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Chair: Mr. Turbék (Vice-Chair) . . . . . (Hungary)

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16-18685 (E)

In the absence of Mr. Danon (Israel), Mr. Turbék (Hungary), 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-eighth session (*continued*) (A/71/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to VI and XIII of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

2. **Mr. Varankov** (Belarus), referring to the draft articles on the protection of persons in the event of disasters, said that the scope of the text went beyond the original proposal for the topic, and that consideration should be given to amending the title to place greater emphasis on cooperation in the protection of persons in the event of disasters. Draft article 1 (Scope) should stipulate that the text applied exclusively to the activities of subjects of international law. In order to bring draft article 2 (Purpose) into line with the general thrust of the text, greater emphasis should be placed on the rights and not the needs of affected persons. Belarus continued to believe that draft articles 4 (Human dignity) and 5 (Human rights) should be merged. It should be clearly indicated in the texts of and the commentaries to both draft articles that their contents were without prejudice to the positive and negative obligations of States at the international level. Caution should be exercised with regard to draft article 11 (Duty of the affected State to seek external assistance), which was clearly based on similar requirements as the concept of responsibility to protect. If a binding legal instrument was to be developed on the basis of the draft articles, it should be based on the practice of States and international intergovernmental bodies and not on the practice of treaty bodies and the views of non-governmental organizations.

3. Turning to the topic of identification of customary international law, he said that the commentary to draft conclusion 14 (Teachings) should state that the work of the Commission was among the most important subsidiary means for the determination of rules of customary international law. The wording in paragraph (6) of the commentary to draft conclusion 4 (Requirement of practice) concerning the functional equivalence of the acts of international organizations to the acts of States was appropriate, because acts of international organizations could be construed very broadly in the identification of "practice" for the purposes of draft conclusion 4. His delegation therefore proposed that the possibility of including that wording directly in the text of the draft conclusion should be considered.

4. It should be made clear in the commentary that draft conclusion 5 (Conduct of the State as State practice) referred not only to the conduct of States but also to that of State institutions. Alternatively, the commentary could suggest using the same approach to attribution of conduct to a State as the approach used in the articles on responsibility of States for internationally wrongful acts. In paragraph (6) of the commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), reference should be made to situations when there was a lack of clear support by States for such resolutions. Paragraph 1 of draft conclusion 15 (Persistent objector) needed to more clearly delineate the time frame relevant to the formation of a rule of customary international law and should perhaps indicate that such a rule could not create obligations for a persistent objector. Paragraph 2 should be reworded, along the lines of draft conclusion 10, paragraph 3, to refer to situations when States were in a position to react and to the circumstances calling for such a reaction. With respect to draft conclusion 16 (Particular customary international law), objective criteria such as geography, history, military alliances and technology should be used for specifying which States were involved in the formation of a particular rule of customary international law.

5. With regard to subsequent agreements and subsequent practice, and specifically to paragraph (14) of the commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice), he said that in order for an agreement to be considered a subsequent agreement, a direct reference to the fact that it concerned the interpretation of a treaty was not essential. His delegation proposed that the description of *modus vivendi* contained in the commentary to that draft conclusion as "a temporary and exceptional measure that left the general treaty obligation unchanged" should be included in draft conclusion 6, paragraph 1. With reference to the commentary to draft

conclusion 13 [12] (Pronouncements of expert treaty bodies), he said that when resolutions, including those adopted by consensus, cited the pronouncements of expert treaty bodies, that could in no way be construed as constituting the agreement of States with the pronouncements themselves.

6. The draft articles on crimes against humanity were well balanced and could be of special interest to States not participating in the work of the International Criminal Court. Nothing could justify crimes against humanity — neither security concerns nor countermeasures in respect of internationally wrongful acts. Paragraph 4 of draft article 5 (Criminalization under national law) should be reworded to reflect the fact that the commission of an offence by a subordinate following orders could be viewed as a mitigating circumstance if the subordinate took steps to minimize the consequences of the offence, including the provision of a report or other information to competent bodies. Since the ultimate goal of draft article 5, paragraph 7, was to bring physical persons to justice, the introduction of the concept of a criminal organization could prove promising for the future work of the Commission. In draft article 9 (*Aut dedere aut judicare*), the principle of *aut dedere aut judicare* should be offset with the principles of sovereign equality of States and non-intervention in their internal affairs, taking into account the personal or absolute immunity of high-level officials. His delegation had doubts as to whether the phrase "including human rights law" was needed at the end of draft article 10, paragraph 1, as the idea was already subsumed in the reference to applicable national and international law.

