regard to methodology, examination of State practice and the case law of international courts was a good approach; in that regard, his Government would provide the Commission with the information it had requested on the topic. Lastly, his delegation agreed that the regime of State responsibility in the context of the provisional application of treaties was no different from the general regime that normally applied. The Special Rapporteur's work should therefore focus on the process of provisional application and its legal effects.

17. His delegation welcomed the inclusion of the topic of protection of the environment in relation to armed conflicts in the Commission's programme of work. In view of the frequent violations of article 35, paragraph 3, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I), which prohibited the employment of methods or means of warfare intended to cause widespread, long-term and severe damage to the natural environment, it was important to promote the adoption of legal measures to protect the environment before, during and after an armed conflict. His delegation was therefore in agreement with the three-phase temporal perspective proposed by the Special Rapporteur for addressing the topic. As a State party to the main instruments of international humanitarian, human rights and environmental law, Mexico underscored the importance of taking into account in the three phases of the study the obligations under each of those fields of international law, some of which would be applicable to more than one phase. It would be valuable to gather information on best practices from a variety of sources, including States, other United Nations organs and international organizations specialized in the protection of the environment, as a foundation for the Commission's work on the topic.

18. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), since the question of whether the obligation existed in customary international law had not been definitively resolved, it was appropriate for the Commission to conduct a systematic assessment of State practice in order to determine whether a customary rule indeed existed in that respect. However, the examination of elements of the *aut dedere aut judicare* principle did not necessarily depend on the conclusion as to the

principle's customary nature; work should therefore continue in parallel on both fronts.

19. In its recent judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, analysed in the report of the Working Group on the topic, the International Court of Justice had ruled that, in the specific case of the Convention against Torture, the choice between extradition or submission for prosecution did not mean that the two alternatives were to be given the same weight, but rather that extradition was an option offered to a State, whereas prosecution was an obligation. The Commission should therefore analyse the question of the relative weight of the obligation to prosecute and the obligation to extradite in greater depth.

20. In addition, with regard to the scope of the obligation to prosecute, the Court had analysed the actions taken by Senegal vis-à-vis its prosecution obligations under the Convention Against Torture, considering elements such as the need to legislate, the obligation to investigate, and finance-related issues concerning the obligation to initiate legal proceedings, as well as the need to take such actions without delay and the question of which authorities were competent to do so. It would be advisable for the Commission to address those aspects in the context of the Working Group and discuss whether they might be of universal application or whether different procedures accompanied the obligation to prosecute depending on the instrument that contained the obligation or the crime in relation to which it existed.

21. Lastly, the Court had analysed the question of legal interest and the impact with regard to international responsibility of the *aut dedere aut judicare* principle when it related to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. That analysis was closely related to the obligation to extradite or prosecute, since it involved determining in respect of whom the obligation existed, who could request extradition, and who had a legal interest in invoking the international responsibility of a State for being in breach of its obligation to extradite or prosecute. Those topics, too, might be taken up by the Working Group.

22. On the topic of the most-favoured-nation clause, his delegation supported the Study Group's overall objective of safeguarding against fragmentation of international law, in view of the current divergence of relevant case law and, in particular, the lack of coherence in the treaty interpretation rules used, the application of those rules, and the reasoning of tribunals that permitted the use of the clause to incorporate dispute settlement provisions. Interpretation of the scope of most-favoured-nation clauses should clarify the true intention of the parties to a treaty and preserve the equilibrium of an investment agreement between the protection of the investor and its investment and the necessary policy space of a host State. For that reason, the ideal outcome of the Study Group's work would be a report with three sections: (a) an overview that set out the main issues and the legal reasons for the emergence of divergent trends in the application of the most-favoured-nation clause; (b) substantive recommendations on international law and model clauses to provide countries with guidelines for future contracts; and (c) recommendations on the correct interpretation of most-favoured-nation clauses in existing treaties where it was not clear whether the clause could be applied to procedural matters, such as dispute settlement, taking into account the *ejusdem generis* principle and the fact that the source of the right to treatment in accordance with the most-favoured-nation clause must be the basic treaty and not the third-party treaty.

23. **Ms. Farhani** (Malaysia), speaking on the topic of protection of persons in the event of disasters, said that her delegation viewed the general idea behind the formulation of draft article 5 ter as favourable to States and helpful in promoting cooperation for disaster risk reduction in keeping with the principle of State sovereignty under public international law. However, the term "measures" used in draft article 5 ter appeared to correlate with the specific measures detailed in draft article 16, paragraph 1; that correlation might unduly extend the duty to cooperate. Her delegation further noted that draft article 5 made it mandatory for States to cooperate with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with other relevant non-governmental organizations. That provision, read together with the implementation measures set out in draft articles 5 ter and 16, could lead to the usurpation of the sovereign right of a State by a supranational body.

24. Her delegation also considered the version of draft article 16 proposed by the Special Rapporteur, which provided for the adoption of appropriate measures through the establishment of institutional

arrangements, more acceptable than the version prepared by the Drafting Committee, which widened the scope of implementation of such measures by requiring States to adopt legislation and regulations to prevent, mitigate and prepare for disasters. Any measures undertaken by a State to reduce the risk of disasters should be within its capabilities, based on the principle of State sovereignty. With regard to paragraph 2 of draft article 16, her delegation was concerned that the requirement for States to collect and disseminate risk and past loss information, with the aim, inter alia, of enhancing transparency in transactions and public scrutiny and control, might touch on matters affecting a State's national security. The dissemination of risk and past loss information should not be absolute and should be guided by each State's existing laws, rules, regulations and national policies.

25. With regard to the topic of formation and evidence of customary international law her delegation did not object to the change in the title to "Identification of customary international law", since the proposed work of the Commission would still include an examination of the requirements for the formation of rules of customary international law, as well as the material evidence of such rules. While regional customary international law could become binding on a group of States in a given region, the Commission should carefully scrutinize the manner in which a practice gained recognition as customary international law in a particular region, since the judgment of the International Court of Justice in the *Asylum Case (Colombia v. Peru)* suggested that a different approach might be required for regional customary international law than for general customary international law.

26. With regard to methodology, her delegation supported the Special Rapporteur's proposal to examine carefully State practice and *opinio juris*, the two widely accepted constituent elements of customary international law. In that regard, the Commission should also identify common situations where States had acted as a result of comity and courtesy rather than *opinio juris*, address the relative weight of each constituent element in identifying customary international law and determine whether a piece of evidence could be used to prove both State practice and *opinio juris*. In analysing the sources of customary law it was sufficient to refer to article 38 of the Statute of the International Court of Justice; further examination of sources was not relevant to the topic.

27. Her delegation agreed with the range of materials proposed by the Special Rapporteur and the suggestion that a distinction should be made between the relative weights accorded to different materials. The jurisprudence of the International Court of Justice could rightly be considered the primary source of material on the formation and evidence of rules of customary international law. The Commission should carefully scrutinize the manner in which national courts applied customary international law, as domestic judges might not be well versed in public international law. However, it should be recognized that domestic judges had discretion to apply their national laws as they deemed appropriate. The outcome of the Commission's work on the topic should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law. It was also important that State practices from all legal systems and all regions of the world should be taken into account.

