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

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14-63833 (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 VI to IX of the report of the International Law Commission on the work of its sixty-sixth session (A/69/10).

2. **Mr. Belaid** (Algeria), referring to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", said that his delegation welcomed the adoption of the final report of the Working Group, which it considered to be an outcome of practical value to the international community. His delegation was pleased that that final report had covered all the issues raised by the Sixth Committee during the sixty-eighth session, in particular gaps in the existing conventional regime; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; the customary international law status of the obligation to extradite or prosecute; and other matters of continued relevance in the 2009 General Framework.

3. His delegation attached great importance to the topic "Protection of the atmosphere". It took note of the Special Rapporteur's approach to the topic and his proposed draft guidelines on use of terms, scope of the guidelines and legal status of the atmosphere. In that connection, it recalled the understanding arrived at by the Commission at its sixty-fifth session in 2013, namely that work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution, and that the topic would not deal with, but was also without prejudice to, questions such as the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries. His delegation noted with interest the debate within the Commission with regard to the need to fully comply with the terms of that understanding, and it agreed with the view expressed that the most important decisions regarding the protection of the atmosphere were to be taken at the political level, and that the Commission could not be expected to prescribe or substitute for specific decisions and action at that level.

4. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation stressed that that the immunity of State officials from criminal jurisdiction was a well-established norm in both international relations and international customary law. Deriving directly from the immunity of the State, which was granted under customary international law, the immunity of State officials from criminal jurisdiction was meant to bar the exercise of domestic and foreign jurisdictions alike on that category of officials.

5. That link between the immunity of State and the immunity of its officials had been indirectly addressed by the International Court of Justice in its judgment of 3 February 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, in which the Court had concluded that under customary international law a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict (para. 91). Even though the Court had pointed out in the same paragraph that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States, the paragraph had the merit of raising the question (without answering it because it had not been an issue in that case) of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State. That link between the immunity of the State and the immunity of State officials was of the utmost importance and should prevail when applying or defining the immunity of State officials from the exercise of foreign criminal jurisdiction.

6. With regard to the persons enjoying immunity *ratione personae*, after a long debate the Commission had indicated in draft article 3 the three main persons to whom such immunity applied, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. That list reflected a general consensus in the international community. His delegation considered that even after their term in office, those State officials should be granted immunity for acts performed in the exercise of their functions. In that connection, it welcomed draft article 4, paragraph 3, which provided for the application of the rules of international law concerning immunity *ratione materiae* to the "troika" after the cessation of immunity *ratione personae*.

7. With regard to draft article 2, subparagraph (e), his delegation noted with interest that the definition of the term "State official" must be understood as encompassing persons who enjoyed immunity *ratione personae* and those who enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. The two criteria set out in subparagraph (e) for identifying who could be considered a "State official" were well chosen and captured the general trend in international practice, which gave a growing role to other high-ranking officials in representing the State or exercising certain State functions. That role should entitle them to immunity *ratione materiae* from foreign criminal jurisdiction.

8. His delegation endorsed draft article 5, which focused on the subjective scope of that category of immunity, referred to the official nature of the acts of the officials and emphasized the functional nature of immunity *ratione materiae*. It agreed that it was not possible to draw up a list of persons enjoying immunity *ratione materiae*. Draft article 5 in conjunction with draft article 2, subparagraph (e), would make it possible to identify the persons to whom such immunity applied.

9. His delegation took due note of the view expressed by some members of the Commission that the definition of immunity *ratione materiae* must be based on the nature of the acts performed and not the individual who performed those acts. It looked forward the Commission's future work on the other element of the immunity *ratione materiae* regime, namely its substantive and temporal scope. His delegation reiterated its preference for a methodological approach which focused on the codification of existing rules of international law on the topic, given the controversial, sensitive and political nature of any proposals based on progressive development. It agreed with the comments made by a number of delegations and members of the Commission regarding the particular importance of the distinction between progressive development of international law and its codification for the consideration of the topic.

10. **Mr. Saeed** (Sudan) said that his delegation valued the role played by the Commission in the progressive development and codification of international law with a view to implementing the principles and purposes of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. It reaffirmed the importance of interaction between the Commission and the Sixth Committee and underscored the need for the Commission to hold part of its session in New York so that representatives of Member States could participate as observers. The Sixth Committee should formulate a recommendation to that effect in its draft resolution.

11. With regard to the topic "Protection of persons in the event of disasters", draft article 12 [9] (Role of the affected State) was fully consistent with the principle of non-interference and respect for the sovereignty of States. The words "and principal" should be inserted in draft article 12 [9], paragraph 2, which would then read as follows: "The affected State has the primary and principal role in the direction, control, coordination and supervision of such relief and assistance". Paragraph 1 of draft article 14 [11] rightly emphasized that external assistance was conditional on the consent of the affected State. However, it was important to clarify the provision in paragraph 2 that such consent should not be withheld arbitrarily. It should be made clear that failure to give consent should not result in prejudice towards the affected persons.

12. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", which was a well-established principle of international law, his delegation agreed that there was a need for a definition of the term "State official" in draft article 2, since such immunity applied to individuals. The definition should be expanded to include all individuals who represented the State or exercised State functions or held a position in the State, regardless of their position in the hierarchy. The scope of the immunity should also be enlarged to ensure that the officials enjoyed immunity after their term of office in respect of acts performed during that term.

13. **Ms. Nguyen** Thi Minh Nguyet (Viet Nam), referring to the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)", said that that obligation played a crucial role in combating crimes of serious concern to the international community by ensuring that perpetrators of such crimes did not go unpunished. The International Court of Justice, in its judgment of 20 July 2012 in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, had shed light on that obligation as a duty of States to cooperate in combating impunity by bringing perpetrators to justice. The obligation to extradite or prosecute applied to a wide range of crimes and had

been incorporated into many multilateral treaties, including a number of conventions on international terrorism concluded since 1970. The Commission's final report on the topic provided useful guidance for States in interpreting and implementing such treaties. Her delegation was pleased that the report covered all the issues raised in that regard in the Sixth Committee. Viet Nam reaffirmed its commitment to fight against impunity; it was prepared to cooperate with other States to combat crimes, bringing alleged perpetrators to justice in accordance with its national law and its obligations under international law.

14. With respect to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", her delegation noted with satisfaction that the commentary to the draft conclusions provisionally adopted took due note of the wealth of jurisprudence of the International Court of Justice, the World Trade Organization dispute settlement bodies, the European Court of Human Rights and arbitral tribunals. The draft conclusions would serve as useful sources for Governments and interpreters of treaties, including judges, arbitrators and other practitioners.

15. With regard to the legal effect of subsequent practice in amending or modifying treaties, her delegation supported draft conclusion 7. It was of the view that subsequent practice had no effect with respect to modifying or amending a treaty. That position had been supported by a majority vote in favour of deleting a draft article on modification of treaties by subsequent agreement at the conference at which the 1969 Vienna Convention on the Law on Treaties was negotiated. State practice and jurisprudence had not developed to such a stage that the possibility of modifying a treaty by subsequent practice could be generally recognized. Such a scenario would be at variance with Viet Nam's domestic law governing the conclusion of treaties, which stipulated that amendments to treaties must be agreed upon by the parties concerned.

16. On the topic "Protection of the atmosphere", her delegation shared the view that the current project presented several difficulties if it was to be in strict compliance with the Commission's 2013 understanding. Given the extreme importance of the atmosphere for humankind and the need for urgent and concrete action by the international community, her Government expected the current project to make a meaningful contribution to global comprehensive endeavours to protect the environment. To realize that goal, the Special Rapporteur should be allowed a degree of flexibility in his methodology while at the same time maintaining compliance with the 2013 understanding.

17. Her delegation welcomed the Special Rapporteur's comments that the major objectives of the project consisted of identifying legal rules regarding the topic and any gaps in the existing treaty regimes and that the project would focus on exploring possible international cooperation mechanisms, which were essential to any effort to protect the atmosphere as a single unit. Such an approach might ensure non-interference in political negotiations on climate change, ozone depletion and long-range transboundary air pollution. As a follow-up to identifying legal gaps, recommendations on ways to fill them might be put forward in order to make the current project inclusive and more useful to Governments.

18. The phrase "a common concern of humankind" as used in draft guideline 3 was an ambiguous and controversial concept which had no basis in State practice or case law. Her delegation welcomed the Special Rapporteur's plan to consult the scientific community for technical advice on the topic and to reformulate the draft guidelines for consideration by the Commission in 2015.

19. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the provisional adoption by the Commission of five draft articles with commentaries represented significant progress. It was necessary to define "State official", but the definition in draft article 2, subparagraph (e), was so general that it might lead to confusion and required further clarification. Further clarification was also needed for the terms "represents" and "exercises State functions" used in the definition, as well as for "acting as such" in draft article 5. The latter draft article, the first in Part Three (Immunity *ratione materiae*), did no more than state which persons enjoyed such immunity; draft articles should be added on the nature of acts covered by immunity *ratione materiae*.

20. The Commission should take an approach that ensured a balance between the need to respect the immunity of State officials from criminal jurisdiction and the need to fight impunity. Given the complexity

of the topic and its sensitive political nature, those aspects must be given full and careful consideration.

21. On the topic "The Most-Favoured-Nation clause", the Study Group was moving in the right direction in setting forth the target of making the final report of practical use. That goal could be attained in part by identifying trends in the interpretation of Most-Favoured-Nation provisions in investment arbitration cases and State treaty practices with regard to such provisions. A Most-Favoured-Nation clause was treaty-specific and its interpretation was dependent on other provisions of the relevant treaty; thus, such clauses did not lend themselves to a uniform approach. However, in view of the proliferation of investment agreements, the ongoing negotiations of several major free trade agreements and the increasing number of arbitration cases, the outcome of the Study Group could serve as a useful guide for treaty negotiators, policymakers and practitioners involved in the investment area.

22. **Mr. Choi** Yonghoon (Republic of Korea) said that his Government welcomed the adoption of the final report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*). The important function of the obligation to extradite or prosecute offenders in combating impunity, in particular for serious crimes punishable by the international community, was undeniable. That obligation also contributed to the establishment of the rule of law at international level. An "extradite or prosecute" clause had been included in almost all important international conventions and agreements concerning criminal matters, in particular international terrorism.

23. However, the scope of application of the obligation to extradite or prosecute could not be identified in a general or abstract manner, but must be determined and analysed according to the specific case through a careful evaluation of the relevant provisions of an international convention or agreement. The final report of the Working Group explained the key elements to keep in mind when enacting national laws and pointed out the gaps in the existing international treaty system; it would provide useful guidance for States. His delegation hoped that the obligation to extradite or prosecute would be given further consideration in relation to the topic "Crimes against humanity".

24. His delegation had followed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" with interest since its inclusion in the Commission's programme of work. The Commission's work on the topic would help States identify and clarify the scope and role of agreements and practices in that respect.

25. With regard to the draft conclusions provisionally adopted by the Commission, his delegation considered that the Drafting Committee had improved draft conclusion 6 (Identification of subsequent agreements and subsequent practice) by dividing it into three paragraphs. Concerning draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), it was necessary to distinguish between treaty interpretation and treaty amendment or modification. If a treaty could be amended or modified by a subsequent agreement as defined in article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, an official amendment or modification procedure in accordance with the provisions of a treaty would be pointless. His delegation agreed with the Commission's view in draft conclusion 7, paragraph 3, that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized. However, the Commission should continue to give attention to that issue in order to reflect any development of relevant international rules, since some international courts and tribunals had accepted the possibility of amending or modifying a treaty by subsequent agreement or practice.

26. On draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation), his delegation accepted the distinction made in paragraph 3 between subsequent practice under article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties and under article 32 thereof. It also agreed with the distinction made in draft conclusion 8 between the weight of subsequent agreement and that of subsequent practice. His delegation endorsed draft conclusion 9 with the Commission's modifications to paragraphs 1 and 2. The question of whether silence could be considered a subsequent practice in terms of treaty interpretation must be examined case by case. Silence could not be regarded as subsequent practice when interpreting treaties delimiting a boundary.

27. His delegation acknowledged the important role of conferences of States parties to treaties, such as those relating to environmental issues. In that regard, draft conclusion 10 contributed to clarifying the legal effect that the decisions adopted by a conference of State parties had on treaty interpretation; such legal effect should be assessed case by case. It would be useful for the Special Rapporteur to propose interim conclusions concerning the particularities of the constituent treaties of international organizations.

28. On the topic "Protection of the atmosphere", it was his delegation's understanding that the three draft guidelines proposed by the Special Rapporteur concerning the definition of the atmosphere, scope of the guideline and legal status of the atmosphere, had been withdrawn following discussion in the Commission. It looked forward to the Special Rapporteur's submitting a new definition of the term "atmosphere" and hoped that a clear distinction would be drawn between "territorial airspace" and "atmosphere", given that the former pertained to national sovereignty while the latter did not.

29. His delegation endorsed the understanding arrived at by the Commission on limiting the scope of the topic, an understanding that would enhance the likelihood of a successful outcome. Care must be taken to ensure that future discussions on the topic did not influence topics which had been discussed in other forums, such as climate change or the ozone layer, or other existing relevant legal principles which had been applied. It was to be hoped that discussions in the Commission on the protection of the atmosphere would evolve into a guideline concerning the mechanism and procedure for strengthening transnational and global capabilities for the protection of the atmosphere. His delegation supported the Special Rapporteur's view that political and policy-driven discussions should be excluded and endorsed his emphasis on a legal approach. Discussions on the topic should take into account existing relevant treaties. The Special Rapporteur should propose guidelines for his next report which reflected and sufficiently incorporated the discussions held during the current session of the Commission and thus enjoyed the broad support of the international community.

30. The topic "Immunity of State officials from foreign criminal jurisdiction" was directly related to the principal rules of international law, such as the sovereign equality of States and the protection of essential values of the international community. Given that the United Nations and the international community placed great emphasis on the fight against impunity, it was vital for the Commission to work towards the codification and progressive development of international rules relating to the topic.

31. With regard to the definition of "State official" in draft article 2, subparagraph (e), the Commission considered that the important factor in identifying State officials was the link between the official and the State, taking into account that immunity was granted to the individual for the benefit of the State. That link was representation of the State or the exercise of State functions. That broad definition of State official was unavoidable since States had different views on who was to be considered a State official. His delegation agreed with the Commission's view that the identification of State officials must be examined on a case-by-case basis. However, like the majority of the Commission's members, his delegation considered that the definition of State officials should not extend to include all *de facto* officials. It supported the use of term "State official" because what was important was not the choice of a specific term but how it was defined.

32. His delegation agreed with the distinction made between immunity *ratione materiae* and immunity *ratione personae*. However, persons belonging to the "troika" of Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* during their term of office, while they enjoyed immunity *ratione materiae* after the end of their term of office. Paragraph (4) of the commentary to draft article 5 (Persons enjoying immunity *ratione materiae*) noted that there was no need to mention that point explicitly in the draft article and indicated that beneficiaries of such immunity did not have to continue to be State officials when immunity was claimed. However, the former members of the "troika" were no longer "State officials acting as such", the phrase used in draft article 5, when they enjoyed immunity *ratione materiae*. Therefore, the body of the text of draft article 5 should refer explicitly to the former members of the "troika" as beneficiaries of immunity *ratione materiae*.

33. His delegation supported the Special Rapporteur's proposal for the next report to focus on immunity *ratione materiae* and the temporal scope of immunity. It was very interested in defining the

"official acts" which constituted the core element of immunity *ratione materiae*. The Special Rapporteur should continue to seek *lex lata* on the basis of State practice while not excluding *lex ferenda*.

34. **Mr. Murase** (Special Rapporteur on protection of the atmosphere), thanking delegates for their insightful comments and constructive criticism, said that the discussions in the Sixth Committee would be fully reflected in his second report.

35. With regard to the Commission's understanding as to the scope of the topic, the Sixth Committee had not imposed any restrictions when it had endorsed the topic in 2011. While some Commission members had considered that the understanding set a bad precedent and should be reconsidered, that was not his own position. He had ensured the Commission that he would fully comply with the understanding. It had not been his intention from the beginning to do anything that would interfere with the political process of negotiations or to deal with specific technical substances. It had also been made clear from the outset that outer space was not part of the topic. At the same time, the Commission's work would involve referring to the relevant rules and principles, as necessary, and identifying gaps, if any, in existing treaty regimes. The understanding as to scope did not say anything about customary international law, the identification of which, whether established or emergent, was the major function of the Commission in its efforts in the area of the codification and progressive development of international law, and that also applied to the topic under consideration.

36. With regard to the use of the term "atmosphere", the first draft guideline was intended to be a working definition specially designed for the current topic as a matter of practical necessity in order to make it possible to embark on the work on the topic. Any attempt to articulate guidelines for the protection of the atmosphere would benefit from a clear understanding of what such guidelines were meant to cover. Eighty per cent of the air was in the troposphere and twenty per cent in the stratosphere; there was no air in the mesosphere or thermosphere, and obviously the topic would not cover those upper spheres.

