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Chair: Mr. Manongi . . . . . (United Republic of Tanzania)

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14-64069 (E)

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

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

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

2. **Ms. Pierce** (New Zealand), speaking on the topic of protection of the environment in relation to armed conflict, said that her delegation strongly condemned the use of nuclear, chemical and biological weapons; careful consideration of their environmental impacts was integral to managing the risk of lasting damage to the natural environment and those living in it. The New Zealand Military Manual of 1992 provided that care should be taken in warfare to protect the natural environment against widespread, long-term and severe damage and prohibited the use of methods or means of warfare intended or expected to cause such damage. The revised manual on the law of armed conflict currently being prepared would take into account the relationship between the protection of the environment and armed conflict. When finalized, its provisions would constitute orders issued by the Chief of Defence Force pursuant to the Defence Act of 1990.

3. The Special Rapporteur's temporal, three-phase approach to the topic would be useful for isolating complex legal issues. However, it might not be possible to adhere to it strictly, as many of the issues were relevant to more than one phase of conflict. It was important, in any event, not to duplicate the existing international rules on the law of armed conflict.

4. Her delegation encouraged the use of a broad working definition of the term "armed conflict" in order to ensure that harm to the environment was included irrespective of the parties to the armed conflict or the location of the damage. It was important not to limit the consideration of the topic at the early stages; in that connection, her delegation supported the current working definition of the term "environment" contained in the report. That definition would allow the Committee to express its support for a broad definition of "environment" in the future, with the aim of preventing overlap with other areas of international humanitarian law. In further reports, the Special Rapporteur should address the need to minimize environmental degradation during armed conflict and consider reparation and compensation by those responsible, for which principle 13 of the Rio Declaration on Environment and Development might prove useful.

5. On the topic of provisional application of treaties, it was particularly important to adhere to the Commission's stated objective of providing greater clarity for States when negotiating and implementing provisional application clauses. It was not appropriate for the Commission to seek to promote the provisional application of treaties in general. While provisional application might be a legitimate tool, its use must be coupled with an appreciation of the constitutional challenges that it presented for many States.

6. The legal effect of provisional application was equivalent to that of treaties. In that respect, her delegation agreed with the Special Rapporteur that provisional application, if not implemented domestically, might give rise to an inconsistency between a State's international obligations and its domestic law. The use of provisional application to circumvent domestic constitutional processes was also a significant concern. Her delegation did not necessarily expect a full study of the domestic procedures allowing for provisional application of treaties. It appreciated the challenges such a study would present, given the lack of a common framework for such procedures, but considered that the Commission needed to take into account the significance of domestic procedures for the acceptance of international obligations and their implementation.

7. Her delegation would welcome further consideration of the topic of the Most-Favoured-Nation clause in relation to trade in services and investment agreements; its relationship to the core investment disciplines; and the relationship between Most-Favoured-Nation clauses, fair and equitable treatment, and national treatment standards. It supported the Study Group's proposal to produce a revised draft final report for consideration at the Commission's sixty-seventh session and looked forward to the recommendations in the draft final report following analysis of the case law. In the light of the ever-evolving nature of international investment jurisprudence, the Commission's work was a timely and valuable contribution. The resulting guidelines would be helpful to States in interpreting Most-

Favoured-Nation clauses and might also provide assistance to investment tribunals and prevent discrepancies between the decisions of various bodies on the interpretation of Most-Favoured-Nation obligations in bilateral investment treaties.

8. **Mr. Khoubkar** (Islamic Republic of Iran), noting that the topic of identification of customary international law dealt solely with the methodological question of such identification and did not intend to establish a hierarchy of sources of international law or codify rules for the formation of international law, said that his delegation supported the so-called "two-element approach" involving general practice and *opinio juris*, which avoided the fragmentation of international law.

9. It was primarily the practice of States that contributed to the creation of customary international law, whereas the practice of international organizations could help in identifying customary international law to the extent that it reflected the practice of States. As had been noted by the International Court of Justice, resolutions of the General Assembly could under certain circumstances provide evidence for the existence of a rule or the emergence of an *opinio juris*: it was necessary to examine the content and the circumstances of the adoption of the relevant resolution.

10. The conduct of non-governmental organizations and individuals did not qualify as practice for the purpose of formation or evidence of customary international law. Nevertheless, they could play an important role through their actions in the promotion and the observance of international law. As for the burden of proof, the State claiming or denying a given rule of customary international law should bear that responsibility. Lastly, further elaboration was needed with regard to the assertion that *opinio juris* was not synonymous with the "consent" or the desire of States, but rather meant the belief that a given practice was followed because a right was being exercised or an obligation was being complied with in accordance with international law.

11. Under the topic of protection of the environment in relation to armed conflict, further study of the environmental obligations in armed conflict might be warranted, not least because it would provide an opportunity to fill existing gaps in international humanitarian law concerning the protection of environment. An example of such a gap was the illustrative but not exhaustive list of vital infrastructure that must not be made the object of attack under article 56 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). In fact, the failure to mention oil platforms and other oil production and storage facilities was contrary to the intent of the drafters of the Protocol to protect the environment. Since the adoption of Protocol I, attacks on such structures with consequent environmental damage for which there was no legal remedy had revealed the gap in the law.

12. The provision in article 56, paragraph 2 (b), of the Protocol allowing for the cessation of the special protection against attack accorded to nuclear electrical generating stations had been repeatedly described as inappropriate in view of the dangerous nature of nuclear installations. Advances had been made since to achieve full prohibition of such attacks, including the adoption of United Nations General Assembly resolutions 40/6 and 45/58, as well as resolutions GC(29)/RES/444 and GC(31)/RES/475 of the General Conference of the International Atomic Energy Agency. The debate on the issue since the 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its evolution into a serious proposal — included in the final document of the 2010 Review Conference — to adopt a legally binding instrument to prohibit any military attacks on nuclear facilities dedicated to peaceful purposes suggested that the lifting of special protections as provided for in article 56, paragraph 2 (b), should be described as outdated.