28. With regard to the topic of provisional application of treaties, it was important not to over-regulate the mechanism but to leave room for flexibility in its application. While the Commission's work was intended to simplify processes for the provisional application of treaties, a number of States, including her own, had already established strict procedures for the internalization and application of treaties. In that regard, States should not be compelled to implement their treaty obligations before they were ready to do so. The Commission should focus its work on the main legal issues arising in the context of provisional application of treaties by considering doctrinal approaches to the topic and reviewing existing State practice.

29. On the topic of protection of the environment in relation to armed conflicts, her delegation noted with concern the ongoing and widespread environmental damage caused during warfare, which could continue to impair natural resources and extend beyond national borders long after the end of an armed conflict. It was time for a detailed analysis of the topic, leading to progressive development of the law and effective regulation. As highlighted in annex E to the report of the Commission on the work of its sixty-third session (A/66/10), the Commission's work should be based on international humanitarian law, international criminal law, international environmental law and international human rights law, in order to provide a holistic

assessment of the topic. Malaysia was a party to various multilateral instruments that indirectly addressed the issue of the protection of the environment in relation to armed conflicts, including the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction and, at the regional level, the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, which promoted protection of the region from environmental pollution and the hazards posed by radioactive wastes and other radioactive material.

30. Her delegation generally agreed with the Special Rapporteur's proposal to approach the topic from a temporal perspective. However, in addition to producing recommendations for concrete measures to protect the environment at the different stages relating to an armed conflict, the Commission should identify the gaps in the relevant bodies of law; a broad analysis of the extent of the protection of the environment under existing international humanitarian law rules was required. While the Special Rapporteur had proposed that the effect of particular weapons on the environment should not be the focus of the topic, her delegation believed that the issue should nonetheless be addressed, since the various instruments regulating the matter were integral to the corpus of international humanitarian law.

31. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation agreed with the Working Group that, owing to the great diversity in the formulation, content and scope of the obligation in treaty practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses. The obligation to extradite or prosecute was currently an obligation under general international law arising from treaties or domestic legislation, as well as on the basis of reciprocity between States. Since there was no strong evidence of its widespread acceptance by the majority of States, it did not have customary international law status. Moreover, the *aut dedere aut judicare* principle was not equivalent to or synonymous with the principle of universal jurisdiction. Her Government had not criminalized offences subject to universal jurisdiction and believed that the obligation to extradite or prosecute was binding on a State only if it had bound itself by means of a treaty or domestic legislation.

32. The obligation to extradite or prosecute had been included in the Malaysian Extradition Act of 1992, under which the Minister of Home Affairs had discretion to determine whether to grant an extradition request or refer the case to the relevant authority for prosecution, taking into account the alleged offender's nationality and whether the Malaysian courts had jurisdiction in respect of the offence in question. Only extraditable offences would be considered in determining any extradition request. In that regard, her delegation agreed with the Working Group that the obligation to prosecute was actually an obligation to submit the case to the prosecuting authorities and did not involve an obligation to initiate a prosecution.

33. It would be premature to attempt to draft any articles until the basis of the obligation to extradite or prosecute had been determined. The status of existing law must therefore be ascertained before embarking on progressive development of the topic. With regard to the third alternative suggested by the Working Group, that of a State surrendering a suspect to a competent international criminal tribunal in order to meet its international obligation to extradite or prosecute, as Malaysia had a dualist legal system, its international obligations would only be legally binding with regard to those treaties to which it had become a party, subject to any reservations, and which it had incorporated in its domestic legislation. Her Government would fulfil its obligation to extradite or prosecute as agreed in the bilateral and multilateral treaties that it had concluded, subject to applicable domestic laws and procedures.

34. With regard to the topic of the most-favoured-nation clause, inasmuch as the overall objective of the Study Group was to bring greater coherence to the approaches taken by tribunals in interpreting most-favoured-nation provisions, it would be useful for the Commission to elaborate a general principle for interpreting and applying the most-favoured-nation clause under public international law in order to ascertain whether there was any assimilation of substantive rights and procedural treatments. Based on the *Daimler Financial Services AG v. Argentine Republic* and *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* arbitration cases, it appeared that the most-favoured-nation clause could not generally be extended to dispute resolution provisions.

35. Although there had not been a uniform approach to interpreting most-favoured-nation clauses, the Study

Group might consider several concepts that might be applied, including “contemporaneity of evidence” and “the standard of preponderance” in analysing *ratione materiae* application of the clause vis-à-vis less favourable treatment in dispute mechanism procedures, and “margin of appreciation” with regard to the specificity of a particular treaty. Those interpretative tools should enable the Commission to analyse admissibility and jurisdictional issues in relation to the most-favoured-nation clause, and to assess to what extent the clause could affect a State’s consent to arbitral jurisdiction.

36. The outcome of the Study Group’s work should not be overly prescriptive; nor should it prejudice States’ original intention and consistent practice with regard to the interpretation and application of the most-favoured-nation clause. The Commission should therefore adopt a merely descriptive approach, focusing on the general and specific language of the clause within its contemporaneous context.

37. **Mr. Leonidchenko** (Russian Federation), speaking on the topic of protection of persons in the event of disasters, said that it was becoming increasingly doubtful whether the outcome of the Commission’s work on the topic should take the form of draft articles. Draft guidelines regulating cooperation among States to prevent disasters and mitigate their consequences might be more appropriate. The rules developed by the Commission should focus on fostering cooperation in assisting States affected by a disaster rather than creating strict legal obligations that could place an even greater burden on affected States. That general argument was applicable to all the draft articles on the topic adopted by the Commission at its sixty-fifth session. Thus, draft article 5 bis (Forms of cooperation) should be seen as a descriptive list of forms of assistance that the international community might provide to an affected State; it was not exhaustive and should not be regarded as creating legal obligations. Draft article 5 bis also ought to indicate that the forms of assistance offered to an affected State should be based on the State’s own request.

38. Draft article 5 ter (Cooperation for disaster risk reduction) should become part of draft article 5 (Duty to cooperate). With regard to the obligation set out in draft article 5 for States to cooperate among themselves and with the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, his delegation saw no grounds for stating that such an obligation had been established as a principle of international law. According to the principle of the sovereign equality of States, the affected State had the right to choose from whom it would receive assistance and with whom it would cooperate in reducing the risk of disasters and their consequences. It seemed that if, in that context, there was indeed a need to develop a rule as progressive development of international law, it should pertain to an obligation of States to cooperate, within their capacity, among themselves and with international organizations, in order to provide assistance to the affected State and assist each other in disaster risk reduction.

39. The purpose of draft article 12 (Offers of assistance), which asserted the right of States, intergovernmental organizations and non-governmental organizations to offer assistance, was unclear and seemed to be stating the obvious. With regard to draft article 13 (Conditions on the provision of external assistance), the limitations imposed on an affected State when formulating conditions for the provision of external assistance should also be imposed on the States providing assistance. Furthermore, his delegation objected to paragraph (8) of the commentary to that draft article, which indicated that some kind of needs assessment must be conducted to identify the assistance required, since it implied that the affected State’s request could not be trusted. The logic of draft article 13 was unclear, as it suggested that the entire process of providing assistance was initiated not at the request of the affected State but as a result of the right of other actors to offer such assistance.