37. In defining the scope of the project, it was crucial to differentiate between the concept of the atmosphere and that of airspace. The atmosphere was the dynamic and fluctuating substance that moved around the earth across national boundaries, whereas airspace was a static, area-based notion. While States had complete and exclusive sovereignty over their airspace, the atmosphere could not be subjected to State jurisdiction or control, because it was an invisible, intangible and non-separable substance. It did not make sense to say "This is my airspace, so this is my atmosphere".

38. Regarding the concept of "a common concern of humankind", which had been intensely debated in both the Commission and the Sixth Committee, that concept and similar notions had been incorporated not only in the United Nations Framework Convention on Climate Change, but also in the Convention on Biological Diversity and the United Nations Convention to Combat Desertification. Those instruments had received more than 195 ratifications. Moreover, there was growing recognition in the international community that transboundary air pollution and climate change were closely linked, a recognition which had led, for instance, to the 2012 revision of the Gothenburg Protocol to the Convention on Long-range Transboundary Air Pollution. The idea of one atmosphere was gaining ground in positive international law. The threat of air pollution was no doubt an important element for the protection of the atmosphere. Thus, the Stockholm Convention on Persistent Organic Pollutants and the Minamata Convention on Mercury had adopted similar language, such as "global concern". The notion of "a common concern of humankind" would serve as a basis for international cooperation, which was the most important aspect of the topic.

39. The topic required a certain scientific understanding of the atmosphere. Since 2011, he had established contacts with a number of international environmental organizations and had organized workshops in Nairobi, Geneva and New York on the topic. Article 16, subparagraph (e), of the Commission's statute authorized it to consult with scientific institutions and experts. Thus, a meeting for an interactive dialogue with scientists and experts from the United Nations Environment Programme, the World Trade Organization, the United Nations Economic Commission for Europe and other organizations would be held at the beginning of the Commission's sixty-seventh session. Although the majority of the Commission members had been in favour of referring the draft guidelines to the Drafting Committee, he had decided not to ask for them to be

referred at the sixty-sixth session. He would elaborate a few additional draft guidelines on basic principles in his next report; he hoped that those draft guidelines could be considered by the Drafting Committee at the sixty-seventh session along with draft guidelines initially proposed.

40. **Mr. Gevorgian** (Chairman of the International Law Commission), introducing chapters X to XIII of the report of the International Law Commission (A/69/10), said that he would begin with chapter X of the report (Identification of customary international law). At its sixty-sixth session the Commission had had before it the second report of the Special Rapporteur, Mr. Michael Wood (A/CN.4/672). The second report addressed the "two-element" approach to the identification of rules of customary international law and proposed eleven draft conclusions relating to the scope of the work and the role, nature and evidence of the two elements. All eleven draft conclusions had been referred to the Drafting Committee, which had provisionally adopted eight draft conclusions. The Chairman of the Drafting Committee had delivered a statement to the plenary Commission on the work of the Drafting Committee on the topic, including a review of the eight draft conclusions provisionally adopted. That statement, dated 7 August 2014, was available on the website of the Commission. The Commission would consider those draft conclusions, along with accompanying commentaries, at its sixty-seventh session in 2015. After addressing the scope and planned outcome of the topic, the second report focused on the basic approach to the identification of customary international law, as well as the nature and evidence of its two constituent elements, namely "a general practice" and "accepted as law". The debate on the second report had addressed issues relating to the overall direction and scope of the work, the use of terms, the basic approach to the identification of rules of customary international law and specific comments on the two elements and associated draft conclusions. There had been broad support for the Special Rapporteur's overall direction and approach, and the two-element approach had been welcomed. It had been agreed that the outcome of the work should be a practical tool, of particular value to practitioners who might not be specialists in international law. There had also been general agreement that the draft conclusions should not be unduly prescriptive and should reflect the inherent flexibility that customary international law represented.

41. Regarding the scope of the topic, some members of the Commission had called for more direct reference to the process of formation of rules of customary international law, in addition to consideration of the evidence of customary international law. A number of members had also raised concerns about omitting a detailed examination of the relationship between customary international law and other sources of international law, in particular general principles of law. The efforts of the Special Rapporteur to draw upon practice from different parts of the world had been praised, though several members had highlighted the difficulty of ascertaining the practice of States in the area of customary international law.

42. With respect to the use of terms, some members had doubted whether it would be advisable to include definitions of "customary international law" and "international organizations" in the draft conclusions, while others had considered the definitions to be useful. There had also been differing opinions on how to best refer to the element of "accepted as law", in particular whether the element should be defined by reference to the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, or whether to use the expression "*opinio juris*".

43. On the basic approach to the identification of rules of customary international law, the view that the two-element approach did not vary across fields of international law had been supported by most members of the Commission. Some members had, however, indicated that there appeared to be different approaches to identification in different fields, but had acknowledged that the variation might be a difference in the application of the two-element approach, rather than a distinct approach.

44. With regard to the first element, "a general practice", there had been a range of views on the proposed language in draft conclusion 5, which provided that it was "primarily the practice of States that contributes to the creation, or expression, of rules of customary international law". In particular, there had been divergent views on whether it was exclusively the practice of States that contributed to "a general practice", or whether the practice of international organizations was also relevant. There had been broad support for the Special Rapporteur's proposal to further address the role of international organizations in his next report.

45. There had been broad support for the proposed forms of State conduct that might constitute "a general practice". In particular, several members had welcomed the fact that verbal acts were included along with physical acts, though some members had called for clarification as to which verbal acts were relevant. As to the inclusion of "inaction" as a form of practice, there had been a general view that the issue needed to be further explored and clarified, with a particular view that silence or inaction might only be relevant when the circumstances called for some reaction. With regard to weighing evidence of practice, questions had been raised as to the precise meaning of the phrase in draft conclusion 8 "[t]here is no predetermined hierarchy among the various forms of practice". Several members had indicated that the practice of certain organs of a State was more important than that of others, with some members noting that different organs were more or less empowered to reflect the international position of the State.

46. The concept of "specially affected States", as reflected in draft conclusion 9, paragraph 4, had also been the subject of considerable debate. Several members were of the view that the concept was irreconcilable with the sovereign equality of States and should not be included in the draft conclusions, while other members not opposed to including the concept had stressed that it was not a means to accord greater weight to powerful States, or to determine whether practice was sufficiently widespread.

47. With respect to the second element, namely "accepted as law" (or "*opinio juris*"), there was general agreement regarding the role of "accepted as law" in determining the existence of a rule of customary international law, though some members had expressed concern that the phrase "a sense of legal obligation" did not sufficiently clarify the operation of the element. With respect to evidence of acceptance of law, the notion that an act (including inaction) might establish both practice and acceptance as law had been discussed. Certain members had been of the view that, as a general matter, acceptance of a practice as compelled by law could not be proved by mere reference to the evidence of the practice itself. On the other hand, several members had seen no problem with identifying evidence of the two elements on the basis of the same conduct. A number of additional issues relating to evidence of acceptance as law had also been discussed, including whether such acceptance needed to be universal.

48. As the Special Rapporteur had noted in his concluding remarks, his proposed future programme of work had been generally supported. The Special Rapporteur had indicated that the third report would address, among other things, the interplay between the two elements, the various aspects pertaining to international organizations, the relationship between customary international law and treaties, as well as questions of the "persistent objector" and regional, local and bilateral custom. The importance of submissions by States on their practice in relation to customary international law, as well as information on national digests and related publications, had also been emphasized. Accordingly, in chapter III of the report, the Commission had reiterated its request to States to provide information on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law. Such information should be submitted preferably by 31 January 2015.

49. With regard to chapter XI (Protection of the environment in relation to armed conflicts), a topic included in the current programme of work of the Commission at its sixty-fifth session, the Commission had had before it the preliminary report by the Special Rapporteur, Ms. Marie Jacobsson (A/CN.4/674). It would be recalled that already at the previous session the Special Rapporteur had proposed to deal with the topic in temporal phases rather than considering each legal regime individually as a distinct category. The temporal phases would address the legal measures taken to protect the environment before, during and after an armed conflict: phase I, phase II and phase III, respectively. Accordingly, the preliminary report had provided an introductory overview of phase I, namely the environmental rules and principles applicable to a potential armed conflict, so-called "peacetime obligations". It did not address measures to be taken during an armed conflict or post-conflict, which would be the subject of future reports.

50. The preliminary report set out in general terms the Special Rapporteur's proposed approach to the

topic and provided, inter alia, an overview of the scope and methodology, as well as of the previous work of the Commission relevant to the topic. It also sought to identify certain existing obligations and principles arising under international environmental law that could guide peacetime measures taken to reduce negative environmental effects in armed conflict. The Special Rapporteur had nevertheless indicated that it was premature, at the current stage, to evaluate the extent to which any such obligations continued to apply during armed conflict. The preliminary report further addressed the use of certain terms which had been proposed to facilitate discussion, such as "armed conflict" and "environment", as well as the relevance of international human rights law to the topic.

