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Chair:	Mr. Pašić (Vice-Chair)	(Bosnia and Herzegovina)
later:	Mr. Gharibi (Vice-Chair)	(Islamic Republic of Iran)

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In the absence of Mr. Manongi (United Republic of Tanzania), Mr. Pašić (Bosnia and Herzegovina), Vice-Chair, took the Chair.

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

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

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

2. **Ms. Faden** (Portugal), speaking on the topic "Identification of customary international law", said that her delegation agreed with the Special Rapporteur's two-element approach, which took into account both practice and *opinio juris*. It considered that the party claiming the existence of a rule of customary law should have the burden of proving its existence, and agreed that a judge had the power to examine ex officio the existence of a given rule of customary international law, as seemed also to be the view of the International Court of Justice in the *Colombian-Peruvian asylum case, Judgment of November 20th, 1950*.

3. The practice of international organizations was relevant for the identification of customary law, since many international organizations, such as the European Union, had competences that had been transferred to them by sovereign States. The practice of other non-State actors might also be worth exploring. In that regard, the well-known study by the International Committee of the Red Cross on customary international humanitarian law referred to the practice of non-State actors, and the ad hoc arbitral tribunal in *Government of Kuwait v. American Independent Oil Company (Aminoil)* had found that private companies could contribute to the formation of customary international law.

4. Concerning the definition of customary international law, the expression "accepted as law" was too closely associated with a mere voluntary adherence to law that echoed the decision in the 1927 case *S.S. "Lotus" (France v. Turkey)*, whereas the expression "*opinio juris*" implied rather a conviction of the existence of, or the necessity to comply with, a certain legal obligation. Such a conviction could be rooted in certain ethical or moral perceptions or in specific social contexts. The Commission should therefore further study the issue of the formation of *opinio juris* over time, seeking to identify the point at which it could be said to exist regarding a certain practice. In that connection, it was interesting to note that the International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, used somewhat enigmatic temporal expressions such as "the gradual evolution of the *opinio juris* required for the establishment of a new rule" or "nascent *opinio juris*".

5. As it proceeded with its much-needed work on the topic, the Commission would find it necessary to take a position on the different theoretical approaches to customary international law and international law in general. The work on the topic should result in a flexible and pragmatic outcome, such as a guide to practice, that would assist practitioners in identifying customary international law.

6. With regard to the topic of protection of the environment in relation to armed conflicts, while preservation of the environment was the primary focus, it went hand in hand with disarmament, non-proliferation, conflict prevention and the progressive restriction, legally and politically, of recourse to armed conflict. Her delegation agreed with the Special Rapporteur's proposal to approach the topic in three phases: before, during and after the armed conflict. However, that distinction should be made for analytical purposes only, to facilitate identification of obligations and effects at different points in time in relation to the protection of the environment. Without prejudice to an integrated approach, the most important phase was the second one — protection of the environment during an armed conflict — since it was chiefly then that environmental damage occurred.

7. The Commission should also take into consideration the law of armed conflict, which addressed environmental protection to a limited extent. If existing international legal obligations were insufficient, the Commission should consider embarking on a progressive development exercise. Moreover, since the impact of armed conflicts on the environment depended to a major extent on the type of weapons used, the issue of weapons must necessarily be addressed, even if only from a general perspective. The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* could provide useful guidance in that regard.

8. Non-international armed conflicts should not be overlooked in analysing the impact of armed conflicts on the environment, bearing in mind that most ongoing armed conflicts were intra-State conflicts, many of which had a link to natural resources. Armed conflicts between non-State actors, or between non-State actors and States, should therefore be included in the scope of the topic. However, since an armed conflict implied a minimum degree of intensity of hostilities, a reference should be added excluding "internal disturbances and tensions", as provided in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) and the Rome Statute of the International Criminal Court.

9. A decision as to the final outcome of the topic would depend on how the Commission's work in identifying existing law on the protection of the environment in relation to armed conflicts evolved; it was still premature to take a stance on that issue. Currently, her delegation did not rule out the need for progressive development.

10. Concerning the topic "Provisional application of treaties", her delegation agreed that provisional application gave rise to treaty-based legal obligations as if the treaty was in force for the signatories provisionally applying it. It was clear that domestic law must concur with the decision of a State to apply treaty rules provisionally. For that reason, while the Commission should focus on the international law aspects of provisional application, a comparative study of relevant domestic law would also be helpful, bearing in mind that the purpose of its work on the topic was to provide guidance.

11. Her delegation agreed with the Special Rapporteur that the breach of an obligation arising from the provisional application of a treaty should have the same legal consequences as the violation of a treaty already in force; such a breach could amount to a wrongful act and, as such, trigger international responsibility. It also supported the Special Rapporteur's decision to consider the legal regime applicable to the provisional application of treaties between States and international organizations, as well as those between international organizations. In addition to State practice, case law and legal writings should also be considered. Since the Commission's work was to clarify the legal regime of provisional application of treaties, a guide with commentaries and model clauses would perhaps be the best outcome of the topic.

12. With regard to the topic of the Most-Favoured-Nation clause, her delegation noted not only the growing number of cases relating to the topic, but also the increasing number of dissenting opinions being appended to arbitral awards, which demonstrated the existence of different understandings concerning the correct interpretation to be given to such clauses. While some decisions followed the general logic of *Emilio Agustín Maffezini v. Kingdom of Spain*, stating that the Most-Favoured-Nation clause did apply to dispute resolution provisions, other decisions were based on *Plama Consortium Limited v. Republic of Bulgaria*, which made the opposite assumption. The Commission's survey of the various trends and approaches to the interpretation of Most-Favoured-Nation clauses was in itself already a valuable outcome. Through its work, the Commission would provide assistance to States, international organizations, investors, courts and tribunals and thus contribute to the necessary certainty and stability in the investment field.

13. **Mr. Scullion** (United Kingdom) said that the Commission's work on the topic "Identification of customary international law" had real practical value. His delegation appreciated the Special Rapporteur's two-element approach, taking into account both State practice and *opinio juris*. It also agreed that *jus cogens* should not be considered in detail under the topic, since the question of whether a rule constituted a rule of *jus cogens* was different from the question of whether it constituted a rule of customary international law. When parties to litigation before the domestic courts in the United Kingdom sought to make arguments based on customary international law, judges found guidance in the judgments of the International Court of Justice, but there was currently no other authoritative reference to which they could turn. A practical outcome of the Commission's work in the form of a set of conclusions with commentaries would be useful to judges and other legal practitioners in determining whether or not a rule of customary international law existed.

14. His delegation broadly agreed with the approach taken and the substance of the draft conclusions provisionally adopted by the Drafting Committee. It looked forward to the draft commentaries to those draft conclusions, as well as to further discussion of the

draft conclusions proposed in the second report of the Special Rapporteur (A/CN.4/672) that the Drafting Committee had yet to consider.

15. With regard to the topic of protection of the environment in relation to armed conflict, his delegation welcomed the Special Rapporteur's confirmation that phases I and III remained the main focus of the work and that there was no intention to modify the law of armed conflict. In relation to phase II, the proposal to produce guidelines with examples of rules of international law that might be suitable for continued application during armed conflict could be a useful initiative, provided that the rules in question were confined to the environmental field and recognized the *lex specialis* nature of the law of armed conflict, which already contained rules relating to the protection of the environment.

16. His delegation supported the Special Rapporteur's proposal to exclude from the scope of the topic such subjects as the exploitation of natural resources, the protection of cultural heritage and the effect of particular weapons. Internal disturbances and tensions, such as riots, should also be excluded from the topic. More generally, the topic should not address undecided and often controversial questions of international environmental law, human rights law, and the rights of indigenous peoples. Furthermore, it was not appropriate for States to be obliged to prepare environmental impact assessments as part of military planning. Lastly, his delegation shared the Special Rapporteur's view that the topic was more suitable for the preparation of non-binding guidelines than a convention.

17. On the topic of provisional application of treaties, his delegation attached particular importance to the analysis of the legal effects of provisional application at the international level and was disappointed that the Special Rapporteur's second report did not contain more detailed reporting of State practice. It was to be hoped that more information would be provided in the next report, since a broader picture of State practice was vital before any conclusions were presented.