40. His delegation had no major objections to draft article 14 (Facilitation of external assistance). However, it proposed that paragraph 1 of the draft article should be made conditional upon the phrase “where applicable”, since assistance in such fields as privileges and immunities would not necessarily be appropriate in all cases. Draft article 15 (Termination of external assistance) should incorporate the first sentence of paragraph (2) of the commentary thereto, namely: “When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided”.

41. Draft article 16 (Duty to reduce the risk of disasters) was another example of progressive development of international law. The parallels drawn in paragraph (4) of the commentary thereto with principles

emanating from international human rights law or environmental law were not entirely appropriate in the context. In practical terms, each State would wish to reduce the risk of disasters but not every State had the capacity to take such measures. The rule should therefore be redrafted in the form of a recommendation and should include the phrase "within its capacity".

42. Under the topic of provisional application of treaties, the Commission should adopt a cautious, balanced and pragmatic approach to its work, based on article 25 of the Vienna Convention on the Law of Treaties as the logical point of departure. Provisional, transitional or intermediate treaties should not be considered within the scope of the topic unless they were provisionally applied. Furthermore, the Commission should not overly concern itself with the question of whether the provisional application of international treaties contravened a State's constitution or other domestic legislation or violated the principle of separation of powers. That issue was relevant only to the extent that it concerned the possible invocation of contravention of domestic procedures as grounds for non-performance of a provisionally applied treaty. The main focus should be on State practice with an external effect. His delegation supported the Special Rapporteur's plan to consider the relationship between article 25 of the Vienna Convention and its other articles, and to determine the effects of a breach of an obligation arising from a treaty being provisionally applied. The question whether the regime of provisional application constituted customary international law also deserved consideration.

43. The Commission's work should be based on a comprehensive study of State practice, including cases where the text of the treaty did not specifically provide for provisional application. Its main task was to systematize the topic along the lines indicated in the report on the work of its sixty-fifth session (A/68/10), without encouraging or discouraging recourse to provisional application or overregulating it. His delegation would support an outcome in the form of draft conclusions and model clauses.

44. On the topic of formation and evidence of customary international law, his delegation had no objection to the Commission's decision to change the title of the topic to "Identification of customary international law", although the work of the Commission should still include an examination of the requirements for the formation of rules of customary international law, which was one of the core issues in relation to the topic. His delegation welcomed the intention to consider the practice of States from all regions of the world, which was particularly important for the development of a general approach on how to identify customary international law. It agreed that draft conclusions with commentaries would be an appropriate outcome of the Commission's work; the guide thus developed would be of both theoretical and practical value, especially to lawyers and judges who were not experts in public international law. It also supported the Special Rapporteur's decision not to deal with *jus cogens* as part of the scope of the present topic.

45. While the question of whether there were different approaches to customary law in the various fields of international law required careful study, it was important to proceed from the understanding that international law, including customary international law, constituted a single, unified system of law and the process of its formation should not be split into separate areas. In order to work effectively on the topic, the Commission should also consider the relationship between customary international law, treaty law and general principles of law, as well as studying the issue of the potential transition from treaty rules to rules of customary international law. The development of a glossary of terms and their definitions would be of practical utility, primarily for practitioners who were not experts in public international law.

46. In researching the practice of States, the Commission should not place too much emphasis on the practice of national courts, which should be discussed only in the context of confirming the existence of a rule of customary international law binding upon a given State, since national courts, in deciding on matters touching on international relations, applied only established law. The decisions of national courts should not be considered State practice that could lead to the emergence of a rule of customary international law. The Commission should also study whether State practice creating international custom included not only the actual behaviour of States but also official statements at international meetings and conferences. Moreover, State practice might consist not only of performing positive acts but also of refraining from protesting against an active practice of other States. Lastly, it would be hard to establish the content of rules of customary international law without taking into account resolutions adopted by the States members of international

organizations, in particular consensus-based resolutions adopted and reaffirmed by the United Nations General Assembly over many years.

47. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation wondered whether the Commission should continue its consideration of the topic, as it had been unable to make progress for some years. On the topic of protection of the environment in relation to armed conflicts, sufficient regulation already existed under international humanitarian law, since the period before and after an armed conflict was considered to be peacetime, during which the general rules applicable to the protection of the environment were fully applicable. The Special Rapporteur should therefore not seek to draft comprehensive rules in that area.

48. **Mr. Popkov** (Belarus), speaking on the topic of formation and evidence of customary international law, said that, despite the increasing number of bilateral and multilateral international treaties, international custom still played an important role in contemporary international law. Customary international law not only served as a traditional means of filling the legal vacuum in areas not regulated by international treaties, but also helped to ensure the harmonious, systematic and non-contradictory application of treaty rules. From the beginning of its existence the Commission had focused on identifying international custom as a necessary precondition for codification in a given area; a study of its work should therefore help to pinpoint the tools it had used to identify customary rules and analyse the process of their formation and evolution. Only the International Court of Justice had comparable experience and institutional memory in that area, and its practice should also be carefully studied.

49. His delegation supported the Special Rapporteur's proposed timetable and methodology for consideration of the topic and agreed with the need to study the specific nature of the formation and evidence of customary rules based on traditional approaches to the topic, which stressed the significance of both State practice and *opinio juris*. With regard to the material and subjective elements of customary rules, State practice was of key importance, although in some particular areas of international law, especially international humanitarian law and international outer space law, a long history of stable practice might be less significant. Moreover, practice was not always consistent and easily identified, in part because not all State practice was public. It was appropriate to make a distinction between behaviour of States that was known to the public at large and activity carried out in a non-public manner, such as confidential exchanges in diplomatic correspondence and closed consultations among States.

50. Regarding the practice of international organizations in the formation of customary international law, the most productive approach would be to take account of the activities of the States members of those organizations rather than the practice of the international organizations themselves, which were secondary subjects of international law. Despite the change in the title of the topic, the formation of customary international law warranted particular attention, because it would be difficult to identify customary rules without careful consideration of their formation. Although the issue might not seem to have practical application, that impression was misleading. The concept was also important to State officials, judges, diplomats and others who contributed to the formation and identification of international custom.

51. *Jus cogens* norms should not be dealt with separately from other customary rules, given that they had the status of international custom and were therefore formed and identified in the same way as any other rule of customary international law. However, his delegation agreed that the interrelation between customary international law, general principles of international law, *jus cogens* norms and other sources of international law should be studied as part of a separate topic on the hierarchy of sources of international law.

52. In its future work on the topic, the Commission should study the relationship between customary international law and international treaty law, since they had a clear reciprocal influence. In that context, it would be useful to examine how multilateral treaty rules became customary rules of international law binding even on States not parties to the treaty in question and to identify the quantitative or qualitative criteria for such a transition, the driving forces behind it and its legal nature. The Commission could also analyse the potential for and the consequences of changes to the original treaty rules through international custom. It would be desirable to establish clearly the concept of general international law by considering its relationship to customary international law and international treaty law. In that regard, his delegation believed that general international law encompassed not only rules of customary international law but also the rules of

general multilateral treaties. Lastly, the Commission should study in more detail the specific nature of local and regional customary rules, which were important for regulating relationships among States and for dispute settlement, including as part of legal and arbitration mechanisms at the regional level.