51. The debate in the Commission had addressed in particular questions of scope and methodology, use of terms, the range of materials to be consulted, environmental principles and obligations, human rights and the environment, as well as the future programme of work. There had been general support in the Commission for the temporal approach adopted by the Special Rapporteur. There had been considerable debate, however, on the weight that should be accorded to phase II, as well as on what issues should be excluded from the scope of the topic, in particular with regard to the issues of weapons, internally displaced persons and refugees, cultural heritage, environmental pressure as a cause of armed conflict, and non-international armed conflicts.

52. While there had been broad support for the proposal to develop working definitions to guide the discussions on the topic, the question whether any definition would be included in the outcome of the work had been left open. One of the main issues discussed in that context had related to the proposed definition of "armed conflict" and concerned the proposal to include conflicts between "organized armed groups or between such groups within a State".

53. Concerning the environmental principles and obligations discussed in the preliminary report, the general position within the Commission had been that further analysis of the relationship of such principles with armed conflict was required and that the topic should focus on their applicability in relation to armed conflict rather than on determining whether they were general principles or rules of international law. There had also been a more general discussion on the specific principles presented by the preliminary report and their particular relevance to the topic. Different views had been expressed on the consideration of human rights as part of the topic, as well as on the advisability of according indigenous rights separate treatment.

54. With regard to the future programme of work, there had been broad support for the proposal by the Special Rapporteur that her second report would further examine aspects of phase I and would address phase II, including analysing the extent to which particular environmental principles were applicable in relation to armed conflict.

55. In her concluding remarks, the Special Rapporteur had stressed the importance of receiving information from States concerning legislation and regulations in force aimed at protecting the environment in relation to armed conflict. Accordingly, in chapter III of its report, the Commission had reiterated its request to States to provide information on whether, in their practice, international or domestic environmental law had been interpreted as applicable in relation to international or non-international armed conflict. The Commission would also like information from States as to whether they had any instruments aimed at protecting the environment in relation to armed conflict, such as national legislation and regulations, military manuals, standard operating procedures, rules of engagement or status- of- forces agreements applicable during international operations, and environmental management policies related to defence-related activities. Such information should be submitted preferably by 31 January 2015.

56. On chapter XII (Provisional application of treaties), the Commission had had before it the second report of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo (A/CN.4/675), which sought to provide an analysis of the legal effects of the provisional application of treaties. In his report, the Special Rapporteur had identified four ways in which article 25, paragraph 1, of the Vienna Convention on the Law of Treaties might be manifested: (1) when a treaty established that it would apply provisionally from the moment of its adoption; (2) when the treaty established that it would be applied provisionally by the signatory States; (3) when the treaty left open the possibility for each State to decide if it wished to apply the treaty provisionally or not from the moment of the adoption of the treaty; and (4) when the treaty was silent on its provisional application and States applied article 25, paragraph 1. In the Special Rapporteur's

view, since the obligations under the provisional application of treaties could also take the form of one or more unilateral acts, a legal analysis of the effect of unilateral acts was also of relevance.

57. The Special Rapporteur had further stated that the rights established by the provisional application of treaties as actionable rights would also depend on how the provisional application had been enshrined in the treaty or agreed to. Hence, the scope of the rights would be clearer in those cases where the treaty explicitly established that it would be provisionally applied from the moment of adoption or the moment of signature. The analysis of the scope of obligations became more complex when a State decided unilaterally to apply a treaty provisionally.

58. The Special Rapporteur had further maintained that the regime that applied to the termination of treaties applied *mutatis mutandis* to the provisional application of treaties. He had noted that some States followed the practice of performing the obligations agreed upon during a transitional period over which the provisional application of a treaty was being phased out, in the same manner as in the case of the termination of the treaty itself, and that that was evidence that those States assigned the same legal effects to the termination of provisional application of the treaty as to the termination of the treaty itself.

59. As for the legal consequences of breach of a treaty being applied provisionally, the Special Rapporteur had limited himself to reiterating the applicability of the existing regime of the responsibility of States, as provided for in the 2001 articles on the responsibility of States for internationally wrongful acts.

60. In the debate on the Special Rapporteur's report, the Commission had been cognizant of the fact that the comments received from States, both in the Sixth Committee and in writing, had generally supported the view that the provisional application of treaties did give rise to legal effects. Broad agreement had also been expressed in the Commission that the provisional application of a treaty, although juridically distinct from entry into force of the treaty, did nonetheless produce legal effects and was capable of giving rise to legal obligations, and that those were the same as if the treaty were itself in force for that State — a conclusion that was supported both in the case law and by State practice.

61. Reference had also been made during the debate to several specific legal constraints on provisional application. It had been noted that the provisional application of a treaty could not result in the modification of the content of the treaty, nor could States (or international organizations) which had not participated in the negotiation of the treaty resort to its provisional application, and the provisional application of a treaty could not give rise to a distinct legal regime separate from the treaty. Nor could provisional application give rise to rights for the State beyond those that were accepted by States and provided for in the treaty.

62. Different views had been expressed during the debate regarding the characterization of the decision to provisionally apply a treaty as a unilateral act. It had been noted that such a position could not be reconciled with article 25 of the Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States. At the same time, it was also noted that recent practice had revealed the possibility that a State could unilaterally declare its intention to provisionally apply a treaty.

63. While support had been expressed during the debate for the position that the regime that applied to the termination of treaties applied *mutatis mutandis* to the provisional application of treaties, other members were of the view that, while there was some overlap in the legal position of the termination of treaties and that of provisional application, that did not mean that the same rules applied, even mutatis mutandis. A difference of opinion had also been expressed as to the applicability of the rules on the unilateral acts of States to the termination of provisional application, as well as to the assertion that such termination could not be undertaken arbitrarily.

64. As for the legal consequences of breach of a treaty being applied provisionally, the Commission had supported the Special Rapporteur's view on the applicability of the existing regime of the responsibility of States, and it had been pointed out that article 12 of the 2001 articles on State responsibility referred to an obligation "regardless of its origin or character", which could cover obligations emanating from treaties being provisionally applied. However, other members called for further reflection on that issue.

65. Some members had expressed support for the Special Rapporteur's decision not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Others had been of the view that such an analysis, as part of a broader study on State practice, was both feasible and necessary for a proper consideration of the topic, since the possibility of the resort to the provisional application of a treaty depended also on the internal legal position of the State in question.

66. As for future action, the Special Rapporteur had indicated his intention to complete, in his next report, the analysis of the contributions made by States on their practice. The attention of the Sixth Committee was drawn to chapter III of the Commission's report, in which the Commission had reiterated its request to States that they provide to it information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to: the decision to provisionally apply a treaty; the termination of such provisional application; and the legal effects of provisional application. Such information should be submitted preferably by 31 January 2015. The Special Rapporteur had also expressed his intention to consider the legal regime applicable to treaties between States and international organizations, and those between international organizations, and had indicated that he would propose draft guidelines or conclusions for the consideration of the Commission at its next session.

67. On the question of the eventual outcome of the work on the topic, support had been expressed for the Special Rapporteur' s intention to propose draft guidelines or conclusions. In terms of another view, however, the Commission should not rule out the possibility of developing draft articles, as it had done in its work on the effects of armed conflicts on treaties.

68. From the beginning of its work on the topic "The Most-Favoured-Nation clause" (chapter XIII), the Commission had worked in the framework of a Study Group. As he had done the previous year, during the sixty-sixth session of the Commission Mr. Mathias Forteau had presided over meetings of the Study Group in the absence of its Chairman, Mr. Donald McRae. It was envisaged that the Study Group could complete its work in 2015. It was therefore the Commission's hope that Mr. McRae would be in Geneva to complete the task.

69. The Study Group had had before it a draft final report on its overall work. It had been prepared by Mr. McRae, putting together the various strands of issues concerning the topic into one comprehensive draft report, based on the various working papers and informal documents considered by the Study Group since 2009. The draft final report systematically analysed the various issues within the broader framework of general international law and in the light of developments since the adoption of the 1978 draft articles. In its overall structure, the draft report consisted of three parts, which: (a) provided the background and address the contemporary relevance of MFN clauses, and issues surrounding them; (b) surveyed the different approaches in the case law to the interpretation of MFN provisions in investment agreements; and (c) analysed in greater detail the various considerations concerning their interpretation.