13. The suggestion that the Commission should define the term "armed conflict" in order to facilitate consideration of the topic was acceptable if the definition was confined to the term "international armed conflict" and was considered merely a working definition. Expanding the scope of the definition of armed conflict to include non-international armed conflict would be problematic. The Commission would need to consider the legal obligations of non-State actors, on the basis of a definition already fraught with ambiguities and disagreements; such an endeavour would also entail further attempts to determine the threshold of non-international armed conflicts. In either case, the relevant provisions of the international law of armed conflict would need to be changed, which

was far from the purpose of the work in question. The inclusion of refugee matters, on the other hand, was clearly relevant. One of the immediate consequences of large-scale war was the displacement of persons, which could result in the mass influx of refugees. Provision for settlement in the event of a surge of refugees necessarily involved issues relating to the protection of the environment.

14. **Mr. Townley** (United States of America), speaking on the topic of identification of customary international law, said that his delegation welcomed the two-element approach and hoped that the commentary to be developed would underscore the importance of identifying actual practice — as distinct from statements about practice — and the fact that the two-element approach applied across all fields, as in the Special Rapporteur's report second report (A/CN.4/672).

15. In draft conclusion 4 [5] (Requirement of practice) as provisionally adopted by the Drafting Committee, it was important that the word "primarily" should not be interpreted as implying that the practice of non-State actors, including non-governmental organizations, corporations, and even natural persons, might be of relevance to a customary law analysis. To include such actors would be misguided and unsustainable under any fair reading of customary international law. If, on the other hand, the intent was to indicate that, in addition to the practice of States, the practice of international organizations could in some circumstances contribute to the formation of custom, it should be stated more clearly. The Drafting Committee might consider redrafting paragraph 1 of draft conclusion 4 [5] to read: "The practice of States may constitute a general practice that, as one element, contributes to the formation, or expression, of rules of customary international law." Such a formulation properly emphasized the centrality of States in the formation of that source law, without creating confusion as to the relevance of other actors. In addition, the treatment of international organizations together with States in draft conclusion 4 [5] might be taken to suggest that those actors played the same roles as States in the formation of custom, obscuring, in particular, significant limitations on the role of international organizations in that regard. Paragraph 2 of the draft conclusion could be rephrased to provide that in addition to State practice, the practice of international organizations might contribute — in some defined circumstances — to the formation of customary international law, perhaps with a cross-reference to a later draft conclusion that addressed the issue in greater detail.

16. Although the decision had been taken not to address the issue of "specially affected States" at the current stage, the role of the practice of such States in the identification of customary international law should be recognized and addressed in the final product, so as to reflect accurately the well-established jurisprudence on that subject. For similar reasons, his delegation welcomed the Special Rapporteur's indication that he intended to cover the issue of "persistent objectors" in his third report and looked forward to that subject's inclusion in the draft conclusions.

17. His delegation agreed that practice might take a wide range of forms, including physical acts, verbal acts and, in some circumstances, inaction. However, draft conclusion 6 [7] (Forms of practice) as provisionally adopted by the Drafting Committee could be further strengthened by clarifying that whether any of the listed acts constituted State practice would depend on the rule at issue and the context of a given case.

18. Generally speaking, the decision as to the form of the outcome of the current exercise should be taken only at the end of the process. If the final product was to be draft conclusions and commentary, the draft conclusions themselves must be drafted clearly and comprehensively in such a way that they accurately reflected the relevant rule. Leaving important qualifications to the commentary meant that they might be far less accessible to practitioners and decision-makers. The Drafting Committee's draft conclusion 8 [9] was a useful illustration in that regard: it was possible to interpret the phrase "sufficiently widespread and representative" as meaning that the practice of just a few States from different regions of the world was "sufficient". So important a question as the extent of practice required for the formation of a customary rule should be addressed in the body of the draft conclusion and not simply left to the commentary. Moreover, consideration should be given to incorporating the standard articulated by the International Court of Justice in the *North Sea Continental Shelf* cases of "extensive and virtually uniform" practice, which provided greater guidance regarding the international law requirement.

19. Furthermore, most interaction among States — even when it produced similar patterns of conduct — did not result in practice of sufficient density and extent, or of appropriate character, to give rise to rules of customary international law. Only when the strict requirements for extensive and virtually uniform State practice, including that of any specially affected States, in conjunction with *opinio juris* were met was customary international law formed. Therefore, the creation of customary international law should not be inferred lightly. Satisfying such requirements, and recognizing the "persistent objector" rule, were critical to give effect to a basic principle of international law, namely that States generally could not be bound to legal obligations without their consent. In that connection, the Commission's work on the topic would benefit from further analysis of the cases in which a customary rule was found not to have developed owing to the absence of the requisite practice or *opinio juris*, to help better illustrate the relatively high threshold required to establish that a rule of customary law had been formed.

20. On the topic of provisional application of treaties, his delegation supported the Special Rapporteur's decision not to propose draft conclusions or guidelines at the current stage, as a number of issues required additional study by Member States and by the Commission. The well-established meaning of "provisional application" was that States agreed to apply a treaty, or certain provisions of it, as legally binding prior to the treaty's entry into force, with the distinction being that those obligations could be more easily terminated. Therefore, his delegation was pleased with the repeated recognition in the Special Rapporteur's second report that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects that went beyond the obligation not to defeat the object and purpose of a treaty. Whatever the final form of the Commission's work on the topic, it should be consistent with article 25 of the Vienna Convention on the Law of Treaties. Therefore, the Special Rapporteur's suggestion that a party seeking to terminate provisional application of a treaty might not do so arbitrarily and must explain its decision should be clarified, as article 25 did not include those requirements.