53. On the topic of provisional application of treaties, his delegation welcomed the Commission's intention to clarify the provisions of the Vienna Convention on the Law of Treaties and, if possible, to adapt them to the requirements of contemporary treaty practice without departing from the Convention itself, which had proved its effectiveness and remained a vital source of international treaty law. With regard to terminology, the wording of article 25 of the Vienna Convention was appropriate, as it reflected the legal nature of provisional application as a subsidiary and optional element of the treaty. As indicated by the Special Rapporteur, a State's provisional application of a treaty terminated naturally with the treaty's entry into force for that State. The main motivation for provisional application was the urgent need to give immediate effect to all or some provisions of a treaty. However, its use as a means to modify the provisions of a treaty covertly or to bypass constitutional procedures could negatively affect the legal force of the treaty.

54. In the Commission's future work on the topic, the most productive and practical approach would be to study the international legal consequences of provisional application, more specifically, to elucidate the differences in the international law nature and consequences of provisional application and entry into force; determine the nature of provisional application as a unilateral obligation of a corresponding State or (implicitly) as a bilateral or multilateral obligation, and the extent of the reciprocal obligations of a State announcing provisional application and other contracting States; consider the consequences of unilateral termination of provisional application for the terminating State and for the other contracting States, as well as the applicability of the principle of estoppel and legal expectations; and assess the consequences of invoking domestic law as a condition restricting the provisional application of an international treaty. Clauses in some international treaties, for example, made provisional application contingent on compatibility with States' domestic law, in relation not to the need to comply with constitutional and other procedures in order to conclude an international treaty but to the correlation of provisions of the provisionally applied treaty with the rules of substantive law regulating similar legal matters.

55. Belarus actively resorted to provisional application in its treaty practice, and it implemented provisionally applied international treaties in the same way as treaties already in force. It considered that the breach of any treaty, whether provisionally applied or in force, should carry the same consequences, and expected other States to treat provisionally applied treaties in the same way.

56. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), no real progress had been made because of the lack of a clear understanding regarding the expected outcome of the Commission's and the Committee's work. Draft articles were unlikely to be a suitable outcome, since the obligation to extradite or prosecute already appeared in sufficiently standardized form in many bilateral and multilateral treaties; the formulation of guiding principles and commentaries might be more appropriate. The best approach would be to work in a broader context by ensuring that there was no impunity for certain crimes. Given that most delegations recognized a specific interrelation, whether in the form of complementarity, mutual exclusiveness or full equivalence, between universal jurisdiction and the obligation to extradite or prosecute, it would be advisable to study specific aspects of universal jurisdiction in order to detect possible rules of customary international law.

57. With regard to the topic of the most-favoured-nation clause, the work of the Study Group should contribute to the harmonization of rule-making and application of the law in relation to most-favoured-nation clauses. The results of the Study Group's work to date were important for practice and had also contributed to the harmonization of approaches to interpretation of the clause. Research by the Commission on implementing the most-favoured-nation regime in investment relations complemented the work of other international bodies and organizations, such as the United Nations Conference on Trade and Development and the Organization for Economic Cooperation and Development, on expanding international treaty and arbitration practice. It was to be hoped that the Commission would not merely conduct a comprehensive analysis of existing international practice but would also recommend how to improve the balance between the legitimate interests of both the investor and the host State.

58. The Commission's conclusions on the scope of application of the most-favoured-nation regime based on multilateral investment treaties would be of practical importance, particularly as it related to the limits on and criteria for appropriating provisions of bilateral or regional treaties for protection of third-country investments, national legislation on the promotion of certain kinds of investment activity and investment contracts, and the expansion of the regime to the stages before and after an investment was made in the host State. It would also be useful for the Commission to determine the correlation between the most-favoured-nation regime, national treatment and minimum international standards on the treatment of aliens. The effect of the principle of reciprocity in the context of the most-favoured-nation regime, and possible exceptions and limitations to its application, including for reasons relating to the implementation of sustainable development strategies and policies, should also be carefully studied.

59. The Commission's comprehensive approach to the topic would allow it to look beyond the framework of international investment law. Attention should be paid to the legal content of the similar clauses in headquarters agreements pertaining to international organizations in order to contribute to the progressive development of international law in that area. Lastly, it would be productive, from both theoretical and practical standpoints, to study the application of the most-favoured-nation clause to State procurement, including with regard to General Agreement on Tariffs and Trade and World Trade Organization rules.

60. **Mr. Alimudin** (Indonesia), speaking on the topic of protection of persons in the event of disasters, said his delegation agreed that the core principles of sovereignty, non-intervention and the requirement of the consent of the affected State must be considered in the light of the responsibilities undertaken by States; the Commission should ensure that its work struck a balance between those principles. It should be emphasized that the Government of the affected State was in the best position to determine the severity of a disaster situation, the limits of its national response capacity and whether there was a need to seek external assistance. The actual practice of States must not be undermined. When dealing with major disasters, Indonesia had always promptly chosen to work with the international community. Recognizing the country's vulnerability to disasters, the Government had enacted a law on disaster management which stipulated that providers of external assistance must respect Indonesia's political independence, sovereignty, territorial integrity, laws and national legislation.

61. His delegation questioned whether draft article 12, which set out the right to offer assistance, was necessary. By virtue of its sovereignty, and subject to the consent of the affected State, any non-affected State could provide assistance to an affected State. It was thus unnecessary to establish a right to offer assistance. Nevertheless, his delegation welcomed paragraph (2) of the commentary to draft article 12, which clarified that the draft article did not establish a legal duty to assist and did not create the obligation for the affected state to accept assistance. Those concepts should be viewed in conjunction with paragraphs (1), (5) and (6) of the commentary to draft article 13, which described the right of the affected State to place conditions on the provision of external assistance and the obligation of both the affected State and assisting States to comply with the applicable national laws of the affected State.

62. The final outcome of the Commission's work on the topic of formation and evidence of customary international law would provide national judges, government lawyers and judges and arbitrators at the specialized international courts and tribunals, among other actors, with guidance on identifying and applying the rules of customary international law. The two aspects of the topic, the formation of customary international law, which was a dynamic process, and evidence of customary international law, which had a static character, were nonetheless closely related and should be addressed comprehensively, regardless of the title chosen for the topic. In order to determine whether a rule of customary international law existed, both the requirements for the formation of a rule of customary international law and the type of evidence that established whether those requirements had been fulfilled should be considered. The concept of *jus cogens* should not be considered as part of the topic, although reference could be made to *jus cogens* as work on the topic advanced.

63. Consideration of the topic of provisional application of treaties was important, as it would clarify the legal consequences of provisional application and related legal issues. Article 25 of the 1969 Vienna Convention on the Law of Treaties was the correct basis for developing a set of guidelines on

provisional application. Given the complexity of the topic, some of the issues raised by the Commission had been controversial. It would therefore be beneficial if more research could be done on State practice, judicial decisions and arbitral awards relating to the provisional application of treaties. With respect to the legal effects, it would be essential to consider the relationship between the provisional application of treaties and the requirements under constitutional law for the entry into force of the treaty, as provisional application could lead to a conflict between international law and the constitutional law of contracting States. For reasons of legal certainty, any guidelines on the topic should set out conditions for the provisional application of treaties that would prevent or minimize the potential of such conflict.