70. The Study Group had undertaken a substantive and technical review of the draft final report with a view to providing input for the preparation of a new draft for 2015 to be agreed on by the Study Group. The Study Group had acknowledged the need to make attempts to shorten the draft report and to update certain of its elements in the light of more recent cases.

71. The Study Group had once more underlined the importance and relevance of the Vienna Convention on the Law of Treaties as a point of departure in the interpretation of investment treaties. Accordingly, emphasis had been placed on analysing and contextualizing the case law and drawing attention to the issues that had arisen and trends in practice. The Study Group had also stressed the significance of taking into account the prior work of the Commission on fragmentation of international law and the Commission's current work on the topic of subsequent agreements and subsequent practice in relation to interpretation of treaties. It had also highlighted the need to prepare an outcome that would be of practical utility to those involved in the investment field and to policymakers. The Study Group had acknowledged as feasible the timeline of seeking to present a revised draft final report for consideration at the sixty-seventh session of the Commission in 2015, taking into account comments made and amendments proposed by individual members of the Study Group during the current session.

72. **Ms. Cujo** (Observer for the European Union), speaking also on behalf of the candidate countries

Albania, Montenegro, Serbia, the former Yugoslav Republic of Macedonia and Turkey; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia and the Republic of Moldova, said that the European Union welcomed the Commission's work on the topic "Provisional application of treaties" and reiterated its interest in the important role that the Commission could play in providing guidance and enhancing the understanding of that instrument of international law. The European Union agreed that the focus of the analysis should be on the legal effects at international level, rather than on a comparative analysis of domestic law.

73. The Special Rapporteur's second report (A/CN.4/675) made a number of interesting distinctions and observations concerning, for example, the differences between agreements that produced effects primarily within the State and those that produced effects at the international level; the different sources of obligation (the treaty itself or a parallel agreement); and issues connected with termination of provisional application. Those were all important aspects of the topic and merited further analysis. It might enhance the practical value of the final outcome if the Commission's work were focused on certain selected issues that were felt to be important in practice and had the potential to present a difficulty when parties decided to resort to provisional application. During the consideration of the second report, the members of the Commission had already pointed to a number of interesting issues that could be studied further.

74. In its statement at the sixty-eighth session, the European Union had referred to a number of specific issues for consideration, including: to what extent provisions involving institutional elements, such as provisions establishing joint bodies, might be subject to provisional application or whether there were limitations in that respect; whether provisional application should also extend to provisions adopted by such joint bodies during provisional application; whether there were limitations with regard to the duration of the provisional application; and how the provisional application provided for in article 25 of the Vienna Convention on the Law of the Treaties related to its other provisions and other rules of international law, including responsibility for breach of international obligations. The Special Rapporteur had already touched briefly on some of those matters, but more detailed analysis would be welcome.

75. The European Union noted that the Special Rapporteur intended to address the provisional application of treaties by international organizations as part of his future work. It should be noted in that connection that the possibility of provisional application of international agreements with third countries was explicitly envisaged in the European Union's founding treaties (article 218, paragraph 5, of the Treaty on the Functioning of the European Union), and that possibility was often put into practice by the European Union. The Special Rapporteur would find ample material for analysis in European Union practice; should specific questions arise, the European Union would be pleased to provide more detailed information on its own practice.

76. With regard to the topic "Identification of customary international law", the European Union appreciated that, notwithstanding the complex and theoretical nature of the issues relating to the two constituent elements of customary international law, the Special Rapporteur had not lost sight of the practical purpose of the Commission's work on the topic, namely to give guidance on the process of identification of customary international law.

77. It was apparent that there were divergent views within the Commission on the role of international organizations in the formation of customary international law. The practice of States had been historically and still was central to the formation of customary international law. However, in recent decades international organizations had played an increasing role in international relations, including in setting norms. That development was particularly visible in the case of regional integration organizations such as the European Union. The European Union had legal personality and was a subject of international law exercising rights and bearing responsibilities. It had full treaty-making capacity, based on the competences conferred on it by its member States in many important areas such as trade, development, fisheries and the environment, to name but a few. The European Union was recognized as a treaty partner in a large number of multilateral and bilateral treaties, either on its own or alongside its member States.

78. Implicit in that recognition was the view that the international community considered an organization

such as the European Union to be capable of contributing to the development of international law in other contexts, including the formation of customary international law. In that context, too, the European Union's action was based on the responsibilities that its member States had entrusted it with. The European Union's founding treaties provided that the Union "shall contribute … to the strict observance and the development of international law" (Treaty on European Union, article 3, paragraph 5). The European Union therefore agreed with the Special Rapporteur that the practice of at least certain international organizations in certain fields, such as in relation to treaties, privileges and immunities, or the internal law of international organizations, could not be dismissed.

79. The Special Rapporteur had illustrated the special characteristic of the European Union by pointing out that there were areas where only the European Union could act on the international plane and its member States could not, unless they were authorized to do so. The Special Rapporteur had also correctly noted that not to take into account the practice of the European Union in those areas would effectively imply that the member States of the Union would be reduced in their ability to contribute to the formation of customary law. In areas in which, in accordance with the rules of the European Union treaties, only the Union could act, such as trade or fisheries matters, it was the Union's practice that should be taken into account with regard to the formation of customary international law alongside the implementation by the member States of European Union legislation.

80. In the light of the above considerations, the European Union welcomed the explicit inclusion of a reference to the practice of international organizations in draft conclusion 4 [5] as provisionally adopted by the Drafting Committee. It noted that the Drafting Committee intended to revisit that paragraph after the Special Rapporteur had submitted his third report. The European Union supported retention of that text and urged the Commission to take the same approach in subsequent draft conclusions, for instance, in draft conclusions 5 [6] to 7 [8], by devoting specific paragraphs to international organizations there as well.

81. **Ms. Weiss Ma'udi** (Israel), referring to the topic "Identification of customary international law", said that her delegation welcomed the Special Rapporteur's proposed draft conclusions. It supported the two-element approach proposed by the Special Rapporteur as the primary tool for identifying the existence of a rule of customary law, and approved of the emphasis placed on the need to take into account the pertinent circumstances in each particular case. That approach was enshrined in Article 38, paragraph 1, of the Statute of the International Court of Justice, and had been followed by Israel's High Court of Justice in its 1983 decision in *Bassil Abu Itta et al. v. the Chief of Judea and Samaria*.

82. Her delegation stressed the importance of draft conclusion 9 concerning the need for the relevant practice to be "sufficiently widespread and representative" in order to give rise to custom, and the emphasis placed on giving due regard to specially affected States for the identification of a customary rule. With respect to draft conclusion 7, her delegation agreed that inaction might constitute a type of State practice that might reflect the existence of an applicable customary law rule. It supported the view that conflicting statements by various State organs on a particular practice weakened the weight to be given to that practice.

83. Her delegation also agreed with the Special Rapporteur that actions of non-State actors did not constitute practice for the purpose of forming or identifying rules of customary international law. Widening the scope of potential actors for such analysis beyond State actors was fraught with the risk of political bias. There was also a question of how, from a practical point of view, the scope and nature of non-State actors was to be included in or excluded from such analysis. Israel supported an approach that placed 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 and analysis of State practice. With regard to the significance of oral statements, no weight should be given to mere political statements as evidence of a customary rule.

84. A cautious approach should be taken to the issue of "special" or "regional" customary international law and the question of whether there were alternative rules for the formation and evidence of customary international law in specialized legal fields. In an already fragmented international legal system, further

diversification of the rules for the formation and evidence of custom based on particular regional practices or on a particular legal field would serve only to increase incoherence and uncertainty and cause greater discrepancies between States. Her delegation endorsed the Special Rapporteur's pertinent clarification that not all international acts had legal significance, such as acts of comity, courtesy and tradition. Certain acts carried out by States on an ex gratia basis should not be viewed as necessarily establishing either State practice or *opinio juris*.

85. Her delegation supported the Special Rapporteur's intention to continue the formulation of conclusions and commentaries which would serve as a general interpretive guide for international and domestic courts and practitioners.

86. With regard to the topic "Protection of the environment in relation to armed conflict", as a matter of principle Israel attached great importance to the protection of the environment, including in the context of armed conflict. With respect to the Special Rapporteur's preliminary report (A/CN.4/674), it shared the view that the laws of armed conflict contained a body of rules and principles that adequately addressed the issue of environmental protection. Accordingly, it welcomed the Special Rapporteur's decision to focus on identifying already existing legal obligations and principles, and it agreed that non-binding draft guidelines might be the preferred approach to the topic.