18. Concerning the topic of the Most-Favoured-Nation clause, his delegation welcomed the progress made by the Study Group in undertaking a substantive and technical review of the draft final report. It supported the Study Group's intention to shorten the report and update certain elements in the light of recent cases, and appreciated its determination to ensure that the final report was of practical utility to those involved in the investment field and to policymakers. It also supported the Study Group's general position that it would not be appropriate to develop any new draft articles or revise the 1978 draft articles.

19. **Mr. Popkov** (Belarus), speaking on the topic of identification of customary international law, said that the work of the Special Rapporteur could help the Commission to develop a practical tool that would be of value not only to specialists in international law but to a broad range of practitioners. For the identification of rules of customary international law, an understanding of the process of their formation was also required. His delegation supported the Special Rapporteur's two-element approach. While rules of customary international law were more difficult to grasp than treaty rules, customary rules were in fact the most broadly accepted rules of international law and formed its backbone. It would be logical to consider expanding the scope of the draft conclusions to include *jus cogens* and generally accepted norms of international law, which also had the status of rules of customary international law.

20. The concept of general practice should not restrict the scope of the topic. His delegation welcomed the Special Rapporteur's intention to examine the issues of special or regional customary international law, including bilateral custom, in his third report in 2015. In that regard, it was worth asking to what extent the definition of customary international law proposed by the Special Rapporteur in draft conclusion 2 took into account the well-accepted concepts of regional or bilateral custom. In addition, the definition of international organization could perhaps be broadened in order to make it possible to apply the draft conclusions without reference to other sources.

21. His delegation agreed that, with respect to the role of practice in the formation of customary rules, it was necessary to understand the practice of States, including within the framework of international organizations. For that reason, it was not appropriate to include the word "primarily" in draft conclusion 5 as proposed by the Special Rapporteur in his second report (A/CN.4/672). In future reports, consideration should be given to the extent to which the practice of States acting within an international organization affected the development of customary international

law. It would also be valuable to examine the specific legal consequences of silence as a manifestation of State practice with regard to the development of customary rules, including in the context of a dynamic interpretation of the founding documents of an international organization by other States or the organization's secretariat. Furthermore, it should be noted that the acceptance of a customary rule of international law was confirmed by the action of a State foregoing certain advantages or benefits in order to apply the rule. Additional analysis was required on that point.

22. In some cases, the development of international customary law might depend on the specific technical, scientific, geographical or other characteristics or capacities of States. For that reason, it might be reasonable to include the concept of "specially affected States", while ensuring that the legitimate interests of other subjects of international law and the principle of the sovereign equality of States were upheld.

23. On the topic of provisional application of treaties, it was important to analyse the distinction between the legal effects, at the national and international levels, of the provisional application of an international treaty and its entry into force. A flexible mechanism should be established with regard to the provisional application of treaties, taking into account constitutional constraints and the diversity of national legislation, and ensuring the stability and certainty of treaty obligations and the corresponding legal enforcement practice.

24. While an intention to apply a treaty provisionally had a direct impact on the rights and obligations assumed by the State in question, at least one other State must also acknowledge the said provisional application in order for international obligations to arise. Unilateral action could lead only to the application of an international treaty rule in domestic law; it could not create corresponding obligations for the other contracting parties. His delegation agreed that the form in which the intention to apply a treaty provisionally was expressed would have a direct impact on the scope of the obligations assumed. It was therefore important not only for a State to express its intention to apply a treaty provisionally, but for that intention to be established and brought to the knowledge of other subjects of international law. Consideration should also be given to the degree of freedom of action enjoyed by a State to terminate its provisional application of a treaty, within the framework of the treaty and State legislative practice.

25. Since it was a constitutional requirement in some States to arrange for official publication of any legal acts that created rights and obligations for their citizens, it would be advisable to consider the inclusion of provisions allowing for delayed provisional application of international treaties directly affecting the rights and obligations of natural and legal persons, in order to allow time for publication before the start of provisional application. In order to take into account the legislation of States that did not allow for the provisional application of international treaties, the practice of acceptance of reservations to treaties and declarations, as they related to provisional application, should also be examined.

26. On the topic of the protection of the environment in relation to armed conflicts, his delegation supported the comprehensive approach taken by the Special Rapporteur. Given that modern armed conflict often affected the interests of a large number of States, various norms in such areas as international humanitarian, environmental and human rights law could be applicable. However, the Commission should determine which area of law was *lex specialis* with regard to the topic, and then apply the principles and basic norms of that area of law accordingly. In its task of codification and progressive development, the Commission should also take into account levels of socioeconomic development. Not all States were able to implement fully the best practices described by the Special Rapporteur; consequently, some practically oriented minimum standards should be established.

27. While his delegation welcomed the temporal perspective adopted by the Special Rapporteur, the main focus of the Commission's work should be on phase II. Care should also be taken to ensure that the language used did not change the classic definition of armed conflict; in that regard, the definition of armed conflict in international humanitarian law, or, at the very least, the definition contained in the articles on the effects of armed conflicts on treaties, should be used.

28. With regard to non-international armed conflicts, such as those occurring between two armed groups on the territory of a State, the question arose as to whether the participants had the capacity or willingness to comply with any kind of international legal obligations

regarding the protection of the environment. States, as subjects of international law, generally had insufficient control over such situations to be able to influence the behaviour of the participants in the conflict, except through the possibility of holding them accountable afterwards. They therefore had to deal with the environmental consequences of such non-international armed conflicts occurring on their territory. The Commission should consider adapting the conclusions reached in the ongoing work on the protection of persons in the event of disasters and applying them to the topic of protection of the environment in relation to armed conflicts. In addition, it would be useful not only for the topic in question but also for the progressive development of international law as a whole to examine the legal content of the concepts of sustainable development, the precautionary principle, and the principle of prevention.

29. **Ms. Telalian** (Greece), referring to the topic of identification of customary international law, said that, while the two-element approach was generally applicable, the variations in the relative weight of the two elements in some specific fields of international law, such as human rights law, should be further analysed. The reference to "inaction" as a form of practice relevant in identifying customary law, while acceptable in principle, should be qualified. It was the conscious inaction of an interested State with regard to the practice in question, often considered in relation to an act, proposal or assertion of another State calling for a reaction, that might be relevant, not just any form of inaction. For that reason, the words "under certain circumstances" included next to "inaction" in paragraph 1 of draft conclusion 6 [7] (Forms of Practice), as provisionally adopted by the Drafting Committee, should be retained.

30. States might follow a general practice on the assumption that a right was being exercised or an obligation was being complied with in accordance with international law. In that respect, the expression "by a sense of legal obligation" in draft conclusion 10 proposed by the Special Rapporteur was overly restrictive, as it did not seem to cover the case of a practice being considered as the exercise of a legal right. It might be better to replace it by a broader term, such as "by a sense of the implementation of a legally binding norm under international law" or, following the wording of the International Court of Justice in its judgment in the *North Sea Continental Shelf* cases, "by a sense that this practice is rendered obligatory by the existence of a rule of law requiring it". Furthermore, it would be useful if the Commission could provide guidance on the relationship of customary international law to treaties and general principles of law, and in particular on how a general principle might evolve into a customary rule. When addressing the notion of a "persistent objector", the Commission could also shed light on so-called general principles of international law, considered by some authors as rules valid for all States, irrespective of their attitude during the process of formation of the rules.

31. While the decisions of international courts and tribunals as to the existence of rules of customary international law did not constitute "general practice", international case law had an indirect but decisive normative influence that should be further considered in the Commission's future work and reflected in the commentary, preferably under draft conclusion 3 [4] provisionally adopted by the Drafting Committee, as it pertained to the identification of both elements of international custom. Her delegation also looked forward to the Special Rapporteur's future consideration of the normative practice of international organizations in the field of customary law and highlighted the important role played by regional integration organizations in that regard. The law-creating effects of resolutions adopted by the organs of international organizations deserved particular attention since, despite being acts attributable to the organization in question, they could, under certain circumstances, reflect the collective *opinio juris* of the States concurring with their adoption.

32. On the topic of protection of the environment in relation to armed conflicts, her delegation supported the Special Rapporteur's temporal, three-phased approach, which allowed for a unified consideration of the relevant applicable norms, irrespective of whether they arose under the law of armed conflict, international environmental law or human rights law. With regard to the scope of the topic, the issue of the protection of natural heritage, which was afforded special protection by the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, could not be disregarded. The reference in the Special Rapporteur's preliminary report (A/CN.4/674) to the definition of natural heritage provided in that Convention suggested that the matter

would be further considered in subsequent reports. Her delegation would welcome that approach.