64. The Commission should decide on the final form of the topic only after it had made significant progress in its work. Its aim should not be to encourage States to provisionally apply treaties, but rather to provide them with guidance on the issues involved. States ultimately enjoyed the sovereign right to make any decision concerning the provisional application of treaties.

65. With regard to the topic of the protection of the environment in relation to armed conflicts, his delegation welcomed the Special Rapporteur's proposal to approach the topic in temporal phases, which would examine the legal measures taken to protect the environment before, during and after an armed conflict. However, there could not be a strict dividing line between the different temporal phases. His delegation agreed that the topic was more suited to the development of non-binding draft guidelines than to a draft convention.

66. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation welcomed the reconstitution of the open-ended Working Group in order to evaluate progress of work on the topic and to explore possible future options to be taken by the Commission.

67. **Ms. Bolaño Prada** (Cuba), speaking on the topic of protection of persons in the event of disasters, said that the Commission's work to codify the topic with a view to protecting human lives was welcome. Efforts at codification should indeed take account of the crucial importance of disaster prevention in the treatment and protection of the population, especially in the poorest countries. However, any proposed rule of international law must focus on broad issues and respect the spirit of the Charter of the United Nations. Her delegation noted with satisfaction that the draft articles provided for the affected State's consent to the provision of assistance and reiterated that such cooperation should be provided with respect for the principles of sovereignty and self-determination. Under no circumstances should the draft articles give rise to interpretations that violated the principle of non-intervention in the internal affairs of States. Only the affected State could determine whether the magnitude of the disaster exceeded its response capacity and decide whether to request or accept assistance from international organizations or other States.

68. Cuba had had extensive experience with large-scale natural disasters and had a comprehensive response system. Its efforts were guided by the fundamental principle of safeguarding human life and protecting the population. It had cooperated with many countries and offered assistance in natural disaster situations, despite having had to contend for over 50 years with an economic, commercial and financial embargo that had significantly limited its development.

69. On the topic of provisional application of treaties, her delegation emphasized its strict adherence to the provisions of the Vienna Convention on the Law of Treaties. The Special Rapporteur should be cautious in interpreting States' sovereign acts in respect of the signature and entry into force of treaties, as such acts could take place within a political context that might be difficult for third parties to understand.

70. Her delegation welcomed the inclusion of the topic of protection of the environment in relation to armed conflicts in the Commission's programme of work. A study of the effects of all types of weapons on the environment would be useful; her delegation was particularly interested in the effects of the use, development and storage of nuclear weapons. In that regard, the Special Rapporteur on the topic should consider the possibility of developing a regime of responsibility that would address reparation of the harm, reconstruction, responsibility for the illegal act and compensation for the damage caused to the environment.

71. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) was of great importance to the international community. Any regulation of the issue must respect the principles of

self-determination and the sovereignty of States. Application of the obligation to extradite or prosecute must strictly respect the principles enshrined in the Charter of the United Nations, in particular those relating to the sovereign equality and political independence of States and non-interference in their internal affairs. The Commission should focus on establishing the general principles that governed extradition and the grounds for refusing extradition, taking into account article 3 (Mandatory grounds for refusal) of the Model Treaty on Extradition, contained in the annex to General Assembly resolution 45/116.

72. It would also be useful to establish a general framework of extraditable offences, while bearing in mind that each State had the right to identify in its legislation those offences for which extradition would be granted. In that regard, Cuba's position was that the obligation to prosecute arose from the presence of the alleged perpetrator in the territory of a State, while the obligation to extradite only applied when there was a treaty or a declaration of reciprocity between the States involved. The obligation to extradite or prosecute depended not only on practice but also on international law and its relationship to each State's domestic law. When a State refused to grant an extradition request, that State had a duty to bring criminal proceedings, but only in accordance with its domestic law.

73. Both the obligation to extradite or prosecute and the principle of universal jurisdiction had the purpose of combating impunity in respect of certain types of crimes against the international community. However, the Working Group on the topic should consider whether it was pertinent to specify the crimes to which the two principles were applicable, taking into account the negative effects the abuse of those principles could have on State sovereignty.

74. The Commission's work on the topic of the most-favoured-nation clause was particularly important with respect to investment protection treaties. In that regard, the Vienna Convention on the Law of Treaties should serve as the point of departure for study of the principles applicable to international agreements of any kind. It was worrying that the most-favoured-nation clause could be used by an investor to claim rights that had not been provided for in the agreement with its State of nationality and indeed had often been expressly excluded during the negotiation of the agreement. Such questionable use of the criteria contained in other legal instruments or rules unrelated to the treaty in question was blatantly contrary to the principles of treaty interpretation and application as established by the Vienna Convention. Her delegation noted with concern that arbitral tribunals, in seeking to assert their competence to hear cases, were improperly expanding the scope of investment protection agreements on the basis of such principles as the most-favoured-nation clause. A broad interpretation of such clauses affected the balance of the investment protection agreements and impinged upon the sovereignty of the host State in respect of policymaking. The terms of the treaty, in which the most-favoured-nation provisions should be expressly spelled out, particularly with regard to the settlement of disputes, must be respected, without broad interpretation.

75. **Ms. Topf-Mazeh** (Israel), speaking on the topic of protection of persons in the event of disasters, said that Israel attached great importance to prevention as a key element of a comprehensive and effective response to the threat of disasters. In 2008, her Government had established the National Emergency Authority, which coordinated and provided guidance to government agencies and local authorities in the area of disaster management and raised public awareness of the need for risk prevention, mitigation of harm and preparedness. The Government also conducted national disaster exercises, often with the participation of international bodies. In addition, through its Emergency International Force, Israel had participated in education and capacity-building initiatives in other countries, mainly to support sustainable health and education infrastructure, before, during and after disasters. It remained committed to international cooperation and would continue to offer assistance when possible and as needed.

76. With respect to the Commission's work, her delegation reiterated its view that the topic should not be considered in terms of rights and duties; instead, the Commission should aim to provide guidance on international voluntary cooperation efforts. Furthermore, the duty of States to cooperate should be understood in the context of the affected State's primary responsibility for the protection of persons in the event of disasters. That position should be reflected in the draft articles.

77. With regard to the topic of formation and evidence of customary international law, any analysis by the Special Rapporteur of the role of international organizations with respect to the identification or formation of rules of customary international law should

be considered with great caution. In order to avoid possible political bias and institutional fragmentation, the role of non-State actors in the identification or formation of customary rules should be extremely limited. Resolutions, reports and statements issued by multilateral organizations, in particular by United Nations agencies and bodies, were not solely motivated by legal contemplation and often reflected political imbalances, selective considerations and pressures of a temporary nature. Such instances of so-called "soft law" should therefore not be considered as establishing any legal obligations in respect of a particular practice, or serve as evidence of such. In that regard, her delegation questioned the appropriateness of observations 13 and 14 in the memorandum by the Secretariat on the topic (A/CN.4/659) and remained wary of any possible future reliance by the Special Rapporteur on the London Statement of Principles of the International Law Association.

78. Israel strongly supported a research methodology that placed an emphasis on States as the sole developers of international rules of a customary nature. The identification of such rules should thus rely on a comprehensive review of the actual practice of States, coupled with *opinio juris*. The jurisprudence of international courts should be relied upon as a subsidiary means of identification only when it included such a comprehensive review. In its work on the topic, the Commission should not give any weight to political statements, general reactions or mere omissions by States.