21. His delegation disagreed with the suggestion that international law rules regarding the unilateral acts of States, and the Commission's work on the subject, had general relevance to the topic of provisional application of treaties. While States might, in some limited cases, unilaterally undertake to apply a treaty provisionally, it was not the appropriate framework for analysing the vast majority of cases of provisional application. In most cases, provisional application created a treaty-based regime between two or more States, not obligations for just one State.

22. On a related point, it was not correct to consider that the form in which the intention to apply a treaty provisionally was expressed would have a direct impact on the scope of the rights and obligations assumed by the State in question. The form in which the State's intention was expressed did not have such an impact, any more than did the form in which a State ratified or acceded to a treaty. Rather, it was the text of the treaty allowing for provisional application, or any other text associated with a State's acceptance of provisional application, that determined those rights and obligations. The sole exception might be the unusual circumstance in which the provisional application was the result of a unilateral act. In that case, however, it was not the State's obligations, but the rights it had vis-à-vis other States, that would be altered.

23. It was also doubtful that the intention to apply a treaty provisionally could be communicated tacitly. The practice cited in relation to that assertion did not involve tacit acceptance of provisional application, but rather involved a treaty in which States expressly agreed that its provisions would be applied provisionally as of a specified date, but which allowed States to opt out of that provisional application obligation by written notification to the depositary. Generally speaking, the same requirements that applied to a State's consent to a treaty, including those reflected in article 11 of the Vienna Convention on the Law of Treaties, also applied to its consent to apply a treaty provisionally.

24. On the topic of protection of the environment in relation to armed conflicts, his delegation was concerned about the Special Rapporteur's attempt, in her first report, to determine principles and concepts of international law that might continue to apply during an armed conflict. The identification, extraction or application of broad concepts from international environment law was less useful than the assessment of provisions of the law of armed conflict relating to the

protection of the environment. Moreover, such an approach would unnecessarily draw the Commission into issues regarding the concurrent application of bodies of law other than the law of armed conflict during armed conflict that would be difficult to resolve. The manner in which the report characterized some of those concepts, including the so-called "principles of prevention and precaution", did not reflect international law. References to the concept of sustainable development and other issues, such as indigenous peoples and environmental rights, were less useful for identifying legal protections of the environment with regard to armed conflict.

25. Notwithstanding such concerns, his delegation welcomed the Special Rapporteur's decision to focus her second report on identifying existing rules and principles of the law of armed conflict relating to the protection of the environment, which might reflect how concepts and principles relevant in peacetime had been adapted to circumstances of armed conflict. The task of identifying existing rules might, however, prove less helpful should the Commission attempt to determine whether provisions of certain treaties reflected customary international law. The Commission should not seek to modify existing legal regimes.

26. With regard to the topic of the Most-Favoured-Nation clause, his delegation supported the Study Group's decision not to prepare new draft articles or revise the 1978 draft articles, and instead to summarize its study and description of current jurisprudence in a final report. Most-Favoured-Nation clauses were a product of specific treaty negotiation and tended to differ considerably in their language, structure and scope. They were also dependent on other provisions in the particular treaty in which they were located and thus resisted a uniform approach. The Study Group should continue to study and describe current jurisprudence on questions related to the scope of Most-Favoured-Nation clauses in the context of dispute resolution, while heeding the distinctions between the investment and trade contexts.

27. **Ms. Tansu-Seçkin** (Turkey) said that the provisional application of treaties was an important instrument of international treaty practice and was especially useful where the subject matter was urgent, implementation of the treaty was of great political significance, or it was important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of treaties. The Commission's study of provisional application should not seek to persuade States to utilize it, and, in that vein, should take the form of guidelines rather than draft articles.

28. Individual States were responsible for determining whether or not their legal systems allowed for the provisional application of treaties. A comparative study of domestic provisions relating to provisional application was therefore necessary for proper consideration of the topic. Her delegation supported the Special Rapporteur's intention to collect additional information on State practice before presenting conclusions on the basis of his analysis of such practice. Further clarification was needed as to whether the legal effects and legal obligations arising from provisional application could be identical to those that would apply if the treaty were in force.

29. The decision to apply a treaty provisionally could not be characterized as a unilateral act, since provisional application was possible only on the basis of agreement between States and as an exercise of the free will of States. The Special Rapporteur's explanation regarding the reference to unilateral acts, specifically that the legal obligation for a State arose not when the treaty containing a clause allowing provisional application was concluded but when the State unilaterally decided to resort to such provisional application, might be valid for multilateral treaties. In the case of bilateral treaties, however, the legal obligation arose when the treaty was concluded. Her delegation therefore supported the suggestion that the Special Rapporteur should consider the different consequences arising from the provisional application of bilateral as opposed to multilateral treaties. The Commission should focus on the specific issues that were important in practice and that it would be useful for States to know when they decided to resort to the provisional application of treaties. The applicability of the regime on reservations to treaties also merited further consideration.

30. With regard to the topic of protection of persons in the event of disasters, there was a delicate balance to be maintained between the sovereignty of an affected State and the need to assist affected populations following a disaster, including by seeking and providing external assistance. Close cooperation and solidarity on the part of the international community was paramount for efficient disaster relief; legal

guidance on that issue would be useful for ensuring a timely and efficient response to disasters.

31. The International Law Commission played a central role in the progressive development and codification of international law. Her delegation welcomed the decision of the Working Group on the Long-Term Programme of Work to review and update the list of possible topics for consideration by the Commission. The review of the 1996 list to be conducted by the Secretariat would reflect the developments since that date and provide a useful basis for the potential topics for future consideration. Nevertheless, it was important to limit the number of topics so as to ensure a richer, more thorough debate.

32. **Mr. Rattray** (Jamaica) said that the Commission was justified in not identifying each rule or approach it put forward for consideration as representing either progressive development or codification, because many such rules or approaches might incorporate elements of both concepts, and the same rule or approach might reflect codification from the perspective of one State and progressive development in the eyes of another. Nonetheless, the Commission and its Special Rapporteurs on particular topics should identify cases of progressive development as distinct from those of codification where appropriate, to make it easier for States to fully grasp the balance between the *lex ferenda* and the *lex lata* of any rules or approaches they recommended.