33. Some of the basic principles of international environmental law presented in the preliminary report as candidates for continuing application during armed conflict were unquestionably relevant to the topic. One such example was the precautionary principle, bearing in mind that article 57, paragraph 3, of Protocol I additional to the Geneva Conventions, among other international humanitarian law provisions, incorporated a precautionary approach. In contrast, the applicability of the sustainability principle was less obvious and deserved careful examination. The obligation of prevention was a due diligence obligation stemming from the much broader no-harm rule, which also encompassed obligations of control and reduction of environmental damage. In her delegation's view, it was the no-harm rule in its entirety that should be scrutinized with regard to its application in case of armed conflict.

34. The obligation to disclose environmental information to the public, as mentioned in the Special Rapporteur's report, had gained momentum since the adoption and entry into force of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The scope of application of the safeguard clause in that Convention, stating that a request for environmental information might be refused if the disclosure would adversely affect national defence, should therefore be thoroughly examined. Lastly, on the issue of human rights, future reports should take into account the debate about an emerging right to water.

35. With regard to the topic "Provisional application of treaties", the fundamental question of the legal effects of provisional application warranted further exploration, particularly in the light of relevant State practice. However, in view of the disparities in practice, the Special Rapporteur should first analyse more thoroughly the circumstances under which States had recourse to provisional application. Furthermore, the decision to apply a treaty provisionally also depended on the national legal requirements of the State concerned. For that reason, some treaty provisions stated that the contracting States should provisionally apply an international agreement only to the extent permitted by their respective national legislation.

36. Reliance on relevant State and judicial practice was crucial when examining the consequences arising from a breach of an obligation in a treaty being provisionally applied. It would be premature to assume, without further consideration, that the rules on responsibility for internationally wrongful acts should apply in such cases, where such a conclusion was not supported by a sufficient body of practice. Her delegation also shared the concerns of some members of the Commission with regard to the applicability of the rules on unilateral acts of States, since article 25 of the 1969 Vienna Convention on the Law of Treaties expressly provided for an agreement of the negotiating States. While the concept should be further explored, her delegation welcomed the Special Rapporteur's clarification that he had, on purpose, not referred to the unilateral declaration of a State that it intended to apply a treaty provisionally as being the "source" of the legal obligations, but rather its "origin" in a temporal sense, in other words, the act which triggered the provisional application.

37. **Mr. Redmond** (Ireland), speaking on the topic of identification of customary international law, said that the outcome of the Commission's work on the topic should provide clear and practical guidance not only for those working at the international level but also for practitioners in the domestic sphere; at the same time, it should not be unduly prescriptive and should reflect the inherent flexibility of customary international law. With regard to the draft conclusions, his delegation agreed that the "without prejudice" clause originally proposed by the Special Rapporteur as paragraph 2 of draft conclusion 1 should be omitted and the question addressed in the commentary instead.

38. In draft conclusion 2 [3] as provisionally adopted by the Drafting Committee, his delegation welcomed the clear two-stage process that took account of the two constituent elements of general practice and acceptance as law. While the language of the Statute of the International Court of Justice should be closely followed in order to ensure harmony across practice and commentary, the insertion of the words "that is" between "general practice" and "accepted as law" was a useful way of identifying the two elements as distinct. His delegation also supported the addition of the words "*opinio juris*" in parentheses after "accepted as law", given the central significance of the term. It agreed that the interplay between the two constituent elements required further consideration, particularly

with regard to the potential temporal implications of the current draft conclusions, as well as the question of "double-counting". It 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, and looked forward to the Special Rapporteur's further examination of such practice in his third report. In draft conclusion 5 [6] (Conduct of the State as State practice), it favoured an approach that focused on the functions of the State, rather than on acts attributable to the State.

39. His delegation supported a cautious approach when it came to addressing the inaction of States as a form of State practice. It therefore welcomed the two proposals by the Drafting Committee, firstly, to include the question of inaction in paragraph 1 of draft conclusion 6 [7], rather than maintaining it as a stand-alone paragraph, and, secondly, to state expressly that practice might take the form of inaction "under certain circumstances". Context was particularly important in the assessment of inaction as a form of practice, and was likely to play a greater role there than in the assessment of other forms of practice. The issues identified in paragraph 163 of the Commission's report merited further examination.

40. On the topic of provisional application of treaties, his delegation welcomed the focus of the Special Rapporteur's second report (A/CN.4/675) on the substantive legal effects of the provisional application of treaties at the international level, and agreed with the core observation that both State practice and case law indicated that the provisional application of treaties produced legal effects. It noted with interest the consideration of the Commission's previous work on unilateral acts of States capable of creating legal obligations in the context of provisional application. While the effect of a unilateral commitment to apply provisionally all or part of a treaty was a useful aspect of the topic, a clear distinction should be maintained between principles or conclusions relevant to such unilateral acts and the consideration of the mutually agreed provisional application of a treaty by the negotiating parties. In that regard, it might also be helpful, in relation to certain aspects of the topic, to consider bilateral and multilateral treaties separately. Lastly, the issues identified in paragraphs 242 and 247 of the Commission's report merited further examination; a study of the practice of treaty depositaries would be especially beneficial.

41. **Ms. Benešová** (Czech Republic), referring to the topic "Protection of the environment in relation to armed conflicts", said that her delegation supported the three-phased approach adopted. The Commission's work should primarily identify the rules and principles of international environmental law applicable to armed conflicts, without modifying the law of armed conflicts itself, and should determine whether such rules and principles might clarify and supplement principles of international humanitarian law relating to the protection of the environment during international and non-international armed conflicts. A clear distinction should be made between the protection of the environment and the protection of cultural heritage, having regard to existing legislation on the protection of cultural heritage in the event of armed conflict.

42. On the topic of identification of customary international law, her delegation appreciated the balanced approach taken by the Special Rapporteur in his second report (A/CN.4/672), which both reflected universally recognized principles and provided specific guidance for practical application, in line with the principal objective of the topic. Significant progress had been achieved in the initial phase of study, particularly with regard to the formulation of the 11 draft conclusions presented in the Special Rapporteur's second report, as well as the provisional adoption of eight draft conclusions by the Drafting Committee.

43. Her delegation welcomed the retention of the two-element approach to the topic, even though the relative weight given to each element might vary according to the circumstances, and looked forward to the examination of the relationship between practice and *opinio juris* at a later stage of the Commission's work. It also agreed with the use of the widely recognized terms "general practice" and "accepted as law", taken from article 38, paragraph 1 (b), of the Statute of the International Court of Justice. With respect to the element of "general practice", the recognition of the requirement of consistency as inherent in the concept of generality in draft conclusion 8 [9] as provisionally adopted by the Drafting Committee was acceptable, since it corresponded to the general definition adopted in the Statute of the International Court of Justice. Moreover, while her delegation recognized that *jus cogens* norms did not come within the scope of the topic, it welcomed

the Drafting Committee's decision to eliminate the express reference "the practice need not be universal", as paragraph 1 of draft conclusion 8 [9] already explained that the practice need only be "sufficiently widespread and representative". With regard to the second element, "accepted as law", her delegation welcomed draft conclusions 10 and 11 proposed by the Special Rapporteur and commended the clear, illustrative nature of the guidelines on the practical identification of *opinio juris*.

44. **Ms. Carnal** (Switzerland), referring to the topic of protection of the environment in relation to armed conflicts, said that her delegation welcomed the Special Rapporteur's proposal to focus her next report on the law applicable during both international and non-international armed conflicts. In that regard, if a definition of the term "armed conflict" was required, it should be based on the definition used by the International Tribunal for the Former Yugoslavia in *Prosecutor v. Duško Tadić a/k/a "Dule"* and subsequent jurisprudence that considered armed conflicts between organized armed groups. Her delegation would appreciate more information on how the conclusions and recommendations relating to each temporal phase might be synthesized, particularly in cases where there was not a clear division between the phases and rules would apply to more than one phase.