79. It would also be important to adopt a careful and responsible approach to analysis of the issue of special or regional customary international law and to the question of whether different rules were needed for the formation and evidence of customary international law in different fields, such as international human rights law, international humanitarian law and international criminal law. In an already fragmented international legal system, further diversification of the rules for the formation and evidence of custom based on a specific region or legal field would only increase inconsistency and uncertainty. Any divergence from the broadly accepted approach to identifying the formation of customary law, which was based on the two components enshrined in article 38 of the Statute of the International Court of Justice and applied in the vast jurisprudence of international and national tribunals and courts, would be counterproductive. Any leaning towards what the Special Rapporteur identified as "modern" scholarly approaches, would undermine the authoritative force of custom as a source of international law and could potentially unravel the fragile structures of the existing international legal system.

80. Her delegation supported the Special Rapporteur's decision not to deal with the issue of rules of *jus cogens* for pragmatic reasons, as such rules presented their own set of unique problems that fell outside the scope of the topic. It also welcomed the Special Rapporteur's clarification that not all international acts bore legal significance; State acts undertaken on *ex gratia* basis, such as acts of comity, courtesy and tradition, should not be viewed as necessarily establishing either State practice or *opinio juris*. With regards to the outcome of the Commission's work, her delegation agreed that the aim should be to develop a set of conclusions and commentaries which would serve as a general interpretive guide for international and domestic courts and practitioners.

81. Her delegation welcomed the inclusion of the topic of provisional application of treaties in the Commission's long-term programme of work. While Israel provided for the possibility of the provisional application of treaties, such application was done only under exceptional circumstances. For example, provisional application could be relevant in situations of urgency, when exceptional flexibility was needed, when a treaty was of great political significance or when it was important not to await completion of States' lengthy process to ensure compliance with their constitutional requirements for the approval of a treaty.

82. With respect to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), legal developments over the past year had proved once again that the Commission was dealing not with a theoretical subject but with a practical legal tool in the international fight against impunity. The obligation to extradite or prosecute was entirely treaty-based; current international law and State practice did not provide sufficient grounds for extending such an obligation beyond binding international treaties that explicitly contained such an obligation. When drafting treaties, States could and should decide for themselves which conventional formula on the obligation to extradite or prosecute best suited their objective in a particular circumstance, and it would be futile for the Commission to attempt to create one model for all situations and treaties. While her delegation appreciated the Working Group's study of the

judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, it doubted whether broad and far-reaching implications could be derived from the specific circumstances presented in the judgment.

83. With regard to the topic of the most-favoured-nation clause, the comprehensive research undertaken by the Study Group highlighted the complexities of the clause in relation to bilateral investment agreements. The question of the scope of the most-favoured-nation clause with respect to dispute settlement mechanisms contained in bilateral investment agreements and investment chapters in trade agreements was of particular interest, as was the method of application of the *ejusdem generis* principle by investment arbitration tribunals. The principle of consent between the parties negotiating such agreements was important in determining the scope and coverage of most-favoured-nation clauses and the exclusion of certain provisions. Her delegation looked forward to the continuing work of the Study Group, including its analysis of the jurisprudence relating to the most-favoured-nation clause in relation to trade in services and investment agreements.

84. **Mr. Mangisi** (Tonga), speaking on the topic of protection of persons in the event of disasters, said that his delegation welcomed the inclusion of draft articles 5 ter and 16, which recognized the duty incumbent upon States to reduce the risk of disasters. The focus on prevention was particularly important in the Pacific region, where rising sea levels and increasingly frequent and intense tropical storms were having profound adverse impacts. Tonga, like other Pacific small island developing States, was highly susceptible to the increased risk of disaster as a result of climate change. It had been the first country in the region to develop a Joint National Action Plan on Climate Change Adaptation and Disaster Risk Management and was a leader in the development and implementation of a regional approach to disaster risk assessment and mitigation.

85. However, responsibility for mitigating the risk of disasters resulting from climate change could not be borne solely by the most affected developing countries but must also be assumed by the international community, in particular the developed countries. Draft article 5 ter confirmed that States' duty to cooperate, as set out in draft article 5, encompassed measures intended to reduce the risk of disasters. In that regard, the risk of disaster associated with climate change compelled States to cooperate; they were in fact obliged to do so under international law, including by reducing global emissions of greenhouse gases. It was incumbent upon both developed and developing States to cooperate with each other to ensure that measures to reduce the effects of climate change, which were devastating small island developing States, were taken as a matter of priority.

86. Draft article 16, paragraph 1, set out the duty of States to reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters. In its commentary to the draft article, the Commission stated that that duty was based on the principle of due diligence and States' obligation to actively protect human rights. Given that the principle of due diligence also applied to State conduct, including inaction, that had an impact on the risk of disasters in other States, it could be concluded that, under draft article 16 as well, States were obliged to take measures to reduce greenhouse gas emissions and support other climate change mitigation and adaptation measures that would reduce the risk of disaster. In that regard, the commentary to article 16 should clarify that States' duty to prevent disasters included a duty to take necessary and appropriate measures to ensure that their actions did not increase the risk of disaster in other States.

87. His delegation believed that the duty to cooperate set out in draft article 5 included the positive duty of States to provide assistance when requested by the affected State, taking into account the capacity of each State to provide such assistance. In the context of climate change, the nature of that positive duty to provide assistance should reflect States' legal and moral responsibility for the harm caused as a result of the rapid pace of human development over the past two centuries.

88. **Mr. Sinhaseni** (Thailand), speaking on the topic of protection of persons in the event of disasters, said that draft article 5 ter (Cooperation for disaster risk reduction) must be construed in the light of, among others, draft article 11 (Consent of the affected State to external assistance) and draft article 13 (Conditions on the provision of external assistance). Together, those draft articles correctly recognized the right of the affected State to reject offers of assistance if it deemed that the offering State or entity harboured an ulterior

motive that could prejudice its sovereignty or a crucial national interest.

89. With regard to the topic of formation and evidence of customary international law, Thailand took a dualist approach to international law and incorporated the provisions of international treaties into its domestic legislation in order to fulfil its obligations under those treaties. On rare occasions, Thai courts referred to well-established rules of customary international law to settle disputes. The outcome of the Commission's work on the topic would provide valuable guidance to judges and lawyers on how to identify the rules of customary international law. In an era in which there were nearly 200 sovereign States, it would appear that treaties had become the main source of international legal obligations incumbent upon States and that it had become relatively difficult to prove *opinio juris* and establish the existence of a rule of customary international law. The Commission's views on those issues would be appreciated.

90. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), an indispensable tool for combating impunity, there were gaps in the existing conventional regime governing the obligation that might need to be closed, particularly in relation to crimes against humanity and war crimes that did not fall with the scope of the grave breaches set out in the four Geneva Conventions of 1949 and Additional Protocol I. Moreover, in relation to genocide, as stipulated by the International Court of Justice in its judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention obligated contracting parties to exercise criminal jurisdiction or to cooperate with an international penal tribunal only under certain circumstances. In that regard, his delegation agreed with those delegations that had encouraged the Commission to develop a model set of provisions on the obligation to extradite or prosecute in order to close such gaps. It also highly commended the joint initiative of Argentina, Belgium, the Netherlands and Slovenia aimed at the adoption of a new international instrument on mutual legal assistance and extradition for the investigation and prosecution of all the major international crimes, including crimes against humanity. The Commission's work on the topic would support that endeavour.