33. His delegation commended the Commission on the progress made during its sixty-sixth session on a broad range of topics, in particular the adoption, on second reading, of the draft articles on the expulsion of aliens and, on first reading, the draft articles on protection of persons in the event of disasters. The decision to include the topic of crimes against humanity in the Commission's programme of work and that of *jus cogens* in its long-term programme was also commendable. His delegation wondered, however, whether the Commission would consider including other topics deriving from international investment law, international human rights law and economic development law in its programme of work.

34. With regard to the topic "Identification of customary international law", his delegation agreed that, to determine the existence of a rule of customary international law and its content, it was necessary to ascertain whether there was a general practice accepted as law. It also agreed that the two-stage approach — identifying a general practice and then assessing whether that practice was accepted as law — was an appropriate way of identifying customary international law rules. Though the phrase "accepted as law" was used in Article 38, paragraph 1 (b), of the Statute of the International Court of Justice and was appropriately included in the draft conclusions proposed by the Special Rapporteur in his report (A/CN.4/672), the concept of *opinio juris* should also be reflected in those draft conclusions, rather than being confined to the commentaries, as that term was widely used by the International Court of Justice and in the literature of international law.

35. The Special Rapporteur did not intend to deal with *jus cogens* in relation to customary international law, although the Commission had decided to include it in its long-term programme of work. However, *jus cogens* rules were rules of customary law, even though, owing to their peremptory nature, they called for additional elements beyond those required for ordinary customary international law rules. The case could therefore be made that the identification of *jus cogens* rules should be part of the current project.

36. The Special Rapporteur's proposed draft conclusion 7 offered an indicative list of manifestations of practice — presumably items that were sometimes referred to as material sources of custom. However, that list should have included pleadings by States before international, regional and national courts or tribunals. Although such pleadings were specific to the particular case, they often reflected State perspectives on given questions and to that extent were manifestations of practice. Nonetheless, the views expressed in pleadings might also vary from case to case and hence might not carry much weight. It might be that including them in a draft conclusion could bring out the special features of that item as a manifestation of practice. In addition, more could be said in draft conclusion 7 about the relationship between treaties and custom, a topic that would be addressed in the next report of the Special Rapporteur.

37. His delegation agreed with the statement in draft conclusion 7, paragraph 3, that inaction might also serve as practice. However, separate draft conclusions on the significance of inaction could usefully be presented at a later stage. Inaction might amount to acquiescence or give rise to an estoppel if it was based on detrimental reliance. Inaction owing to resource

limitations or a lack of knowledge might also place some States at a disadvantage in international relations. With regard to draft conclusion 7, paragraph 4, which stated that the acts or inaction of an international organization might also serve as practice, it was not clear whether all such acts or inaction should be given the same weight. For example, where an organization acted *ultra vires* or where an act was prompted by a narrow majority in the organization, it might be that less importance should be attached to such acts as a manifestation of practice.

38. His delegation generally agreed with the statement in draft conclusion 8 that there was no predetermined hierarchy among the various forms of practice. However, there might be circumstances in which some forms of practice should be given more weight than others. For example, where a State reinforced a statement with conduct on the ground, the combination of words and action carried more weight than words alone. In other circumstances, conduct on the ground would carry more weight than a mere statement. Under the traditional law of title to territory, for example, some State action, as distinct from a mere claim, could serve as evidence for purposes of historical consolidation of title. In the context of the law of the sea, some States sought to reinforce maritime claims by actions on the ground. Generally, that point could be given further consideration in the draft conclusions.

39. His delegation agreed with the statement in draft conclusion 9, paragraph 3, that if practice was sufficiently general and consistent, no particular duration was required. However, the question arose whether that assumption would still apply in cases where a practice was not sufficiently general and consistent, or whether the passage of time during which some States adopted one approach while others remained silent on the point suggested the existence of a rule. The term "custom" in ordinary language did imply the element of duration. More might need to be said about the time element in customary international law.

40. The stipulation in draft conclusion 9, paragraph 4, that in assessing practice, due regard was to be given to the practice of States whose interests were specially affected, was consistent with the position taken by the International Court of Justice in the *North Sea Continental Shelf* cases. However, it might be difficult to reconcile that approach with the idea of the sovereign equality of States.

41. With respect to draft conclusion 11, his delegation agreed that evidence of *opinio juris* might take different forms. The list of forms of evidence given in paragraph 2 included action in connection with resolutions of organs of international organizations and of international conferences. However, it was questionable whether the vote of a State for a resolution that was not legally binding, if not assessed together with a relevant statement indicating the State's *opinio juris*, would necessarily indicate anything about the State's acceptance of a rule of law. The list might also include State pleadings before courts or tribunals.

42. Paragraphs 1 and 2 of draft conclusion 11 affirmed in different ways that both "general practice" and "acceptance as law" were necessary components of customary international law. But given the difficulties inherent in identifying the acceptance of law by States and the artificiality of seeking to identify belief on the part of States, there were authoritative suggestions that the existence of widespread and general practice alone should raise a presumption in favour of the existence of a customary rule. To remove any doubt, it might be useful to state clearly in the draft conclusions that no presumption in favour of the existence of a rule of customary international law might be drawn from the existence of general practice alone. Although the current topic was about the identification of customary international law, some attention should also be given to the process of formation of customary rules.

43. His delegation would communicate its views on the topic "Expulsion of aliens" in writing to the Secretariat in due course.