45. The general right to protection of civilian property under international humanitarian law, during both international and non-international armed conflicts, extended to the natural environment. Moreover, Additional Protocol I to the Geneva Conventions of 1949 provided for the special protection of the natural environment by prohibiting "widespread, long-term and severe damage to the natural environment" during international armed conflicts. In that regard, her delegation wondered whether the special protection accorded to the environment should be clarified or strengthened, as the terms were imprecise. In addition, it questioned whether the general rules on the protection of civilian property adequately guaranteed the effective protection of the natural environment in practice. If indeed no specific treaty rule provided for the protection of the environment during non-international armed conflicts, there were several rules of customary international law whose scope could be expanded or further articulated. Lastly, it would be of interest to clarify how other bodies of law, in particular human rights and international environmental law, could contribute to the topic.

46. **Mr. van den Bogaard** (Netherlands), referring to the topic of identification of customary international law, said that his delegation questioned whether the Special Rapporteur's proposed draft conclusion 6 on the attribution of State practice should be based on the attribution rules set out in the articles on the responsibility of States for internationally wrongful acts, which clearly served a different purpose. While the actions of all branches of the State might contribute to State practice, determining attribution for the purpose of responsibility was a fundamentally different exercise than evaluating facts that might be understood as State practice for the purpose of determining the existence of a rule of law.

47. With regard to the Special Rapporteur's proposed draft conclusion 7, paragraph 2, the matter of the confidentiality of Government correspondence, such as confidential letters or notes verbales required further clarification. Although such documents might attest to the *opinio juris* of States and were thus highly relevant to the identification of customary law, in his second report (A/CN.4/672) the Special Rapporteur did not describe how confidential documents could be relevant unless they were somehow published, and what the implications were in respect of unpublished legal opinion. Frequently there was no need to publish such documents as they served their primary purpose of transmitting a view through a diplomatic channel effectively by being confidential. Governments did not generally release confidential correspondence and might do so only when problems arose, as required by litigation or in response to the Commission's work. Indeed, a large quantity of *opinio juris* was unpublished.

48. His delegation cautioned against including the list of manifestations of practice in draft conclusion 7, paragraph 2. When addressing forms of practice the emphasis ought to be on the concrete actions of States. Practice was the objective element in the development of customary international law. In that regard, documents in which Governments expressed their legal opinions, such as statements on codification efforts or acts in connection to resolutions, should not be counted as practice, as had been suggested by the Special Rapporteur, but rather should fall in the category of *opinio juris*.

49. The reference to “judgments of national courts” in draft conclusion 7, paragraph 2, and to “the jurisprudence of national courts” in draft conclusion 11, paragraph 2, should be further qualified. It was difficult to see how case law could contribute to practice in States like the Netherlands, where the judiciary was traditionally barred from relying on customary international law. The references also appeared to presuppose that a domestic judiciary that was not well-versed in in international law could contribute to *opinio juris*, independent of the Government. Perhaps use of those terms was a consequence of grounding the text in the attribution rules for State responsibility, which, as mentioned, had a very different function.

50. Concerning draft conclusion 7, paragraph 4, his delegation agreed with the Special Rapporteur that the role of international organizations in the development of international law could not be ignored. The practice of international organizations was evident, but the question of how the *opinio juris* of international organizations was established should be addressed. Consideration should also be given to how the mandate of an international organization affected whether it could have an *opinio juris* that was relevant to the creation of customary international law. While the scope of the treaty-making powers of an international organization tended to be set out in its foundational document, it was not clear how those powers related to *opinio juris*.

51. His delegation generally agreed with the notion set out in draft conclusion 9, paragraph 4, that the practice of “specially affected States” was important when evaluating practice, but had found the Special Rapporteur’s discussion in his report (A/CN.4/672, para. 54) to be too brief. It was not clear whether the “specially affected States” were the same as the “interested States” discussed in respect of *opinio juris* in paragraph 64 of the report. His delegation would also welcome investigation into other aspects of identification of “specially affected States”, including whether they were the States that would face an increased burden as a consequence of a new rule and how technological changes would affect developing rules and the way they were applied to different States. For example, when law evolved as a consequence of new weapons technology, States that possessed modern weapons technology as well as those that did not appeared to have a specific interest in how law in that field developed.

52. Concerning the topic of protection of the environment in relation to armed conflicts, it was important to delineate the scope of the study while the project was still in its early stages in order to avoid including matters that would only complicate the Commission’s work. The cautious approach taken by the Special Rapporteur, including the possibility of the use of a “without prejudice” clause, was therefore welcome. Given that the overall purpose of the study would be to clarify the rules and principles of international environmental law in relation to armed conflicts, his delegation agreed with the Special Rapporteur that it should not modify the existing law of armed conflict. Any working definitions proposed by the Special Rapporteur to frame the subject matter of the study need not be included in the final text. The term “armed conflict” had been defined by international humanitarian law and should not be redefined by the Commission.

53. With regard to the topic of provisional application of treaties, his delegation supported the decision taken by the Special Rapporteur to concentrate his analysis on the legal effects produced at the international level. It would appreciate further clarification regarding the distinction made between the legal regime governing the entry into force of a treaty and the regime governing provisional application of a treaty in the light of different scenarios, including situations in which the treaty regime provided for an institutional framework or a secretariat that would only become fully effective after the treaty had entered into force. His delegation was not convinced that the law relating to unilateral declarations of States was relevant to the topic and needed to be included in the study. Article 25 of the Vienna Convention on the Law of Treaties should be the primary reference point.

54. His delegation was also not convinced that there was any authority supporting the conclusion arrived at by the Special Rapporteur in paragraph 81 of his second report (A/CN.4/675) that “a State that has decided to terminate ... the provisional application of a treaty is subject to the requirement that it explain to the other States to which the treaty applies provisionally, or to the other negotiating or signatory States, whether that decision was taken for other reasons”. It also did not believe that there was any authority for the

conclusion stated in paragraph 82 that "provisional application cannot be revoked arbitrarily".

55. In order to draw more definitive conclusions on the topic, including the status of the concept under customary international law, his delegation reiterated its request that the Commission should thoroughly analyse State practice in the light of article 25 of the Vienna Convention. Lastly, his delegation supported the Special Rapporteur's proposal to study the provisional application of treaties by international organizations, particularly treaties concluded by the European Union and its member States with third States.

56. **Mr. Czapliński** (Poland), referring to the topic of identification of customary international law, said that his delegation attached great importance to the discussion, as issues relating to customary law were often underestimated and abused. It generally supported the method adopted by the Special Rapporteur and the Drafting Committee, although the possible outcomes were still difficult to assess. While the Commission had taken the traditional two-element approach to the topic, recent developments in the area of customary law, in terms of both methods and substance, should be incorporated in the final instrument elaborated by the Commission.

57. The Commission's conception of the scope of practice and *opinio juris* was too narrow. States were, of course, the primary subjects of international law and their practice was the most significant, but consideration of the practice of secondary subjects of international law should not be limited to that of international organizations. His delegation could not approve an approach that limited the influence of non-State actors on the creation and application of customary law to what was accepted by States. The Commission should in fact investigate to what extent non-State actors were bound by general customary law. That approach would entail unavoidable challenges, in particular relating to the theory of international legal personality, but those challenges should not be avoided simply by narrowing the scope of research on the topic.

58. The Commission appeared to have difficulties in drawing a distinction between relevant practices and expressions of *opinio juris*, as the elements taken into account in each case were largely the same. In that regard, his delegation believed that all of the manifestations of practice set out in the Special Rapporteur's proposed draft conclusion 7, paragraph 2, and the forms of evidence of *opinio juris* set out in draft conclusion 11, paragraph 2, should be treated as practice during the formation stage of a customary rule and as an expression of *opinio juris* at the stage of application of a well-established rule.

59. Not all elements of practice by different State agencies should be accorded the same importance. Declarations and activities of organs constitutionally empowered to represent the State in international relations would seem to be more important than those of other agencies. Similarly, the jurisprudence of constitutional courts and supreme judicial organs would seem to be more important than the decisions of lower courts, since judges in lower courts were less familiar with the application of international law in general, and customary law in particular. If all of the different acts of State organs were seen as contributing to the formation of customary law, it was not important whether a particular organ acted within its competence or *ultra vires*. All the acts of a State as a whole should be considered as practice of that State; the State itself cannot act *ultra vires*. As confirmed by the International Court of Justice in *LaGrand (Germany v. United States of America)* and *Avena and Other Mexican Nationals (Mexico v. United States of America)*, possible violations of domestic law were not relevant from the perspective of international law. His delegation would welcome guidelines in respect of situations where official statements conflicted with State actions, including the possible influence such conflicts had on the identification of customary rules.