91. With regard to the need to establish the necessary jurisdiction to implement the obligation to prosecute or extradite, there was a possible overlap between that obligation and universal jurisdiction in cases when a crime was committed abroad with no nexus to the forum State. The Commission should study State practice in applying the principle of universal jurisdiction, which could be relevant to its work on the topic. Lastly, the link between the obligation to extradite or prosecute and the mechanisms put in place by international jurisdictions should be given particular attention.

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

93. **Ms. Benešová** (Czech Republic), speaking on the topic of formation and evidence of customary international law, said that her delegation agreed with the general scope of the topic set out by the Special Rapporteur. Even if the title of the topic was changed to "Identification of customary international law", the proposed work of the Commission should remain focused on both the process of formation of the customary rules and the material evidence of their existence. The two aspects were interlinked and served as an essential means for tracing the emergence of customary norms.

94. Her delegation also supported the "two-element" approach, which recognized the need for both State practice and *opinio juris* in the formation of international custom, although the balance between them might vary. There was a temporal aspect to their relationship, and one element could potentially be more relevant than the other. The examination of such key issues as whether *opinio juris* could anticipate State practice, the effects of time and repetition on the consolidation of a customary norm and the concept of "instant" customary law would help to clarify some basic features of international custom. However, the Commission should take into account the flexibility of customary law and avoid taking an overly prescriptive approach to the topic. The outcome of the Commission's work should be practical in nature.

95. With regard to the topic of protection of the environment in relation to armed conflicts, her delegation agreed with the Special Rapporteur that the issue was relevant to contemporary international law and supported her proposed methodology, which would approach the topic from a temporal perspective. Draft articles would be an appropriate outcome.

96. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), some of the conclusions in the report of the Working Group (A/68/10, annex A) were problematic. In particular, paragraph 28 did not adequately reflect the position of States as set out in draft article l3 of the draft articles on the expulsion of aliens adopted by the Commission on first reading (A/67/10, chap. IV). Since no substantial progress had been made since 2005, the Commission should not continue its work on the topic but should instead focus its efforts on other issues on its agenda. Those views notwithstanding, her delegation attached great importance to the inclusion and implementation of treaty clauses on the obligation to extradite or prosecute in relevant international law instruments and stood ready to work on the issue in the relevant forums.

97. **Mr. Van Den Bogaard** (Netherlands), speaking on the topic of protection of persons in the event of disasters, said that his delegation, like some Commission members, had concerns regarding the contents of chapter II, section B, of the Special Rapporteur's sixth report (A/CN.4/662), which discussed prevention as a principle of international law. The principle of prevention should not be applied too broadly, or in relation to all types of disaster. Moreover, while the reference to environmental law might be useful, it should be recalled that the duty to prevent harm in environmental law applied in relation to transboundary harm.

98. With regard to draft article 5 *ter*, which extended the general duty to cooperate to the pre-disaster phase, his delegation supported the intention to merge the article into draft article 5 or 5 bis, which would avoid giving too much prominence to the pre-disaster phase. The Commission should focus on the phase of the actual disaster, in line with the title of the topic. The adjustments made to draft article 16 had improved the text, which now better reflected the views of his delegation. The new wording clarified that the duty to reduce the risk of disasters applied to each State individually, which implied that measures should be taken primarily at the domestic level. His delegation recalled and supported the Special Rapporteur's earlier proposal to study the protection of humanitarian assistance personnel, which was an issue of concern.

99. With regard to the topic of formation and evidence of customary international law, the change of the title to "Identification of customary international law" more appropriately described the Commission's focus on improving transparency regarding the process by which customary law was established and developed. The Commission's work would be of great relevance to national judges who at times might need to apply customary law. In many jurisdictions operating within the continental legal tradition, customary law was frowned upon or regarded with suspicion. In that tradition, the law must be codified in writing and references to international law in the form of customary law were frequently misunderstood. The process by which international customary law was created was often so unfamiliar to the domestic judge that its application, even when relevant to a particular case, was frequently unsuccessful. An authoritative view on the identification of customary law would therefore be helpful for the application of customary law in domestic jurisdictions.

100. A better understanding of the formation of customary law was also needed. In that respect, the Commission should reflect on the need for publication and transparency in respect of the different elements that made up customary law. While State practice could be observed by the trained eye, there was no specific legal obligation for States to clarify or even publish their *opinio juris*. Indeed, States might not wish to disclose their *opinio juris* when they were not required to do so. Furthermore, while *opinio juris* could be deduced from official publications or statements by ministers and high-level officials, those documents were not always available or accessible and might not cover all of the detailed rules of customary law. The fact that *opinio juris* was at times treated as a confidential matter by States would create difficulties in identifying customary law. His delegation looked forward to hearing the Special Rapporteur's views on that issue.

101. His delegation agreed with the majority of Commission members that the concept of *jus cogens* should not be included in the work on customary law. *Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law. Determining the way in which a rule obtained the status of a peremptory norm from which no derogation was permitted was clearly a distinct undertaking from that of identifying the rules of customary law.

102. While his delegation recognized that references to the law of treaties were relevant to research on the identification of customary law, it questioned the reference to general principles of international law in the

discussion of the topic. Given that general principles were understood to be secondary sources of international law, their relevance to the identification of customary law was not immediately obvious. His delegation would appreciate clarification of that approach.

103. Concerning the topic of provisional application of treaties, his delegation doubted whether the issues identified in paragraph 53 of the Special Rapporteur's first report (A/CN.4/664) were indeed those in need of further clarification. Although the provisional application of treaties was an instrument of practical relevance, it was not the task of the Commission to encourage greater use of it, but rather to elucidate the concept. The Commission should not aim to change the terms of the Vienna Convention on the Law of Treaties, but should, as proposed, thoroughly analyse State practice in the light of article 25 of the Convention. Such an analysis would also be relevant to determining the status of article 25 under customary international law, which was another question the Special Rapporteur should reflect upon. The Commission should also look into the ways in which States could express their consent to the provisional application of a treaty and how provisional application was terminated.

104. The Special Rapporteur noted that article 25 of the Vienna Convention was based on the scenario of provisional application while the treaty was not yet in force and that, consequently, provisional application might end with the entry into force of the instrument. Yet in such cases provisional application might still continue for those States that had not yet ratified the treaty. The Commission would need to look into the different legal issues arising from that situation. Similarly, article 25 provided that provisional application ended when a State notified other States of its intention not to become a party. The Commission should examine the legal significance of that notification, as it would not prevent a State from becoming a party to the treaty at a later stage.

105. The Commission should also consider the legal effects of the provisional application of treaties in relation to the principle *pacta sunt servanda* laid down in article 26 of the Vienna Convention. In that respect, it would need to consider several different scenarios, including situations in which the provisional application of treaty regimes, such as those requiring an institutional framework or a secretariat, would only become fully effective after the treaty entered into force. More generally, the Commission might find it necessary to clarify the effect of other provisions of the Vienna Convention on the provisional application of treaties, taking into account reservations, and to distinguish the concept of provisional application from the obligation not to defeat the object and purpose of a treaty prior to its entry into force, pursuant to article 18 of the Convention.