44. **Mr. Wan Jantan** (Malaysia), speaking on the topic "Identification of customary international law", said that his delegation disagreed with the statement in the Special Rapporteur's proposed draft conclusion 7, paragraph 4, that the acts or inaction of an international organization might serve as practice. The practice of an international organization should only be applicable to the States members of that organization. Since international organizations differed in terms of their membership and structure, it should not be presumed that the acts or inaction of any of them represented the general practice of States for the purposes of establishing customary international law. Nonetheless,

it was probably premature to reach any definitive conclusion as to the role of international organizations in the establishment of rules of customary international law, since that element would be dealt with in greater detail in the third report of the Special Rapporteur. With respect to draft conclusion 5 (Role of practice), the stipulation that it was "primarily" the practice of States that contributed to the creation, or expression, of rules of customary international law was mean to imply that the practice of international organizations should not be overlooked. However, it was his delegation's view that widespread and consistent State practice must be given the utmost priority in determining the formation or expression of customary international law and should be the guiding principle of the work on the topic in the initial stages.

45. The decision to base draft conclusion 6 (Attribution of conduct) on article 4 of the articles on the responsibility of States for internationally wrongful acts raised some concerns, as the two instruments were different in nature. The phrase "any other function", as it pertained to conduct attributable to a State as a manifestation of State practice, needed to be clarified. Further consideration should also be given to the weight to be afforded to any other functions when they were invoked, and States' consent should be obtained for such practices to be used as a basis of customary international law. The statements in draft conclusion 7, paragraph 3, and draft conclusion 11, paragraph 3, indicating that inaction might serve as practice or evidence of acceptance as law also required further review.

46. With regard to draft conclusion 10, paragraph 2, which stated that acceptance as law was what distinguished a rule of customary international law from mere habit or usage, the Commission should also identify common situations where States had acted as a result of comity and courtesy rather than *opinio juris*. Future versions of that draft conclusion should therefore include a reference to acts performed as a result of comity and courtesy and not just habit and usage. His delegation was of the view that the programme of work proposed by the Special Rapporteur was too ambitious, especially considering that the topic contained numerous difficult questions that would require cautious and careful consideration. The Asian-African Legal Consultative Organization, of which Malaysia was a member, had also proposed the establishment of a working group to study the topic in support of the ongoing work of the Commission.

47. With regard to the topic "Protection of the environment in relation to armed conflicts", the focus should be on identifying the legal issues involved in environmental protection that arose during each phase of armed conflict, with the aim of developing future guidelines or conclusions, rather than addressing issues such as internally displaced persons, refugees, cultural heritage and environmental pressure as a cause of armed conflict, or attempting to modify existing legal rules and regimes under international humanitarian law, human rights law or international criminal law. Although those legal issues might be relevant to the topic at hand, they should be approached with caution.

48. Despite the broad support for the proposal to develop working definitions of "armed conflict" and "environment" to facilitate discussion, there was no urgent need to develop a conclusive definition in the early stages. In particular, the debate on the definition of "armed conflict" should be preceded by a determination of which actors would be covered by the guidelines or conclusions and the scope of protection that would be afforded. ln relation to linkages between environmental principles, human rights law and armed conflict, issues such as "sustainable development", the "principle of prevention", the "polluter pays" principle and the obligation to conduct environmental impact assessments would be relevant for the development of guidelines to encourage the adoption of environmentally sound measures in military or defence planning and operations.

49. ln response to the Commission's request for State practice on the topic, his delegation noted that the measures taken by the Malaysian armed forces to protect and preserve the environment in their administrative and operational structures were generally based on domestic legislation, including the Environmental Quality Act of 1974, the National Forestry Act of 1984 and the Wildlife Conservation Act of 2010. The construction of military bases and installations by the Malaysian armed forces required compliance with the Environmental Quality Act, including the need for environmental impact assessment reports prior to such construction, the proper placement of explosives and fuel storage installations so as not to adversely affect water tables, and respect for the safety of populations and preservation of the surrounding environment. The

Malaysian armed forces also took part in incidental tasks to support civilian enforcement agencies such as the police, customs, and forestry and wildlife departments, since a number of Malaysian border security areas were adjacent to national wildlife or forest reserves. An example worth mentioning was the enforcement measures taken by the Royal Malaysian Navy through its manned facilities on the Layang-Layang atoll on the South China Sea to maintain the area as a marine reserve, for both economic and security purposes.

50. With respect to the topic "Provisional application of treaties", primary guidance for determining whether a treaty applied provisionally or upon its entry into force should be the unequivocal consent and explicit commitment of the States parties to the treaty, as set out expressly in the treaty itself. Thus, the principle of *pacta sunt servanda* enshrined in article 26 of the Vienna Convention on the Law of Treaties should be the general starting point for determining the will to be bound by a treaty, and hence, the application of the treaty to the States concerned. Absent such express provision in a treaty, alternative sources such as parallel agreements, unilateral declarations, diplomatic exchanges and conduct of States within the proper context could be considered. Such an approach would help to avoid generalized interpretations and analyses that might *ipso facto* make the effect of the provisional application of treaties legally and technically equivalent to that of the application of treaties that were going to be in force or were already in force.

51. An express provision specifying that a treaty should apply provisionally but making provisional application conditional upon the express consent of the States concerned would have legal effect only upon a clear positive undertaking by the States in question; such consent could not be inferred from silence on their part. In its experience and practice, when Malaysia signed a treaty which called for subsequent acts of ratification, accession, approval or acceptance, unless the treaty provided otherwise, it did not become a party to the treaty or assume any legal obligations thereunder until such subsequent acts were performed. The legal effect of signature was that the State was obliged to refrain from acts which would defeat the object and purpose of the treaty, in accordance with article 18 of the 1969 Vienna Convention on the Law of Treaties.

52. The Vienna Convention was the general starting point in the interpretation of Most-Favoured-Nation clauses and in determining the intent of States to be bound by them, although it could be supplemented by relevant State practice. In that regard, such clauses should be examined within their proper context and individual international investment agreements should be analysed in the light of the context in which they were negotiated, in order to safeguard against an overly expansive interpretation of Most-Favoured-Nation clauses. The substantive preferential treatments deduced from the interpretation of a Most-Favoured-Nation clause should not be assimilated to the procedural treatments that could be extrapolated from the application of that clause. Hence, the clause should be interpreted in such a way that it applied only to substantive preferential treatment provided in international investment agreements and not to investor-State dispute settlement mechanisms. The Study Group on the topic should ensure that its next report incorporated that principle. In that connection, it should be noted that most free trade agreements entered into in the context of the Association of Southeast Asian Nations explicitly provided that Most-Favoured-Nation clauses should not apply to investor-State settlement mechanisms.