60. His delegation would appreciate clarification regarding the relationship between custom and other sources of international law. In its view, customary law could overlap with subsequent practice in respect of the modification, rather than the interpretation, of a treaty. The Commission should also consider whether the relationship between treaties and custom as defined by the International Court of Justice in the *North Sea Continental Shelf* cases corresponded with new developments in international law. The relationship between customary rules and general principles of international law would also be an interesting subject for further consideration. Lastly, the Commission should discuss situations in which two different types of sources contained the same binding normative content. The identification of custom established on the basis of a treaty required particular attention in order to

avoid an over-reliance on article 38 of the Vienna Convention on the Law of Treaties. The judgment of the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* would be a starting point in that regard.

61. With regard to the topic of protection of the environment in relation to armed conflicts, Poland would provide materials regarding State policy in writing.

62. On the topic of provisional application of treaties, it was true that provisional application was an instrument that granted States some flexibility in shaping their legal relations and accelerated the acceptance of international obligations. Provisional application could be particularly useful in cases when time-consuming ratification procedures might postpone or completely eliminate the potential benefits of concluding a treaty. His delegation concurred with the Commission's conclusion that the provisional application of the treaty should have the same effect as its entry into force, unless otherwise agreed; that view was clearly supported by Polish treaty practice. Poland did not have a specific domestic law on the provisional application of treaties; Polish practice was based on article 25 of the Vienna Convention and the rules of domestic law regarding conclusion of the treaties. Under Poland's constitutional system, it was considered preferable to apply a treaty provisionally only after the domestic procedures necessary for its ratification had been completed.

63. The Special Rapporteur had rightly pointed out that analysis of the legal effects of provisional application of treaties should be considered in the light of State practice, which was based on domestic law. His delegation supported the view expressed by some Commission members that the Special Rapporteur should undertake a comparative analysis of national provisions concerning the provisional application of treaties. There should also be consideration of the practice of States that were members of regional integration organizations which themselves could, independently of their members, conclude treaties that were binding upon their member States. The Commission should take into account situations where a treaty was applied provisionally by such organizations as well as by some or all of its member States.

64. The practice of issuing unilateral declarations which defined the scope of the provisional application of a treaty deserved further examination. Such declarations might play a significant role in ensuring faster application of a treaty. Several scenarios were possible in cases when a treaty provided that it could be applied provisionally from the date of its signing. First, a signatory might apply the treaty provisionally without further reservations. Second, a signatory might declare on the basis of its domestic law that its provisional application of the treaty was restricted in time or scope; for example, a signatory might defer provisional application until its constitutional procedures for concluding the treaty were completed. Third, a signatory might indicate that it would provisionally apply only some of the treaty provisions. In the view of his delegation, such declarations were in general admissible and might entail a number of consequences for the mutual rights and obligations of the contracting parties.

65. **Mr. Tang** (Singapore), referring to the topic identification of customary international law, said that, with regard to the Special Rapporteur's proposed draft conclusion 7, paragraph 4, his delegation supported the observation that considerable caution was required in assessing the relevance of the acts, including inaction, of international organizations. There were wide variations in the organizational structure, mandate, composition of decision-making organs and decision-making procedures of such organizations, all factors that had a bearing on such organizations' role, if any, in the formation of customary international law.

66. The topic of protection of the environment in relation to armed conflicts was at an early stage and its scope and methodology required fine-tuning. The temporal, three-phased approach adopted by the Special Rapporteur as a conceptual delineation of the topic before, during and after a conflict would be helpful not only for the purposes of study and debate, but also in drafting the outcome document. His delegation agreed with the Special Rapporteur that there should not be a strict dividing line between the different phases and stressed that adequate attention should be paid to how the rules pertaining to the different phases overlapped. It also agreed that the study should not delve into considerations of the possible effects of particular weapons on the environment.

67. The rules and principles that might be applicable in peacetime to a potential armed conflict, as they were identified in the preliminary report (A/CN.4/674 and Corr.1), included some concepts that did not have the status of universally accepted principles. The Commission should continue to trace the development and degree of acceptance of such concepts, which would in turn affect the question of their applicability. Non-binding draft guidelines would be an appropriate outcome of the work on the topic.

68. Concerning the topic of provisional application of treaties, his delegation concurred with the Commission that the provisional application of a treaty was capable of giving rise to the same legal obligations as if the treaty were in force. It looked forward to the Commission's study of whether or not provisional application could result in the modification of the content of the treaty. It was of the view that the topic might overlap with the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties and trusted that the Commission would ensure coherence across its work in that regard. The modalities for the termination of provisional application and the applicability of the regime of reservations to treaties were also important subjects for further consideration.

69. His delegation had been closely following the topic of the Most-Favoured-Nation clause over the years, as Singapore had entered into a significant number of bilateral investment treaties and free trade agreements that contained the clause. There was also an abundance of cases on Most-Favoured-Nation clauses, particularly in the context of investor-State disputes, which merited in-depth study. His delegation appreciated the updates made to the Study Group's draft final report to take into account recent developments and welcomed its intention of further considering more recent cases as well as the suggestion that the outcome should be prepared in a form that would be of practical utility to practitioners and policymakers. It looked forward in particular to the final analysis in part III of the draft report concerning the contemporary relevance of the 1978 draft articles to the interpretation of Most-Favoured-Nation provisions.

70. **Mr. Campbell** (Australia), speaking on the topic of the provisional application of treaties, said that his delegation shared the Special Rapporteur's view that the Commission's task was neither to encourage nor discourage the provisional application of treaties, but rather to provide guidance to enhance understanding of that mechanism. In that regard, it appreciated the Special Rapporteur's substantive analysis of the legal effects of provisional application.

71. His delegation had also taken note of the views expressed by Commission members as to whether a comparative study of domestic provisions relating to the provisional application of treaties would be of value. Individual States decided whether to apply treaties provisionally in the light of the purpose, scope and content of the specific treaty and on the basis of domestic legal and political considerations. Australia, for example, had adopted a dualist approach to the implementation of treaties under which treaties had no effect under domestic law until they were incorporated formally through legislation. Accordingly, Australia's general practice was not to apply treaties provisionally, although there were some exceptions, such as bilateral air services agreements. For each State, domestic law, including constitutional law, was key to its provisional application of treaties.

72. With regard to the question of whether the decision to apply a treaty provisionally might be characterized as a unilateral act, his delegation agreed with the view that the source of the obligation remained the treaty itself and not the declaration of provisional application. The Special Rapporteur's continued work on the topic was welcome, including his consideration of the provisional application of treaties by international organizations and the different consequences arising from the provisional application of bilateral treaties as opposed to multilateral treaties.

73. On the topic of the Most-Favoured-Nation clause, his delegation concurred with the conclusion of the Study Group regarding the importance and relevance of the Vienna Convention on the Law of Treaties as a point of departure in the interpretation of investment treaties, including Most-Favoured-Nation clauses. It supported the emphasis the Study Group placed on analysing and contextualizing case law, the prior work undertaken by the Commission and contemporary practice relating to Most-Favoured-Nation clauses. His delegation also supported the Study Group's objective of providing an outcome that would have practical utility for policymakers and those involved in the investment field.

74. *Mr. Gharibi (Islamic Republic of Iran), Vice-Chair, took the Chair.*

75. **Mr. Hanami** (Japan), referring to the topic of identification of customary international law, said his delegation agreed that the outcome should be a practical tool that would be of particular value to practitioners who were not specialists in international law. It also generally supported the basic two-element approach to the identification of rules of customary international law. While some members of the Commission had pointed out that there appeared to be different approaches to identification in different fields of international law, his delegation doubted whether such alternative methods could be applied. On the question of whether acts of entities other than States could be considered as contributing to "a general practice" constituting an element of customary international law, the Commission should take a prudent approach. It was to be hoped that discussion on that point would be continued in the next session, and that any conclusion would be based on existing practice.