87. Her delegation supported the approach of excluding from the scope of the research certain issues such as the protection of cultural heritage, the effect of particular weapons and refugee law, all of which were fully addressed in other bodies of law. The scope of the discussion should not be expanded to include a broader analysis of the laws of armed conflict, but should focus instead on the defined subject matter. Her delegation agreed with the Special Rapporteur that human rights law was separate and based on different principles than international environmental law. Accordingly, the scope of the work should be limited to the matter at hand and not include other unrelated fields of law, such as the body of law on indigenous people.

88. With regard to the topic "Provisional application of treaties", her delegation had noted in the past that the provisional application of treaties was not part of Israel's general policy with regard to treaty law. However, in exceptional circumstances only, a treaty might be provisionally applied. Such exceptional circumstances might include cases of urgency and cases in which prompt application would be of great political or financial significance. Any such provisional application would require prior approval by the Government, which would include a statement as to the extraordinary circumstances that would justify the provisional application of the treaty in the specific case. All treaties that had been provisionally applied by Israel to date had been approved in advance by the Government. The Government decision had included the approval of the treaty itself and of its provisional application.

89. With respect to the topic "The Most-Favoured-Nation clause", the work carried out thus far highlighted the complexities of the Most-Favoured-Nation clause in bilateral investment treaties. Of particular interest was the question of scope and coverage of such clauses with respect to dispute settlement mechanisms in bilateral investment treaties and investment chapters in trade agreements. Israel reiterated the importance which it attached to the principle of consent between parties negotiating such agreements with regard to the scope and coverage of Most-Favoured-Nation clauses, including the consent to exclude certain provisions from the clause.

90. Her delegation endorsed the Study Group's approach regarding the importance and relevance of the Vienna Convention on the Law of Treaties, which should serve as a point of departure for the interpretation of investment treaties. It looked forward to receiving the revised draft final report scheduled for consideration by the Commission at its sixty-seventh session and to examining the adoption of relevant outcomes.

91. **Ms. Zabolotskaya** (Russian Federation), referring first to the topic "Identification of customary international law", said that, by and large, her delegation welcomed the overall approach to the subject. The choice of a practical guide as the final product made it possible to conserve the flexible nature of customary international law, while avoiding the formulation of principles regulating the formation of rules of customary international law. Her delegation agreed with the Commission that a practical guide should assist practitioners in the task of identifying such rules in practice.

92. Her delegation was pleased that the Commission had succeeded in clarifying a number of theoretical disputes, and it agreed that both State practice and *opinio juris* were necessary for the formation of rules of customary international law; that that rule applied to all fields of international law; and that State practice might consist not only of positive acts, but also of declarations, protests and the like. However, her delegation did not agree that there was no predetermined hierarchy of sources of such practice. It was obvious that the outwardly directed practice of a State was of greater importance for the formation of rules of international law. For example, a declaration by a minister for foreign affairs carried more weight than a judgement of a local court for the purpose of establishing the existence of such a rule. Nor did her delegation share the view that no particular duration of time was required for the formation of a rule of customary law. The period of time needed for the identification of such a rule was in fact shrinking, but it was too early to assert that duration of time was not a constituent element in the formation of custom.

93. The practice of international organizations and other entities could only be used as a subsidiary tool for the identification of the practice or *opinio juris* of States. The practice of such entities, unlike that of States, did not have meaning in its own right. Such a view was consistent with the judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, which, in ascertaining whether the principle of the non-interference in the internal affairs of a State was a rule of customary international law, analysed the statements of States relating to the adoption of certain General Assembly resolutions, but not the fact that such resolutions had been adopted.

94. At its next session, the Commission would need, firstly, to consider the interrelationship between customary law and other sources of law, including international agreements. The Commission's final product must reaffirm that a rule of customary law could not be contrary to a rule of *jus cogens*. Secondly, the Commission should revisit the role of silence in the light of the role of objection and the "persistent objector" in the formation of a rule of customary law.

95. On the topic "Provisional application of treaties", her delegation endorsed on the whole the Special Rapporteur's approach based on an analysis of the effects of provisional application, above all from the perspective of international law, which would make it possible to prepare conclusions equally applicable and useful to all States irrespective of their domestic legislation on provisional application. It would, however, be useful for the Commission to examine the domestic legislation of States in the area of the provisional application of treaties to gain a more in-depth understanding of the institution and its use by States, even if the Commission could not immediately use the results to arrive at any conclusions. Of interest in that connection were the meaning and role of rules of domestic law on the basis of which a State took a decision on the domestic application of a treaty. If they were not sufficiently elaborated, it might lead to a conflict between the domestic law of States and international law.

96. Her delegation had questions about the Special Rapporteur's characterization of the decision to apply a treaty provisionally as a unilateral act. That hypothesis was not in keeping with article 25 of the 1969 Vienna Convention on the Law of Treaties, pursuant to which the procedure for provisional application was based on agreement, and not on a unilateral decision.

97. The Commission should consider the situation in which, because of certain difficulties in practice, a multilateral treaty entered into force for some States and continued to be provisionally applied by other States that had not yet expressed their consent to become parties to the treaty. The legal effects of that treaty, which in principle should be the same for all States, would in fact not be entirely identical, for example with regard to the termination of the treaty, decisions on questions concerning its review, or the broadening of its scope.

98. The possibility of terminating the provisional application of a treaty without renouncing an intention to become a party to it in the future also required further examination. A situation might very well arise which prevented further provisional application, but did not mean that it was not appropriate for the treaty to enter into force once that situation was resolved. Interpretation of the expression "intention not to become a party to a treaty" in article 25, paragraph 2, of the Vienna Convention, which implied that a State must inform the other parties applying the treaty in order to terminate its provisional application, was also of great importance. State practice in respect of that article might be useful in analysing that question

further and in considering the problem of the responsibility of States for the breach of obligations stemming from the provisional application of a treaty. It would also be useful to consider whether the provisional application of a treaty could be suspended.

99. With regard to the topic "Protection of the environment in relation to armed conflicts", her delegation noted that the discussion in the Commission had not succeeded in clearly delineating its scope. The purpose of the study was not the general application of rules of international law in the area of the protection of the environment, but rather their application in relation to armed conflicts. For the moment, that relation was not clearly discernible.

100. The Special Rapporteur's preliminary report (A/CN.4/674) was built around the advisory opinion of the International Court of Justice concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which concluded that human rights norms were applicable in the course of an armed conflict, albeit not in their entirety. That conclusion served as a basis to assert that other rules, including rules relating to the protection of the environment, were applicable during an armed conflict. In her delegation's view, the question of whether rules in the area of environmental protection were applicable during an armed conflict required further study. It was not possible automatically to extrapolate from the Court's conclusions regarding inalienable human rights to other areas of law.

101. Her delegation reiterated its doubts about the three-phase approach to the topic. Consideration of the first phase (preparation for potential armed conflict) in the Commission had shown that it was difficult to single it out as a specific period that had an impact on the general regime of State obligations in the area of environmental protection.

102. As to further work on the topic, her delegation agreed with the limitations formulated by the Special Rapporteur in paragraphs 62, 64, 65 and 66 of the preliminary report. It was also of the opinion that the question of refugees and displaced persons and that of indigenous people were not directly related to the topic.

103. Her delegation welcomed the progress made on the topic "The Most- Favoured-Nation clause" and agreed with the view that the report on the subject would serve as a useful tool for States and interested organizations.

104. **Mr. Reinisch** (Austria), referring first to the topic "Identification of customary international law", said that his delegation supported the Commission's aim to clarify issues relating to that source of public international law by formulating conclusions with commentaries.

105. However, his delegation had doubts concerning the desirability of defining "customary international law" and "international organizations", as the Special Rapporteur had proposed in his draft conclusions. As the term "customary international law" was defined in Article 38 of the Statute of the International Court of Justice, and that definition was generally accepted outside the Court's ambit, it did not seem useful to introduce a new definition. The wording proposed in draft conclusion 2, subparagraph (a), which was the subject of controversy in the Commission, might lead to confusion about the general concept.

106. With regard to the definition of "international organization", his delegation did not question the fact that international organizations might also play a role in the creation of customary international law. However, it was not convinced that it was necessary to define the term in the text of the draft conclusions. It would be preferable to clarify the meaning of the term in the commentary to the relevant draft conclusions, such as draft conclusion 7 (Forms of practice). There it could be stated that the term "international organization" did not comprise non-governmental organizations and that international organizations as subjects of international law could be created by States or other international organizations. For that reason, his delegation was not convinced that the term "intergovernmental organization" was appropriate.

107. His delegation supported the Special Rapporteur's two-element approach to the identification of rules of customary international law. However, limiting the scope of potential actors in the process of the creation of customary international law to States alone would be misguided. That potential norm-creating role should be kept open for other subjects of international law. It would be preferable for the Special Rapporteur's approach to be expanded.