53. His delegation noted that the Commission had decided to include the topic "Crimes against humanity" in its programme of work, with a view to developing draft articles for a proposed convention on the prevention and punishment of such crimes. The proposed convention was meant to promote general inter-State cooperation in the investigation, apprehension, prosecution and punishment of persons who committed crimes against humanity. Whatever mechanism was adopted to achieve that goal must take into account the divergence of laws and practices on the topic in different States. His delegation noted with appreciation that the Commission also intended to establish a relationship between that convention and the International Criminal Court. However, the International Criminal Court did not have the capacity to prosecute all perpetrators of crimes against humanity, owing to insufficient resources, and should therefore be supported with additional funding.

54. His delegation also noted that the proposed convention would advance key initiatives not addressed in the Rome Statute of the International Criminal Court, while also supporting the mission of

the Court. Nonetheless, it sought further clarification as to whether a State which acceded to the proposed convention would be obligated in the future to also accede to the Rome Statute, given that the proposed convention would be drafted on the premise that a State which acceded to the proposed convention would also be presumed to have acceded to the Rome Statute. The Working Group on the topic should consider whether the proposed convention could be implemented independently from the Rome Statute. At the current juncture, his delegation was of the view that the time was not yet ripe for the elaboration of a new international instrument on crimes against humanity.

55. **Mr. Issetov** (Kazakhstan) said that his delegation supported the Special Rapporteur's assertion that manifest violations of internal law that were of fundamental importance regarding the competence for concluding treaties could invalidate the consent of a State to the provisional application of a treaty. Such an approach was justified, as international responsibility for the failure to implement a treaty subject to provisional application or the same treaty after its entry into force would be equivalent in terms of both its legal nature and the legal regime applicable to it.

56. His delegation supported the Special Rapporteur's conclusion regarding the source of obligations in the provisional application of treaties, namely that such obligations derived primarily from agreements between subjects of international law. At the same time, although there were no known cases in Kazakhstan's treaty practice of assuming obligations arising from the provisional application of a treaty by means of a unilateral declaration, that possibility could not be ruled out in the future. The issue warranted further study.

57. In the case of treaties that did not provide a mechanism for terminating the provisional application of a treaty, termination of provisional application for any reason other than a State's intention not to become a party to the treaty would be inconsistent with article 25, paragraph 2, of the Vienna Convention on the Law of Treaties. Suggestions to the contrary would undermine the stability of the institution of the provisional application of treaties and would be inconsistent with the reasons for its very existence. At the same time, it was not possible to deny a State that had declared its intention not to become a party to a treaty and thus terminated its provisional application the right to become in the future a full party to that treaty after addressing the reasons that had prompted it to terminate provisional application in the first place. His delegation supported the Special Rapporteur's position regarding the possibility of terminating or suspending provisional application in response to another party's failure to comply with its obligations. Regardless of the fact that the provisional application of a treaty by definition implied that it would be operative over a limited time, that circumstance could in no way justify depriving subjects of international law of the right to be released from the obligation of implementing the treaty before its entry into force.

58. Furthermore, his delegation supported the generally accepted view that the provisional application of a treaty created rights and obligations for the subjects of international law that were provisionally applying that treaty. In that connection, it agreed that the violation of those obligations and the abuse of such rights should be considered internationally wrongful acts for which they would be held legally responsible.

59. **Ms. Bowoleksono** (Indonesia), speaking on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", said that the work of codification and clarification undertaken by the Commission was important to prevent impunity and ensure that all criminals were brought to justice. Her delegation welcomed the final report of the Commission, which would provide valuable guidance for States on the topic.

60. With regard to the topic "Protection of the atmosphere", the work of the Commission would help to enhance understanding of the nature of the atmosphere as a limited natural resource beneficial to all humankind. But, more importantly, it would enable the international community to prevent environmental degradation by preserving and conserving that natural resource. Her delegation supported the suggestion that the modalities of the use of the atmosphere should be considered in greater detail. Given that the deteriorating state of the atmosphere had made its protection a pressing concern for the international community, the concept of "common concern of humankind" deserved close consideration. As a legal consequence of that concept, a State could no longer claim that atmospheric problems were within its domestic jurisdiction. Although that made it difficult to establish national jurisdiction over any segment of the

atmosphere, the Commission should still prepare draft guidelines on the obligations of States to prevent and protect the atmosphere from activities by States or by natural or juridical persons that had the effect of introducing deleterious substances or energy into the atmosphere. In the light of the unique characteristics of the atmosphere, efforts to protect it should also be pursued through international cooperation. It was therefore necessary that the modalities and mechanism for international cooperation should be set out and given priority in the draft guidelines.

61. Definition of the word "atmosphere" might facilitate work on the draft guidelines proposed by the Special Rapporteur in his report (A/CN.4/667). However, the current definition did not fully reflect the unique physical characteristics of the atmosphere, because it did not take into account the fact that the atmosphere moved and circulated around the Earth through atmospheric circulation. That natural characteristic should be added as a component of the definition of "atmosphere" in draft guideline 1 (Use of terms).

62. Her delegation supported draft guideline 2 (a), on the scope of the draft guidelines, which recognized that the human environment and the natural environment were the specific objects of the protection of the atmosphere and that the two issues were intrinsically interrelated. However, it had some editorial reservations regarding the words "as well as to their interrelationship" used in draft guideline 2 (b), which it found unclear. As presently drafted, draft guideline 3 (a) seemed to suggest that "the common concern of humankind" was protection of the atmosphere, rather than the deteriorating condition of the atmosphere, and the text should therefore be redrafted to reflect the correct understanding of the concept.