76. His delegation supported the view that acceptance of a practice as compelled by law could not be proved merely by reference to the evidence of the practice itself. It expected that the Commission would address the matter in order to propose clearer guidance. In that respect, his delegation was in favour of using the term "*opinio juris*" rather than "accepted as law".

77. On the topic of protection of the environment in relation to armed conflict, his delegation noted that the three-phase approach had garnered some support. Some members had argued that the Commission should not focus its work on phase II, given that the law of armed conflict was *lex specialis* and there were sufficient rules relating to the protection of the environment. Indeed, several instruments on international humanitarian law, such as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, contained specific rules on environmental protection in armed conflicts. However, other members had correctly argued that the approved topic was about rules relating to the protection of the environment during an armed conflict, not about general international environmental law applicable in peacetime. The relationship between international environmental law and humanitarian law during the period of armed conflict, namely phase II, should be a major focus of discussion.

78. **Mr. Ney** (Germany) said that his delegation fully supported the two-element approach to the identification of customary international law. It was pleased that, in the draft conclusions provisionally adopted by the Drafting Committee, the term *opinio juris* had been inserted in draft conclusions 2 [3] (Two constituent elements) and 3 [4] (Assessment of evidence for the two elements). That term better conveyed the necessity of a positive conviction on the part of the State. Such guidance would be useful for legal practitioners who might not be very familiar with public international law.

79. Draft conclusion 4 [5] (Requirement of practice) confirmed that States were the primary subjects of international law. Although other subjects of international law, such as international organizations and the International Committee of the Red Cross, might have a role in setting practice and expressing *opinio juris*, States were the most important source for both purposes.

80. In order to be taken into consideration, State practice should be unequivocal and consistent. However, draft conclusion 7 [8] (Assessing a State's practice), paragraph 2, provided that where the practice of a particular State varied, the weight to be given to that practice might be reduced. That formulation could result in less weight being given to the practice of open and pluralistic societies, where the independence of the judiciary and the balance between Government and parliament could lead to the expression of different views. The practice and *opinio juris* of such States should not be any less influential, as that situation would confer an advantage on autocratically organized States.

81. His delegation broadly supported the conclusions of the second report of the Special Rapporteur on the provisional application of treaties (A/CN.4/675). States agreeing to the provisional application of a treaty did so in the expectation that it would be put into practice and that the negotiating States would be held to its terms. As the Special Rapporteur had indicated, the domestic requirements and repercussions of the provisional application of treaties were a matter of domestic law. The Commission need not carry out a comparative study of national regulations in that regard; it was for each State to ensure that its constitutional provisions were applied. At the same time, however, if domestic law did not allow for the provisional application of some or all of a given treaty,

the international obligation could not be fulfilled. Before undertaking to apply a treaty provisionally, negotiating States should carefully consider whether their domestic legal situation allowed for provisional application; whether it enabled them to comply with the treaty as a binding obligation; and whether they were determined to comply. In some conditions, provisional application might prove not to be an option. Treaty clauses providing for provisional application should be carefully worded in order to allow for the fulfilment of domestic procedures or limit the provisional application to certain parts of the treaty. In the case of multilateral treaties, opt-out clauses might be needed as a safeguard for States whose domestic law prevented them from readily agreeing to provisional application.

82. A State's intention to apply a treaty provisionally should be expressed clearly. It was doubtful whether that intention could be communicated tacitly, as the Special Rapporteur had suggested. In paragraph 47 of his first report (A/CN.4/664), the Special Rapporteur had cited in support of the latter view article 7, paragraph 1(a), of the 1994 Agreement relating to the implementation of part XI of the United Nations Convention on the Law of the Sea, which provided that, if the Agreement had not entered into force by a certain date, it would enter into force provisionally for all States that had consented to its adoption in the General Assembly. However, that provision included an opt-out clause. It followed that a State's obligation to apply the Agreement provisionally arose from its participation in adopting the Agreement, and not from its remaining silent at a later date. That arrangement was therefore similar to a clause providing for provisional application of a treaty from the time of its adoption, and distinct from the idea of tacit or implicit agreement.

83. **Ms. Badea** (Romania), referring to the topic of identification of customary international law, said that the Special Rapporteur should be commended for appropriately focusing on methodology rather than on the content of the rules of customary international law. The identification of customary international law had great practical significance; therefore, the draft conclusions and the commentaries thereto in their final form should offer solid guidance in assessing the existence and content of the rules of identification while also preserving a certain level of flexibility that reflected the flexibility of customary international law itself. The two-element approach was consistent with the practice of States, the decisions of international courts, in particular the International Court of Justice, and the majority view of scholars. Further work on the topic should take into account any differences in the application of the two-element approach in different fields.

84. With regard to the Special Rapporteur's proposed draft conclusion 7, paragraph 3, her delegation supported the view that inaction might be deemed a practice that was a constituent element of customary international law, but only when inaction was based on a State being conscious of a duty not to act, as noted by the Permanent Court of International Justice in the *S.S. "Lotus"* case.

85. The reference to international organizations in the draft conclusions provisionally adopted by the Drafting Committee was welcome. The practice of regional integration organizations, such as the European Union, to which States had transferred competence in certain areas should be accorded particular importance. The practice of international organizations with respect to their responsibilities, their depositary functions and such areas as immunities and privileges was also relevant. The term "general practice" was appropriate, as it encompassed the practice of both States and intergovernmental organizations. Her delegation welcomed the Special Rapporteur's proposal to consider further the role of international organizations, including their resolutions, and the relationship between customary international law and treaties in his third report. Her delegation shared the view expressed by the Special Rapporteur in paragraph 45 of his report (A/CN.4/672) in respect of the practice of non-State actors. It also supported the suggestion to supplement the expression "accepted as law" with the term "*opinio juris*". The wording of the draft conclusions on the two elements should be better aligned.

86. The objective of the topic of protection of the environment in relation to armed conflicts should be to clarify the rules and principles of international environmental law applicable in relation to armed conflict. Her delegation agreed that there was no urgent need to address questions relating to the use of terms, such as "environment". Closer examination of State practice and the practice of international organizations would be welcome. The practice of the Committee for Administering the Mechanism for Promoting Implementation and Compliance with the Basel

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal might be particularly relevant.

87. Her delegation looked forward to the Special Rapporteur's analysis of environmental impact assessments in the context of armed conflict. Although the International Court of Justice had found that such assessments were required under general international law for industrial activities in a transboundary context, the content of such assessments was not defined under general international law. Her delegation reiterated Romania's position that there was no need to address the effects of specific weapons on the environment as a separate issue and supported the Special Rapporteur's views in that regard. Should there be a need to address the treatment of cultural heritage, a careful approach was required so as to avoid unnecessarily expanding the scope of the topic or revising established international norms on the protection of cultural heritage, since it had already been agreed that the project would use definitions already established by international law.

88. With respect to the topic of provisional application of treaties, Romanian legislation specifically provided that only treaties that could enter into force without being ratified by the Parliament could be provisionally applied as of the date of signature, if the treaty expressly allowed for it. Treaties for which ratification by the Parliament was compulsory could not be applied provisionally. An exception was made, however, for treaties between the European Union and its member States on the one hand and third States on the other; those so-called "mixed treaties" could be applied provisionally before their entry into force if the treaty expressly provided for it. Romania viewed the provisional application of treaties as an exceptional and limited treaty action, primarily for reasons relating to legal certainty. A comparative study of the various domestic provisions on the provisional application of treaties would contribute to understanding State practice in the field.

89. Her delegation underscored the importance of the will of the negotiating parties to a treaty in respect of provisional application and had reservations regarding the relevance of the law of unilateral acts. While there could be cases where a treaty was applied provisionally by only one State, that scenario did not alter the consensual nature of provisional application. The Special Rapporteur should therefore emphasize the distinction between provisional application as a result of the agreement of the negotiating parties, which was the proper subject of the topic, and provisional application as a unilateral act, as in the case of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, which was outside the scope of the project. Furthermore, her delegation considered that the rules applicable to the obligations resulting from provisional application could be inferred from the principle of good faith and the need for legal security rather than from the law of unilateral acts. A distinction should be made between two categories of obligations relating to provisional application: the obligation to apply the treaty provisionally, as in cases of treaties that provided for compulsory provisional application, and the rights and obligations resulting from the provisional application itself.