108. His delegation also welcomed the illustrative list of forms of practice in draft conclusion 7 and the forms of evidence of acceptance as law in draft

conclusion 11, and it agreed that certain manifestations, whether acts or inaction, might demonstrate both. It endorsed the reference in the Commission's report that the inclusion of inaction as a form of practice, as well as the concept of "specially affected States", needed to be further explored and clarified.

109. With respect to the topic "Protection of the environment in relation to armed conflicts", the Special Rapporteur, in her preliminary report (A/CN.4/674), sought to demonstrate that the entirety of international law on the protection of the environment would apply to phase I (the phase prior to an armed conflict). In his delegation's view, it was not necessary to discuss the whole range of environmental law, which was under permanent development and review. Instead, the main emphasis should be placed on the relationship between environmental law and international humanitarian law.

110. Two terms of fundamental importance for the topic required further discussion: "environment" and "armed conflict". Existing international legal instruments contained very different definitions of "environment". The definition adopted by the Commission in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities seemed to be an appropriate starting point. A definition that also related to the cultural heritage would be too broad for the topic. As to the term "armed conflict", the definition used in international humanitarian law should also be applied in the current context. That definition encompassed international and non-international armed conflicts, but did not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

111. His delegation reiterated the need to coordinate the Commission's work on the topic with the work of the International Committee of the Red Cross. Although specific weapons regimes were not included in the topic, they were nevertheless related to it. In that connection, his delegation drew attention to the upcoming Vienna Conference on the Humanitarian Impact of Nuclear Weapons, to be held on 8 and 9 December 2014.

112. Recent decisions on provisional application relating to the Arms Trade Treaty and the Chemical Weapons Convention had underscored the particular importance of the topic "Provisional application of treaties". In his second report (A/CN.4/675), the Special Rapporteur had identified four ways in which article 25 of the Vienna Convention on the Law of Treaties might be manifested, However, his delegation wondered whether article 25 of the Vienna Convention could be interpreted as permitting a State to declare the provisional application of a treaty unilaterally if the treaty itself was silent on that matter. Since provisional application was deemed to establish treaty relations between the negotiating States , it could be argued that unilateral provisional application would oblige the other negotiating States to accept treaty relations with a State without their consent. That consent was usually expressed by the ratification and accession clauses of a treaty or by a special clause in the treaty allowing for its provisional application.

113. Provisional application of a treaty by unilateral declaration in the absence of a special clause in the treaty could take place only if it could be established that the negotiating States had agreed to that procedure in some other manner in accordance with article 25, paragraph 1(b), of the Vienna Convention. However, that conclusion did not rule out the possibility that a State might commit itself to respect the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the other negotiating States. Whereas normal provisional application resulted in the establishment of treaty rights and obligations with the other negotiating States, provisional application resulting from a unilateral declaration could only lead to obligations for the declaring State. That principle was reflected in the guiding principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission in 2006, pursuant to which a unilateral declaration entailed obligations for the formulating State and could not generate obligations incumbent on other States without their consent.

114. As to the effects of provisional application, his delegation shared the Special Rapporteur's view that a breach of the applicable provisions of a treaty applied provisionally entailed State responsibility that could be invoked by the other States parties.

115. Austria continued to regard the work envisaged by the Commission on the topic "The Most-Favoured-Nation clause" as a valuable contribution to clarifying specific problems of international economic law. As the Commission itself had suggested, its work should entail a systematic study of the main issues, not an

attempt to formulate draft articles. The highly contentious interpretations of Most-Favoured-Nation clauses, particularly in the field of international investment law, testified to the need for a cautious approach.

116. **Ms. Chigiyal** (Federated States of Micronesia), referring to the topic, "Provisional application of treaties", said that when two or more States agreed to be bound by the terms of a treaty, they placed their national interests, aspirations and, potentially, their sovereignty at the mercy of their treaty partners. Whether it was for peace, defence, trade, economic union or some other important matter, a treaty injected a measure of stability and predictability into international relations and provided a fertile source for rules and principles of international law. Given the far-reaching ramifications of validly concluded treaties, it was important for parties to a treaty to know when it actually applied and bound them, particularly if that occurred before the treaty entered into force. The Commission's examination of the provisional application of treaties was thus of critical importance.

117. Micronesia had a long history of provisional application of treaties. When it had emerged from the trusteeship system, it had notified the United Nations that it intended to apply provisionally a number of treaties that the United States, as its administering Power, had extended to Micronesia during the trusteeship period until such time as Micronesia had completed a thorough review of whether to formally accede to those treaties as an independent sovereign. The provisional application of treaties had therefore been one of the first acts undertaken by Micronesia under international law, and it remained a matter of great interest for it.

118. Micronesia was not a party to the 1969 Vienna Convention on the Law of Treaties. In its view, however, article 25 of the Convention was now part of customary international law, even though its specific content and parameters remained to be established in an authoritative manner. Although the drafters of the Convention had grappled with the appropriateness of article 25 in the light of the questionable legal status of the mechanism of provisional application at that time, the usefulness of the mechanism could not be doubted, particularly with regard to "jump-starting" treaty implementation and ensuring the continuity of functions in successive treaty regimes. Unquestionably, States had made widespread use of the mechanism both before and after article 25 had been enshrined in the Convention.

119. Her delegation welcomed the Special Rapporteur's decision to focus in his current work on the legal effects of the provisional application of treaties. That practical approach would enhance States' understanding of the actual functions of provisional application and hopefully lead to broader utilization of the mechanism. It was her delegation's view that the mechanism produced legal rights and generated legal obligations for the State utilizing the mechanism as if the treaty had entered into force for that State, but that the exercise and discharge of those rights and obligations could be limited either by the terms of the treaty being provisionally applied or by a separate agreement concluded by the negotiating parties to the treaty that allowed for its provisional application. In no way could the provisional application of a treaty lead to a modification of the rights and obligations themselves, even though the exercise and discharge of those rights and obligations might be limited during the treaty's provisional application. As a necessary corollary, if a State undertook to apply a treaty provisionally but failed to discharge a treaty obligation that was to be provisionally applied, that failure constituted an internationally wrongful act which entailed the international responsibility of the State. As another necessary corollary, and in line with article 27 of the Vienna Convention, a State that validly opted to apply the treaty provisionally but then failed to discharge its obligations under the treaty could not invoke its domestic law as justification. Since provisional application was a tool designed to hasten treaty implementation and ensure treaty continuity, States must see to it that they could actually use such a tool from the outset; otherwise, the exercise was pointless.

120. Her delegation encouraged the Commission to consider the legal distinctions, if any, between, on the one hand, a State's provisional application of a treaty that had not yet entered into force internationally but which the State had ratified according to domestic constitutional requirements and, on the other hand, a State's provisional application of a treaty that had entered into force internationally but which had not entered into force for the State because of delays in the State's ratification of the treaty due to its domestic constitutional requirements. In the latter scenario, assuming that the State could provisionally apply a

treaty that had not entered into force for that State despite entering into force internationally, the question arose what the international legal consequences were, if any, for a State if it failed to discharge the treaty obligations that it provisionally applied.

121. Perhaps realizing the expansive effects of treaties, the international community had avoided concluding multilateral treaties in recent years, while multilateral treaties that had been concluded struggled to attain sufficient ratifications in order to enter into force. In that climate, the mechanism of provisional application was a vital tool for triggering and sustaining treaty obligations in an expeditious and continuous manner. The Commission's work on that topic was thus important and timely.

122. **Mr. Horna** (Peru), referring to the topic "Protection of the environment in relation to armed conflicts", said that Peru had no domestic legislation or commitments in international legal instruments that dealt specifically with the matter, nor was there any case law involving Peru regarding the direct application of international or domestic environmental law in disputes relating to situations of armed conflict. It should be noted, however, that in its resolution 56/4 the General Assembly had declared 6 November of each year the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict. That resolution was based on the principle of the protection of the environment, since the consequences of an armed conflict had a long-term impact on ecosystems and natural resources that sometimes went beyond national boundaries.

123. Armed conflict unquestionably had an effect on sustainability, a principle recognized in a number of international instruments to which Peru was a party, including, among others, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention concerning the Protection of the World Cultural and Natural Heritage, the Convention on Biological Diversity and the Vienna Convention for the Protection of the Ozone Layer. Thus, the framework of the obligation to protect the environment in peacetime was well established. It might therefore be appropriate to consider the topic on the basis of an analysis of the Geneva Conventions of 1949 as they related to the domestic and international environmental protection framework. In that connection, account should be taken of instruments relating to the trafficking of arms in wartime and their implications in relation to the above-mentioned conventions, given the effect of such trafficking on human lives, the environment, ecosystems, public health and sustainability.