7. Referring to the work done on the protection of the atmosphere, which was much appreciated, he said that draft guidelines 5 and 6 would be better placed at the beginning of the text or in the preamble. In the commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere), it might be advisable to include a reference to the fact that the set of draft guidelines did not apply to situations of armed conflict, especially in the light of the work currently being done by the Commission on related topics.

8. In view of the frequent references in international law to *jus cogens*, its in-depth study was valuable and timely, but the conclusion of an international treaty on that subject was hardly justified. As to the sources on which the Commission should base its work, while the decisions of international judicial bodies elucidated and set out in an accessible form the positions and practice of States, they did not replace State practice. Similarly, while an overview of regional rules of *jus cogens* would be beneficial, the rules of *jus cogens*, strictly speaking, were those that reflected the general opinion of the entire international community and not just that of one region.

9. In conclusion, he said that his delegation welcomed the inclusion in the long-term programme of work of the topic of settlement of disputes to which international organizations were parties. However, topics not conducive to codification should not be included in the programme of work.

10. **Mr. Shin** Seoung Ho (Republic of Korea) said that considering the increasing severity of natural disasters at both the regional and the global levels, his delegation firmly believed that the Commission's work on protection of persons in the event of disasters would provide essential and pragmatic guidance to enhance international cooperation for efficient and effective humanitarian relief assistance. Draft article 11, as adopted on second reading, rightly stipulated that "To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance." That was a notable improvement, but there was a need for further elaboration of what practical standards were to be used in defining that novel duty of a State and when a disaster could be considered to "manifestly" exceed the State's response capacity.

11. Concerning the possible format of the draft articles, the Commission had recommended that the General Assembly should adopt them as a convention. Indeed, the draft articles contained many foundational rights and obligations of the State, in particular with respect to the ever-growing scale and severity of natural disasters. Nonetheless, in view of the past and ongoing discussions within the international community on the issue, a General Assembly resolution could be of value in the current context of international law and relations, in that it could help to disseminate emerging rules and facilitate their effective implementation on a broader basis.

12. With regard to the identification of customary international law, he said that while the speedy and

efficient working methods applied to discuss the subject were welcomed, a more cautious approach might be required, especially in respect of controversial issues such as the persistent objector. A high level of clarity should be maintained with a view to producing practical guidelines for national and international legal practitioners. His Government accordingly welcomed the Commission's requested proposal on the means by which it could acquire evidence concerning relevant customary international law in order to facilitate further discussions on the topic.

13. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he welcomed the fact that the first reading had been completed and a set of 13 draft conclusions, together with their commentaries, had been produced. With respect to draft conclusion 13 [12] (Pronouncements of expert treaty bodies), he said that it was a very timely move to deal with the roles of such bodies in treaty interpretation. Many multilateral treaties, including a good number of human rights conventions, had established bodies composed of individual experts acting in their personal capacities. The replacement in the draft conclusion of the term "reflect" with "refer to" was therefore prudent, properly reflecting the sensitivity of the interpretation of treaties. According to paragraph (17) of the commentary to the draft conclusion, the modification also had been made "in order to make clear that any subsequent practice or agreement of the parties is not comprised in the pronouncement itself" by those expert bodies. His Government deeply appreciated the Commission's necessary caution on the wording and agreed with the modification, while taking note of the divergent views within the Commission on paragraph 4 of the draft conclusion, a disagreement related to the extent to which and the form in which pronouncements of expert treaty bodies could contribute to treaty interpretation. His Government requested the Commission to re-examine the issue, during the second reading, on the basis of the observations of Member States.

14. **Mr. Garshasbi** (Islamic Republic of Iran) said that his Government remained uncertain as to whether the time was ripe for convening a diplomatic conference and adopting the provisions on the protection of persons in the event of disasters in the form of a treaty. International cooperation certainly played a crucial role in managing disasters, but the affected State had the exclusive right to recognition of the threshold of disaster, and thus to affirm that a disaster had disrupted the functioning of society. Paragraph 2 of draft article 13 (Consent of the affected State to external assistance) stated that "consent to external assistance shall not be withheld arbitrarily", but such a determination depended on an evidently subjective criterion, namely decisions freely made by humanitarian actors. Such a determination risked being influenced by political factors that might entail legal consequences for the affected States; it seemed more appropriate to leave it to the affected State to determine its own capacities of reaction in the face of disasters and to decide whether it had the necessary means to confront them.