90. Further consideration should also be given to the various issues surrounding the termination of provisional application, including the legal consequences of the termination of obligations. In that regard, it would be worth examining the relevance of article 18 of the Vienna Convention on the Law of Treaties to the termination of provisional application. Specifically it might help to answer the question to what extent the obligation to defend the object and purpose of the treaty persisted in the case of termination of provisional application, in particular if such action was taken as a consequence of the intention not to ratify. Her delegation would also welcome more guidance from the Commission regarding the possible different effects of termination of provisional application when the intention was to continue the domestic process required for a treaty's entry into force; when the intention was not to ratify a treaty; and when the treaty had been ratified but had not entered into force, especially in cases where the institutional mechanisms had been activated during provisional application. In the latter case, the practice of the European Union would be a useful resource. Given all of the possible scenarios, a more thorough analysis of whether article 25, paragraph 2, of the Vienna Convention was customary in nature would be very useful, in particular for States, like Romania, that were not parties to the Vienna Convention but applied it as customary international law.

91. Her delegation would also appreciate a more in-depth consideration of the non-arbitrary character of the termination of provisional application. For reasons of legal security and predictability, the party terminating provisional application should at least state its intentions concerning ratification of the treaty. Her delegation supported the proposal to examine the question of the provisional application of treaties by international organizations. In that regard, the practice of the European Union and its effect on the law and practice of its member States was particularly relevant. An examination of the effects that provisional application had on other treaty actions such as modification of the treaty or ratification before entry into force would also be welcome.

92. The topic of the Most-Favoured- Nation clause had practical relevance to policymakers and those involved in the investment field; the Study Group's efforts would bring greater clarity to highly debated investment law issues. Indeed, the Study Group's discussions and its well-structured draft final report demonstrated that a solid revised report would be presented at the Commission's next session. In that regard, it should take into account all the significant developments since the adoption of the 1978 draft articles on most-favoured-nation clauses and the need to analyse and situate them within the broader normative framework of general international law, thus limiting further fragmentation of international law.

93. **Mr. Stemmet** (South Africa), referring to the topic "Identification of customary international law", said that his delegation supported the two-element approach and agreed that the first element was best referred to as "general practice", rather than "State practice". It also agreed with the Special Rapporteur that the language of article 38, paragraph 1(b), of the Statute of the International Court of Justice could be relevant to the practice of international organizations, since States' practice included their actions within or through international organizations. However, the practice of international organizations required more detailed assessment and would be usefully addressed in the third report of the Special Rapporteur.

94. The second element, "accepted as law", had generally been used in a theoretical manner, and his delegation would welcome the practical development of the concept over time. The term *opinio juris* was preferable, as it was more commonly used in jurisprudence and in the legal literature. His delegation did not, however, agree that the existence of a general practice must precede its acceptance as law; what mattered was that both elements should be present, rather than their temporal order.

95. It was important that the Commission's work on the topic should result in a guide to assist practitioners. The decisions of international courts and tribunals were among the primary materials for guidance in that regard. There was also a need to engage with Governments and examine the jurisprudence of international, regional and subregional courts. The Constitution of South Africa was very clear that customary international law was automatically part of the domestic legal system unless it was inconsistent with the Constitution or an act of Parliament. His delegation supported the decision to exclude the study of *jus cogens* from the topic, as it required consideration as a topic in its own right.

96. On the topic "Protection of the environment in relation to armed conflict", the Special Rapporteur had suggested that work should be divided into three phases, namely the relevant rules and principles applicable to potential armed conflict (peacetime obligations), measures during armed conflict and post-conflict measures. That fragmented approach had its merits, but it remained to be seen whether it would be more useful than a broader approach focusing on all applicable laws. In any event, the ultimate aim should be to ensure that the environment was protected before, during and after conflict. With regard to phase I of the topic (potential armed conflict), his delegation believed that rules outside the sphere of environmental law could also be relevant. Protection of the environment could in turn have implications with respect to potential sources of conflict, as many conflicts were caused by the need to access or benefit from natural resources. Phase II of the topic (measures during armed conflict) should similarly go beyond environmental principles to include human rights law, international criminal law and international humanitarian law. It was too early to decide whether the work should take a normative approach or aim to develop a soft-law instrument.

97. With regard to the topic "Provisional application of treaties", whether a particular State was able to apply treaties provisionally was a question of domestic rather than international law. The effectiveness of a treaty regime during the provisional phase could therefore depend on the legal systems of the

negotiating States. A number of questions could usefully be addressed: whether a provisionally applied treaty could have legal effect under domestic law; at what point such a treaty could be relied on as the basis for a claim before a domestic court; whether a provisionally applied treaty would prevail over a pre-existing treaty already incorporated in domestic law; and what international consequences would result from a domestic court's failure to apply a provisionally applied treaty.

98. The Special Rapporteur might also find it relevant to consider the example of South Africa, whose 1996 Constitution granted an enhanced status to international law. Under the Constitution, the executive branch had the power to agree to the provisional application of a treaty without parliamentary approval provided that the treaty to be applied provisionally was of a technical, administrative or executive nature; that the agreement on its provisional application was itself of a technical, administrative or executive nature; and that the agreement on provisional application was one that required neither ratification nor accession. The agreement must then be submitted to Parliament within a reasonable time. An agreement to apply a treaty provisionally could take the form of a provision in the treaty itself, a separate agreement, the resolution of a conference or a notification or declaration of provisional application.

99. The executive could decline to ratify a treaty approved by Parliament should the other negotiating party or parties delay or refuse ratification, or if the entire treaty had become obsolete, or if there was a need to renegotiate some terms. If the Government decided not to ratify a provisionally applied treaty, the executive could choose to terminate its provisional application, provided that the agreement on provisional application did not prohibit such action. The Constitution provided that, when interpreting legislation, the courts must prefer any reasonable interpretation that was consistent with international law over any other interpretation that was not. International law in that context was taken to include provisionally applied treaties as well as those that had entered into force.

100. **Mr. Martín y Pérez de Nanclares** (Spain) that the Commission's work on the topic "Identification of customary international law" augured a positive outcome, although the timetable could prove overambitious. As many practitioners were not specialists in international law, the outcome should be of an essentially practical nature, in the form of a set of conclusions with commentaries. His delegation supported the two-element approach and agreed that the objective was not to determine the substance of the rules of customary international law, but rather to identify an approach for their identification. His delegation welcomed the proposal that future reports should cover the persistent objector rule, regional customary international law, bilateral custom, burden of proof and the relation between customary law and general principles.

101. In the second report of the Special Rapporteur (A/CN.4/672), the use of the term "methodology" in draft conclusion 1 (Scope) could cause confusion. However, the alternatives were also problematic. The term "methods" appeared too narrow; the term "rules" would re-open a debate as to the nature of those rules; and the terms "elements" and "factors" were not sufficiently accurate. In draft conclusion 2 (Use of terms), the inclusion of a definition of the term "customary international law" only created confusion, as the term was already the subject of the draft conclusions. In the same way, a definition of "international organizations" was unnecessary, as the terms was being used in the same sense as in any international law handbook or in the articles on the responsibility of international organizations. It would be sufficient to make reference to both terms in the commentary.

102. In draft conclusion 3 (Basic approach), it would be appropriate to retain the traditional term *opinio juris*; the phrase "general practice accepted as law" created unnecessary problems and added no value. It would be useful to elaborate further on the temporal aspect of the two elements and, most importantly, on their interrelation. In draft conclusion 4 (Assessment of evidence), there was nothing to be gained from referring to the "surrounding circumstances", as the importance of context had already been made clear. Moreover, the phrase could prove overly vague for the purposes of practical guidance. Regarding draft conclusion 5 (Role of practice), while the crucial role of States in creating customary law was beyond doubt, certain international organizations had a high degree of internal development and a prominent role in international relations. In particular, the European Union had acquired legal personhood and ample treaty-making powers. In certain areas, such as common trade

policy and the conservation of marine biological resources, it had its own competence that precluded the involvement of States members. The activities of international organizations must be taken into consideration when identifying rules of customary international law, including in such areas as privileges and immunities.