63. Her delegation supported the inclusion of a definition of "State official" in article 2 of the draft articles on the immunity of State officials from foreign criminal jurisdiction, a term which would cover individuals who enjoyed immunity either *ratione personae* or *ratione materiae*. It was also important to note that the definition was solely for the purposes of the draft articles, to avoid any confusion with the general notion of "State official" or "official" in other international instruments and in domestic legal systems that might define the term differently. Her delegation also supported the wording of draft article 5 (Persons enjoying immunity *ratione materiae*), which could be seen as an application *mutatis mutandis* of draft article 3 (Persons enjoying immunity *ratione personae*). It agreed with the explanation in the commentary to the draft article that, in contrast to draft article 3, which specified the individuals enjoying immunity *ratione personae*, draft article 5 did not identify persons enjoying immunity *ratione materiae*, as they had to be identified on a case-by-case basis by applying the criteria set out in draft article 2 (e), which highlighted the existence of a link between the official and the State.

64. On the topic of the identification of customary international law and the related draft conclusions proposed by the Special Rapporteur, a working definition of "customary international law" was necessary, because it would provide a better understanding of the general context of the draft conclusions. Her delegation welcomed the formulation of a definition which borrowed from the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, but felt that consideration of the definition of "international organization" should be postponed until the Commission had dealt specifically with the use of terms in a comprehensive manner.

65. Draft conclusion 3 sufficiently reflected the two-element approach in identifying the existence of a rule of customary international law, namely ascertaining a general practice and then determining whether that practice was accepted as law, an approach that was widely established in State practice and recognized by national and international courts and tribunals. It would be necessary in future reports to establish in more detail the meaning of the expressions "general practice" and "accepted as law (*opinio juris*)". In draft conclusion 4, which provided that in assessing evidence for a general practice as law, regard must be had to the context, including the surrounding circumstances, the words "context" and "surrounding circumstances" were unclear and could give rise to divergent interpretations. The words to be chosen should be easily understood by those responsible for assessing evidence for a general practice accepted as law, such as judges, practitioners and government legal advisers.

66. Her delegation supported the view expressed in draft conclusion 5 that the conduct of States, as the primary objects of international law, contributed to the creation, or expression of rules of customary

international law. In draft conclusion 6, the inclusion of the phrase "any other function" in connection with the attribution of State conduct appeared to broaden the scope of the draft conclusion unnecessarily. In view of the principle of the sovereign equality of states, her delegation had reservations about draft conclusion 9, paragraph 4, on the need to pay due regard to the practice of States whose interests were specially affected in assessing practice. Draft conclusion 10, on the role of acceptance as law, was important, as it constituted a part of the two-element approach. However, in paragraph 1, the statement that "the practice in question must be accompanied by a sense of legal obligation" did not seem sufficient to clarify the meaning of the expression "accepted as law" or "*opinio juris*".

67. On the topic of the protection of the environment in relation to armed conflicts, her delegation welcomed the temporal approach adopted by the Special Rapporteur, which allowed for the consideration of protective measures before, during and after an armed conflict. The primary focus should, however, be on protective measures during an armed conflict. True, there could not be a strict dividing line between the different temporal phases and, as the work progressed, it would become evident how the legal rules pertaining to the different phases blended into one another. Therefore, there should be no attempt to assign different weights to each phase.

68. With regard to the scope of the topic, the Commission should address situations of non-international armed conflicts as well as those of international armed conflict. Even though the United Nations Educational, Scientific and Cultural Organization (UNESCO) had adopted legal instruments concerning the protection of cultural heritage, the Commission should examine the issue with a view to filling any gaps in those instruments. While supporting the principles and concepts of sustainable development, prevention, polluter pays, environmental impact assessment and due diligence, which the Commission had discussed extensively, her delegation believed that the Commission should examine them further in order to determine their proper applicability in the context of the topic.

69. With regard to the topic "Provisional application of treaties", the Vienna Convention on the Law of Treaties was the correct basis for developing a set of guidelines. It was essential to consider the relationship between the provisional application of treaties and the requirements under constitutional law for the entry into force of treaties, 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. The aim of the topic was not to encourage States to use the mechanism of provisional application, but rather to provide a mechanism or guidelines on the topic which would serve as an option for States that might have the intention of provisionally applying a treaty pending its entry into force. Nonetheless, States ultimately enjoyed the sovereign right to make any decision concerning the provisional application of treaties.

70. **Mr. Choi** Yonghoon (Republic of Korea), referring to the topic of identification of customary international law, said that customary international law was one of the most important sources of international law. The topic could therefore be expected to offer practical guidance to the judges of domestic courts who were not familiar with international law. His delegation supported the two-element approach to the topic. The draft conclusions should strike a balance between guidance and the inherent flexibility of customary international law. The topic would gain in clarity if the more commonly used term "*opinio juris*" were used in parallel with the expression "accepted as law".

71. The change in the title of the Special Rapporteur's proposed draft conclusion 6, "Attribution of conduct", to "Conduct of the State as State practice" in the corresponding draft conclusion 5 [6] provisionally adopted by the Drafting Committee was appropriate, as the reference to the articles on the responsibility of States for internationally wrongful acts introduced an unnecessary complexity. The articles on State responsibility used "attribution" in a sense that was not relevant to the current topic and considered some types of conduct attributable to a State that would not be considered State practice for the purpose of the formation of customary international law.

72. The notion of inaction as a form of State practice merited detailed study and explanation in the commentary in order to provide practical guidance, since not all inaction of a State was necessarily to be

considered State practice for purposes of the formation of customary international law. With regard to the Special Rapporteur's draft conclusion 9, his delegation understood the concerns expressed by some members of the Commission as to the irreconcilability of the concept of "specially affected States" with the sovereign equality of States, but nevertheless considered the concept to be useful in determining certain rules of customary international law in certain fields, and particularly in identifying regional custom. Moreover, international humanitarian law, while applying to all States, recognized the existence of "specially affected States". In his third report on the topic, the Special Rapporteur should focus on the acts of international organizations, which played a significant part in the development of modern customary international law; he should also examine carefully the interplay and temporal dimension of the relationship between the two elements of customary international law and the procedural question of burden of proof in regard to the existence of such law.