106. A study of the provisional application of treaties should not ignore the importance of domestic law, for it was a State's domestic legal system that determined whether provisional application was an option. Such internal processes therefore determined to a great extent the scope and usefulness of provisional application as an instrument of treaty practice. While it was clear that the Commission should clarify that relationship, its work in that area should not go beyond taking stock of State law and practice.

107. As the Commission had just begun to explore the topic, it was too early to discuss a preferred outcome. The study should give practical guidance to States on the use of the instrument of provisional application and inform them of the legal consequences thereof, without imposing a particular course of action that might prejudice the flexibility of the instrument.

108. **Ms. Lee** (Singapore), speaking on the topic of protection of persons in the event of disasters, said that, as her delegation understood it, the list of forms of cooperation included in draft article 5 bis was merely illustrative and was not intended to create additional legal obligations. Beyond the duty to cooperate set out in draft article 5, draft article 5 bis did not create an additional duty for the affected State to request the forms of cooperation described in the list, nor did it establish an additional duty for other States to offer them.

109. Draft article 13 (Conditions on the provision of external assistance) required affected States to indicate the scope and type of assistance sought when formulating conditions on the provision of assistance. Her delegation found that requirement to be ambiguous and would appreciate clarification from the Commission. While her delegation had expressed doubts about expressing offers of assistance as a "right" of States and other actors — as had been done in draft article 12 — rather than focusing on the duty of the affected State receiving such offers, it recognized that it was possible for an affected State to receive unsolicited

offers of assistance. In such situations, it was unclear whether an affected State could specify conditions on the provision of assistance without having to indicate the scope and type of assistance sought. While draft article 10 imposed a duty on affected States to seek assistance in cases when a disaster exceeded its national response capacity, it remained unclear whether, in situations where a disaster was well within the national response capacity of the affected State and unsolicited offers of assistance were received, the affected State would be able to specify conditions on the provision assistance without having to indicate that it was seeking assistance and describe the scope and type of assistance it sought.

110. With regard to draft article 15 (Termination of external assistance), her delegation would appreciate clarification concerning the extent of the requirement of the affected State and assisting actors to consult. Although the Commission indicated that it was not always feasible to terminate assistance on a mutual basis, even in that situation there was a requirement to consult on the modalities of termination. If agreement was the intended outcome of such consultations, but no agreement on the modalities of termination was reached after consultations, could an assisting State that had, for example, depleted its assistance resources proceed with termination?

111. On the topic of formation and evidence of customary international law, her delegation favoured a common, unified approach to the identification of customary international law. It also agreed with the Special Rapporteur on the need to ensure that the flexibility of the customary process was preserved and welcomed the intention not to consider the substance of customary international law or expound on purely theoretical matters.

112. Her delegation urged caution when examining the role played by non-State actors, such as the United Nations and the International Committee of the Red Cross (ICRC), in the formation of customary international law. as there was wide variation in the membership, organizational structures and mandates of international organizations, as well as in the composition of their decision-making organs and processes. Those variations had a bearing on the determination of what role, if any, such actors played in the formation of customary international law, in particular, on the weight to be accorded to their actions.

113. On the topic of provisional application of treaties, the Commission's aim should not be to persuade States to utilize the mechanism of provisional application, but rather to develop a practical guide for States on how to utilize it and what its legal effects would be. That would enable States to better understand the concept of provisional application and to utilize it in appropriate circumstances.

114. On the topic of protection of the environment in relation to armed conflicts, her delegation agreed with the Special Rapporteur that the study should not delve into the possible effects of particular types of weapons on the environment. It also agreed that non-binding draft guidelines would be an appropriate outcome on the topic, as there were existing legal regimes on the matter and the work of the Commission should not undermine those regimes.

115. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the report of the Working Group on the obligation to extradite or prosecute (A/68/10, annex A) provided a useful analysis of the judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. However, it was not clear how the Commission intended to proceed with the topic, particularly in the light of the suggestions made by some Commission members during its sixty-fourth session concerning the possibility of suspending or terminating consideration of the topic. In that regard, her delegation would study closely the suggestions to be submitted by the Working Group on the way forward.

116. On the topic of the most-favoured-nation clause, it would be useful to examine the issue as it related to trade in services as well as its relationship with fair and equitable treatment and national treatment standards. Her delegation noted that the Study Group had considered the possibility of developing guidelines and model clauses and shared the view that that approach presented a risk of being overly prescriptive, as it could limit States' options as they pursued economic cooperation.

117. **Mr. Redmond** (Ireland), speaking on the topic of protection of persons in the event of disasters, said that the detailed and extensive treatment given to risk reduction during the pre-disaster phase in the Special Rapporteur's sixth report (A/CN.4/662) and the informative overview of existing provisions in global,

regional and bilateral instruments and in national policy and legislation were very helpful. His delegation supported draft articles 5 ter and 16 and the commentaries thereto and welcomed the commentaries to draft articles 5 bis and 12 to 15. In particular, it took note of the statement that "offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State's internal affairs", contained in paragraph (3) of the commentary to draft article 12 (Offers of assistance), and the focus on the role played by non-governmental organizations contained in paragraph (5) of that commentary.

118. Given the importance of needs assessment, his delegation welcomed paragraph (8) of the commentary to draft article 13 (Conditions on the provision of external assistance), which explained that the term "identified" indicated that there must be some process by which the needs of affected persons were made known. Paragraph (5) of the commentary to draft article 15 (Termination of external assistance), was also welcome, as it explained that that article should be read in the light of the purpose of the draft articles, as indicated in draft article 2, such that decisions on termination of assistance were "to be made taking into consideration the needs of the persons affected by disaster, namely, whether and how far such needs have been met". His delegation also approved of the commentary to draft article 14, which provided further detail on the possible forms of external assistance.

119. For the topic of formation and evidence of customary international law, a suitable outcome should be practical and provide useful guidance not only to practitioners at the international level, but also to those acting in the domestic sphere. The approach taken by the Special Rapporteur in his first report was encouraging, as was his decision to leave aside the issue of *jus cogens* at the current stage. With regard to future work on the topic, his delegation was interested in the proposal to examine the relationship between customary international law and general principles of international law as well as the question of whether there should a unified approach to the identification of customary international law or a plurality of approaches depending on the field of international law at issue. The emphasis the Special Rapporteur intended to place on terminological clarity would greatly contribute to work on the topic. His delegation welcomed the breadth of the range of materials that would be consulted, including earlier work by the International Law Association, the Institute of International Law and the International Committee of the Red Cross.

120. On the topic of provisional application of treaties, the Commission should consider the relationship between article 25 and other provisions of the Vienna Convention, the extent to which provisional application might apply to provisions of a treaty that created institutional mechanisms, and the question of whether the rules in article 25 were applicable as rules of customary international law in cases where the Vienna Convention did not apply. There was merit in the consideration of provisional application of treaties by international organizations, as envisaged in article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

121. Lastly, his delegation welcomed the inclusion of the topic of protection of the environment in relation to armed conflicts in the Commission's programme of work and endorsed the proposal to divide the work into temporal phases which would address the legal measures taken to protect the environment before, during and after an armed conflict.

The meeting rose at 1 p.m.