103. Draft conclusion 6 (Attribution of conduct) drew on the language of the articles on responsibility of States for internationally wrongful acts. However, it was doubtful whether the articles on State responsibility could be applied in relation to general practice, as they had a different purpose. In draft conclusion 7 (Forms of practice), the issue of inaction as practice and the relationship between custom and acquiescence required more detailed examination. With regard to draft conclusion 9, it was essential that "the relevant practice" should be unambiguous and sufficiently general and uniform. Attention should also be paid to bilateral custom as a basis of reciprocal international rights and obligations, since it was highly significant in territorial and maritime delimitation disputes, as well as in disputes relating to navigational rights.

104. The topic "Protection of the environment in relation to armed conflict" created a range of difficulties. In particular, it would not be easy to delimit the purpose of the topic or establish the dividing line between the three temporal phases proposed by the Special Rapporteur; the proposed timetable was also likely to prove too ambitious. The Special Rapporteur's cautious approach was therefore welcome. However, his delegation failed to see the relevance of the term "sustainable development", which referred to economic development in peacetime; and the reference to Principle 24 of the Rio Declaration was unconvincing. Moreover, it was unclear how the Commission could identify obligations to protect the environment in internal armed conflict, an area that was not currently covered by international law.

105. With regard to the topic "Provisional application of treaties", the decisive element was the consent of the contracting State. The Commission therefore need not involve itself in the sensitive task of encouraging or discouraging the provisional application of treaties, or of analysing the domestic law of States. Indeed, once a treaty was applied provisionally, it became subject to article 27 of the 1969 Vienna Convention on the Law of Treaties, which provided that a party might not invoke the provisions of its internal law as a justification for its failure to perform a treaty. For that reason, the Senate of Spain had recently approved a bill, soon to enter into law, which, among other things, placed limitations and safeguards on the use of the provisional application of treaties. It would be useful for the Special Rapporteur to further examine the practice of States and take a more inductive approach. It would also be worth considering the practice of such international organizations as the European Union, which had made frequent use of the provisional application of treaties, and had done so in interesting ways. For instance, in the case of certain treaties between the European Union and its States members on the one hand and a third State on the other hand, only those parts of the treaty that pertained to the competences of the Union were applied provisionally.

106. His delegation doubted whether the decision to apply a treaty provisionally could be characterized as a unilateral act; the Vienna Convention on the Law of Treaties specifically considered it as the result of an agreement between States. The contention that provisional application could not be revoked arbitrarily needed more detailed argument. When a signatory State informed another signatory State of its intention to terminate the provisional application of a treaty, it was under no obligation to provide legal justification. Its decision could be a result of various factors, including an internal political change, and would not necessarily constitute a breach of good faith. The Special Rapporteur should also consider whether the rules of customary international law regarding the provisional application of treaties were the same as those set forth in the Vienna Convention on the Law of Treaties.

107. Lastly, his delegation believed that the Commission's agenda was too full to allow a thorough discussion of the topics at hand. The Commission should consider reducing the number of topics while maintaining the same number of meetings. It should be more selective and concise in requesting information from States: such requests had been made in respect of 7 of the 11 topics under consideration, many of which were complex. In so doing, it should bear in mind the principle of language parity. The Commission's website, which was its principal means of communication with States, should be made more user-friendly. The Commission should not in any way limit, much less eliminate, the summary records of its

internal deliberations, which were a highly important source for Member States to follow the Commission's work.

108. **Mr. Rao** (India), referring to the topic, "Identification of customary international law", said that the decisions of the International Court of Justice were undoubtedly valuable in the identification of rules of customary international law, since the Court was mandated to apply them in settling the disputes brought before it by States. A case in point was its judgment in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, in which the Court had found that an incumbent Minister for Foreign Affairs enjoyed immunity *ratione personae* as a matter of customary international law. Nonetheless, the decisions of other international tribunals should not be overlooked. Unlike treaty law, customary international law did not have a material source. The challenge of identifying it was compounded if those trying to apply it were not well versed in international law.

109. The Commission's work on the topic should give equal weight to the two elements of customary rules, namely the objective element, State practice, and the subjective element, *opinio juris*. The practices of States from all regions should be taken into account. In particular, developing States should receive encouragement and assistance in producing digests of their State practice, including case law and statements before international and regional forums. At the same time, the Commission should be extremely careful not to detach arguments advanced by States before international adjudicative bodies from their original context.

110. The topic "Protection of the environment in relation to armed conflict" addressed an area that was in urgent need of clarification and coherence. The principle had been established in the arbitration award in the *Trail Smelter* case that each State had a duty not to allow its territory to be used in such a manner as to injure another. In the past two decades environmental laws had undergone major development as the urgency of the need for a solution had become more and more apparent. His delegation supported the three-phase approach chosen by the Special Rapporteur, and considered that her work should encompass relevant areas of international humanitarian law, human rights law and refugee law as well as environmental law.

111. While noting the Commission's decision not to adopt draft articles on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", his delegation considered it regrettable that States had been left to interpret the principle at their convenience. In order to combat impunity, it would have been beneficial to bring greater certainty and consistency to the topic.

112. The topic "Protection of the atmosphere" was extremely important in view of the threats posed by air pollution, ozone depletion and climate change. The three draft guidelines proposed in the first report of the Special Rapporteur (A/CN.4/667) required in-depth analysis in view of the technical, scientific and legal issues at stake. In particular, the concept of the atmosphere as a common concern of humankind was controversial and would benefit from more thorough legal justification. It would be useful for the Special Rapporteur to ensure that the interests of developing countries were protected; take into consideration the principle of common but differentiated responsibility; and place a greater emphasis on cooperative mechanisms to address issues of common concern.

113. India had enacted a range of laws to protect the environment, including the Environment Protection Act (1986), the Public Liability Insurance Act (1991), the National Environmental Tribunal act (1995) and the National Environmental Appellate Authority Act (1997). A number of national policies were also in place. The most recent was the National Environment Policy (2006), which addressed the conservation of critical environmental resources, livelihood security for the poor, integration of environmental concerns in economic and social development, efficient use of environmental resources, environmental governance and the optimization of resources for environmental conservation.

114. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation agreed that, as stated in paragraph (4) of the commentary to draft article 2(e), the term "individual" contained in the definition of "State official" covered only natural persons. In paragraph (6) of the commentary to that draft article, the Commission had noted that the individuals who could be termed "State officials" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition, which pointed to a specific link between the State and the

official, namely representation of the State or the exercise of State functions. The emphasis was therefore on the existence of a link between the State and the official, rather than on the nature of that link. It was his delegation's understanding that the Special Rapporteur might address specific situations when considering the substantive scope of immunity. For instance, it would be interesting to examine whether a private contractor representing the State could be characterized as a State official.

115. In the Commission's deliberations on draft article 5, some members had expressed doubts about the need to define the persons who enjoyed immunity *ratione materiae*, since the essence of such immunity was the nature of the acts performed and not the individual who performed them. Nevertheless, his delegation agreed with the majority of members, who thought it would be useful to identify the persons in that category, since they enjoyed immunity from foreign criminal jurisdiction.

116. **Mr. Charles** (Trinidad and Tobago), referring to the topic "Protection of persons in the event of disasters", said that while the draft articles were purportedly based on the principle of cooperation, the constant references to the duties of the affected State in respect of third States reflected a rights/duties approach. His delegation supported both dimensions, but believed that the rights/duties approach could apply only between the affected State and its population. The relation between affected States and third States must be governed by a different set of rules.

117. With regard to the topic "Identification of customary international law", his delegation, while not endorsing the entirety of the second report of the Special Rapporteur, was impressed with its exceptional quality and thorough research. The relevance of the practice of intergovernmental organizations depended on the nature of the rule in question. In order to determine such relevance, an assessment should be made of the relevant practice and legal literature and reflected in the report and commentaries. His delegation agreed with the decision of the Drafting Committee to exclude from the draft conclusions the statement that due regard should be given to the practice of States whose interests were specially affected, as the concept of specially affected States had little basis in law.

118. The work of the Special Rapporteur on crimes against humanity should cover all three major international crimes, namely crimes against humanity, genocide and war crimes. Although the latter two categories were already the subjects of treaties, the inter-State cooperation mechanism for their prosecution should be strengthened. The project should not detract from, but rather complement the Rome Statute of the International Criminal Court. His delegation welcomed the Commission's decision to include in its programme of work the topic of *jus cogens*, which should be addressed with due care and circumspection.

The meeting rose at 6.00 p.m.