73. On the topic of protection of the environment in relation to armed conflicts, his delegation hoped that the work of the Commission would contribute to more constructive discussion concerning the prevention of environmental degradation. It concurred with the Special Rapporteur's view that different problems arose and different rules were applicable before, during and after an armed conflict but thought that it might be difficult in practice to determine exactly when the pre-conflict phase ended and the post-conflict phase began. His delegation also supported the inclusion of organized armed groups in the topic, based on the definition adopted in the Commission's previous work on the effects of armed conflict on treaties.

74. His delegation noted that the definition of "environment" had been taken from the Commission's previous discussions on the principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities but considered that the concept of environment needed to be defined with reference to context. The context of hazardous activities was different from that of armed conflict; accordingly, the appropriateness of the concept should be carefully examined and constructively discussed within the Commission. The anticipated discussions during the Commission's next session on protection of the environment during the actual conflict should include a theoretical examination of the existing principles of such protection; the Commission should also focus on preventive measures and international cooperation and the development of guidelines.

75. The Commission's work on the topic of provisional application of treaties was greatly appreciated by his delegation. However, the legal effects of the provisional application of a treaty should be distinguished from those of its entry into force. The question whether the articles of the 1969 Vienna Convention on the Law of Treaties concerning the entry into force of treaties could apply to their provisional application merited consideration. Furthermore, notwithstanding the Special Rapporteur's view that comparative studies of domestic laws were not needed for the topic, since a treaty or part of the treaty could be applied provisionally only on the basis of internal law, it might be useful to undertake a systematic evaluation of such laws and the related articles of the Vienna Convention. The topic would contribute to the further development of the law of treaties and called for practical guidelines to enable States to enact appropriate legislation and to interpret and apply the rules on provisional application.

76. His delegation appreciated the work carried out by the Study Group on the topic of the Most-Favoured-Nation clause. It noted the Study Group's intention to update the final draft report to take into account more recent arbitral awards and hoped that the outcome would be of practical use to individuals involved in the area of international investment and to public policymakers and officials concerned with international investment norms.

77. **Ms. Jacobsson** (Special Rapporteur on protection of the environment in relation to armed conflicts) thanked the members of the Committee for their rich and substantive statements; their constructive comments and analyses had been duly noted and would be of great assistance to her in preparing her second report, to be submitted in 2015. She was also grateful to all the States that had contributed or intended to contribute comments in writing. Every response was valued, including informal comments and inputs, which she would continue to welcome.

78. **Mr. Gevorgian** (Chairman of the International Law Commission) said that the debate in the Sixth Committee allowed the International Law Commission to benefit from the views of Governments on the general direction of its work and on specific issues.

The views expressed by States orally and in writing were extremely valuable to it. He reiterated the request to Governments to submit their comments on the draft articles on the protection of persons in the event of disasters adopted on first reading and to provide the information requested on the specific issues listed in chapter III of its report on the work of its sixty-sixth session (A/69/210).

Agenda item 75: Criminal accountability of United Nations officials and experts on mission (*continued*) (A/C.6/69/L.11)

Draft resolution A/C.6/69/L.11: Criminal accountability of United Nations officials and experts on mission

79. **Mr. Ahmad** (Pakistan), introducing the draft resolution on behalf of the Bureau, said that the text was essentially a technical update of the resolution adopted at the previous session. Paragraph 8 invited further comments from Member States on the report of the Group of Legal Experts, which would continue to be considered during the seventieth session of the General Assembly within the framework of a working group of the Sixth Committee. Paragraph 9 was of particular importance as it provided for a system for reporting credible allegations of the commission of crimes by United Nations officials or experts on mission. Paragraph 15 had been updated to include a reference to General Assembly resolution 68/105 and highlighted the need for cooperation among States, particularly with respect to paragraph 3 concerning the establishment of criminal jurisdiction. Paragraph 16 requested the Secretary-General to report to the General Assembly at its seventieth session on the implementation of the resolution. He hoped that Governments would respond in a sufficiently specific manner to the request for information to be provided to the Secretary-General and that the draft resolution could be adopted without a vote, as in the past.

Agenda item 84: Effects of armed conflicts on treaties (*continued*) (A/C.6/6/L.9)

Draft resolution A/C.6/69/L.9: Effects of armed conflicts on treaties

80. **Ms. Benešová** (Czech Republic), introducing the draft resolution on behalf of the Bureau, said that the text was based on General Assembly resolution 66/99 and the discussions within the Sixth Committee on the agenda item. The preambular paragraphs were purely technical updates. Paragraph 1 again commended the draft articles to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. Paragraph 2 requested the Secretary-General to invite Governments to submit written comments on any future action regarding the articles. She believed that there was a consensus in support of the draft resolution and therefore proposed that it be adopted without a vote.

Agenda item 85: Responsibility of international organizations (*continued*) (A/C.6/69/L.10)

Draft resolution A/C.6/69/L.10: Responsibility of international organizations

81. **Mr. Luna** (Brazil), introducing the draft resolution on behalf of the Bureau, said that, following the debate in the Sixth Committee on the subject, the text had been prepared on the basis of General Assembly resolution 66/100. Paragraph 1 again commended the articles to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action. Paragraph 2 sought to ensure that more material on practice was provided for the next discussion on the item in 2017. Under paragraph 3, the General Assembly would include the agenda item in the provisional agenda of its seventy-second session with a view to considering what form might be given to the articles. He stressed that the draft resolution had no budgetary implications and recommended that it be adopted without a vote.

The meeting rose at 12.30 p.m.