124. It was important to examine all aspects of the impact that war had on the environment, biodiversity and ecosystems, including pollution due to leaks of fuel and chemicals caused by bombings; indiscriminate pillaging of natural resources by armed forces; dangers to land, homes and lives as a result of landmines, unexploded ammunition and other remnants of war; and the environmental degradation caused by mass settlements for displaced populations.

125. International instruments regulated nuclear, chemical and biological weapons, but the unknown threat of new technologies to the environment must also be taken into account. The parties to armed conflicts were responsible for complying with international norms and agreements on the rules of war, including the Geneva Conventions. Some of those norms, such as those concerning the deliberate destruction of farmland, were also of relevance for the environment.

126. The Special Rapporteur's recommendations on applying the principles of prevention and precaution in the event of an armed conflict were recognized not only in the Stockholm and Rio Declarations, but also in Peru's Constitution, which enshrined sustainability, the right to enjoy a balanced environment, as well as other rights relating to the protection of biodiversity, and in its national environmental protection legislation, policies and programmes.

127. **Mr. Hernes** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and referring first to the topic "Identification of customary international law", said that the Nordic countries welcomed an outcome in the form of conclusions as the most appropriate tool to assist practitioners. The Nordic countries agreed with the Special Rapporteur's approach of focusing initially on the two constituent elements of rules of customary international law, and they endorsed the limitations suggested with regard to the scope of the topic, as expressed in the title of the subject, and the exclusion of the issue of *jus cogens*.

128. Concerning the Special Rapporteur's proposed draft conclusion 6, the Nordic countries agreed that the general standard for the determination of State practice

should be whether or not an act was attributable to the State in question and that the standard for attribution should be the same as under the rules of State responsibility. There was, however, a need to exclude, for example, *ultra vires* acts, which, under the rules of State responsibility, might be attributable to the State in question, but should not serve as evidence of custom.

129. The Nordic countries welcomed the wording in draft conclusion 7 to the effect that practice might take a wide range of forms. They agreed that general practice could also be expressed through inaction. However, the precise conditions for when that was the case should be further examined, in particular what type of circumstances should prevail and what interests should be at stake for inaction to become relevant. Just as action by specially affected States was given particular weight, inaction by specially affected states was correctly given more importance in the draft conclusions. That inaction might serve as evidence of acceptance as law, as suggested in draft conclusion 11, paragraph 3, could be accepted as a general rule, but the circumstances of when that rule came into play should be further explored.

130. The Nordic countries were aware that the issue of whether or not international organizations could contribute to the creation of custom would not be addressed until the Special Rapporteur's third report. They were of the view, however, that international organizations could play such a role, particularly when such organizations had been granted powers by member States to exercise competence on their behalf in international negotiations. Thus, at least where international organizations could be said to act on the international scene on behalf of States, it would seem correct to allow for such practice to contribute to the creation of custom. Inasmuch as some international organizations might act only upon unanimous decision or have members or bodies with veto powers, the Special Rapporteur should examine whether inaction by an international organization would be of a different nature than inaction by a State with respect to identifying forms of practice in relation to draft conclusion 7, paragraph 4.

131. As to the topic "Protection of the environment in relation to armed conflicts", the Nordic countries considered it vital to enhance protection of the environment before, during and after armed conflict. Clarification of existing international law might help to achieve that goal. The Nordic countries therefore welcomed the Commission's decision to include the topic in its programme of work.

132. In her preliminary report (A/CN.4/674), the Special Rapporteur noted that the protection of the environment in armed conflicts had until that point been viewed primarily through the lens of the law of armed conflict. The Nordic countries agreed with the Special Rapporteur that that perspective was too narrow, as modern international law recognized that the international law applicable during an armed conflict might be wider than the law of armed conflict. The Commission had clearly stated in its recent work on the effects of armed conflicts on treaties that the existence of an armed conflict did not ipso facto terminate or suspend the operation of treaties. Indeed, in its draft articles, the Commission included an indicative list of treaties the subject matter of which implied that they continued in operation during armed conflict.

133. Against that background, the Nordic countries endorsed the three-phase approach adopted by the Special Rapporteur. Her report on the environmental rules and principles applicable to the protection of the environment in peacetime (phase I) would provide the necessary basis for continued work and discussion on measures to be taken during armed conflict (phases II) and post-conflict (phase III). The Nordic countries also agreed with the Special Rapporteur that there could not be a strict dividing line between the three phases. Identifying and clarifying the obligations that applied during armed conflict would be an important step towards reducing environmental damage in such situations. Furthermore, they concurred that the scope of the topic must be restricted for practical, procedural and substantive reasons, so that it was necessary to exclude certain issues. They agreed on the whole with the limitations proposed in the report. All in all, the preliminary report on the protection of the environment in relation to armed conflicts provided a very good basis for continued work on the topic.

134. The Governments of Denmark, Finland, Sweden and Norway, together with their National Red Cross Societies, were continuing their work on the issue, in line with joint pledge made during the 31st International Conference of the Red Cross and Red Crescent in 2011. Their work plan fell into two parts. The first part involved an empirical study of the effects of armed conflicts on the environment, based on a

review of a cluster of representative contemporary armed conflicts. That study was well under way. Secondly, an international expert meeting would be organized to discuss the existing legal framework for the protection of the environment in relation to armed conflict and to identify any gaps in that framework, based on the empirical data collected in the report of the study. The conclusions of the expert meeting would be reported to the 32nd International Conference of the Red Cross and Red Crescent, to be held in 2015.

135. With regard to the topic "Provisional application of treaties", the Nordic countries expressed support for the Special Rapporteur's decision not to embark on a comparative study of domestic provisions on the subject. Whether or not a State resorted to provisional application was essentially a constitutional and policy matter.

136. The Commission had expressed its agreement with the view that the provisional application of a treaty produced legal effects and was capable of giving rise to legal obligations, and that those were the same as if the treaty were itself in force for that State. The Nordic countries were of the opinion that provisional application under article 25 of the Vienna Convention went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. The question of the legal consequences arising from a breach of a treaty applied provisionally required further study.

137. The analysis of the topic was likely to identify strengths and weaknesses of different models of provisional application, and it might therefore be considered whether the Commission's work would benefit from further analysis of the different models. That included the possibility for a State to unilaterally declare its intention to apply a treaty provisionally when the source for provisional application did not arise from a provision of the treaty itself.

138. The Special Rapporteur had called for more information on State practice on which to draw conclusions. In the past, the Nordic countries had mentioned examples of agreements in which provisional application had been resorted to, such as the 2010 General Security Agreement on the Mutual Protection and Exchange of Classified Information between the Nordic countries and the 2013 Arms Trade Treaty. One model of provisional application was the adoption of decision l/CMP.8, in which the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol had recognized that parties might provisionally apply the Doha amendment pending its entry into force in accordance with articles 20 and 21 of the Kyoto Protocol; the parties might provide notification to the Depositary of their intention to do so. The Nordic countries implemented the above-mentioned treaties provisionally with the same legal effects as if they had formally entered into force.

139. It might often take some time to complete the constitutional requirements for ratification in the required number of States parties. Provisional application in such cases might provide a suitable instrument to bring the treaty into early effect. It might therefore be useful if the Commission could develop model clauses on provisional application.

140. The question of the provisional application of treaties by international organizations should be addressed as part of the further work on the topic. For example, provisional application was commonly resorted to in the cooperation agreements entered into by the European Union and its member States with a third State.

Organization of work

141. **Mr. Saeed** (Sudan) said that he took the floor to raise a concern of his own and other delegations with regard to the Committee's methods of work. He wished to reiterate that his delegation had full confidence in the Chair of the Committee and the entire Bureau and had so far been very happy with the way they were conducting the Committee's work. His delegation had received an e-mail circulated by the Chair of the Working Group on measures to eliminate international terrorism inviting delegations to a meeting to be held outside the premises of the United Nations, at a mission that had generously offered to host the meeting, on issues relating to the work of the Working Group. His delegation did not encourage the practice of holding meetings that should be held on United Nations premises outside those premises. His delegation urged the Chair to intervene so as to maintain the integrity of the United Nations and to provide for better arrangements for the reading of the draft resolution on the item. The meeting was not for the reading of some specific paragraph on which certain delegations had concerns; rather it was for the reading of the entire draft resolution, for which, insofar

as his delegation was aware, the Chair of the Working Group was the only coordinator.

142. **The Chair** said that the information that the delegation of Sudan had provided had not previously been shared with him, but it was duly noted.

The meeting rose at 1 p.m.