15. The practice of States was central to the identification of customary international law. The decisions of international courts and tribunals and the writings of publicists remained subsidiary, even as evidence of custom: Article 38 of the Statute of the International Court of Justice, which listed the sources of international law, made that clear. Also, the practice of States members of an international organization and that of the organization itself needed to be considered separately, and only the proven practice of States could be considered as evidence. Inaction could not be considered as contributing to State practice; it was most often the result of political convenience, as evidenced especially in the adoption of resolutions by consensus at international organizations. The evidentiary basis of resolutions of international organizations thus remained open to question, since such resolutions were at times adopted by political organs and did not reflect *opinio juris*.

16. The topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties was understood by his Government to be confined within the framework of articles 31 and 32 of the Vienna Convention on the Law of Treaties. While article 31 set forth the general rule of interpretation, article 32 referred to supplementary means of interpretation, which included the preparatory work for the treaty and the circumstances of its conclusion. Those means might include memorandums or statements and observations of Governments, diplomatic exchanges, negotiation records, political, social and cultural factors and, even more broadly, the *travaux préparatoires* of earlier versions of treaties and non-authentic translations of the authenticated text.

17. Recourse to “supplementary” means of interpretation after employing the general rule of interpretation prescribed in article 31 was aimed at providing further evidence of, or shedding further light on, the intentions of the parties and their common understanding of treaty terms. As such, it was only intended to aid the process of interpretation, and such recourse was discretionary rather than obligatory. That was why the rationale behind the recurrent use of the phrase “other subsequent practice under article 32” in draft conclusions 2, 4, 6, 7, 12 and 13 was difficult to understand. His Government could not concur with the Special Rapporteur that a pronouncement of an expert treaty body could give rise to or refer to a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, and even less so, under article 32. Subsequent practice or subsequent agreement referred to the actual practice or agreement of all the States parties to a treaty, and the pronouncements of experts serving in their personal capacity could not be regarded as such.

18. Concerning other decisions and conclusions of the Commission, he said that his delegation took note of the Commission’s recommendation regarding the inclusion in its long-term programme of work of two topics — the settlement of international disputes to which international organizations were parties, and succession of States in respect of State responsibility. It also noted with interest the Commission’s recommendation to hold the seventieth anniversary session during the first part of its seventieth session in New York. On the question of holding future sessions in New York, due to the necessity of preserving consistency in the work of the Commission, it seemed desirable to hold the regular sessions in Geneva, with exceptions being made on a case-by-case basis and upon the recommendation of members of the Commission.

19. **Mr. Madjamba** (Togo) said that although some of the Commission’s output could still be improved, as reflected in the discussions in the Working Groups of the Sixth Committee on such sensitive topics as the responsibility of States for internationally wrongful acts and diplomatic protection. Nonetheless, the Commission, which was made up of eminent experts and jurists, remained an important body that should serve as inspiration for the Committee in fulfilling its mandate. His Government intended to do its part to ensure that the Commission continued to be composed of renowned experts in international law by putting forward the candidacy of Mr. Koffi Kumelio Afande, an international judge with extensive experience in the analysis of political and diplomatic issues in international law. Togo called upon Member States to support the election of Mr. Afande as a member of the Commission for the 2017-2021 quinquennium.

20. The fact that the Commission was now expanding its work into areas that brought international law closer to the daily concerns of people throughout the world, by considering such topics as protection of persons in the event of disasters, protection of the atmosphere and protection of the environment in relation to armed conflicts, was a welcome development. It enabled the Commission to move away from traditional issues and to address new trends in international law. That was why his delegation supported the Commission’s proposal for the inclusion in its long-term programme of work of two new topics: the settlement of international disputes to which international organizations were parties and succession of States in respect of State responsibility.

21. Lastly, his delegation was in favour of holding the first part of the Commission’s seventieth session in New York which, along with the seventieth anniversary commemoration events, would confer greater visibility to the Commission’s efforts and the major challenges it continued to face.

22. **Ms. Rivero** (Cuba) said that her delegation regretted the fact that the work of the Commission with respect to pressing problems of humankind had not found a concrete reflection in the Sixth Committee. Regarding the topic of protection of persons in the event of disasters, Cuba recalled the responses it had provided to the Commission’s request for comments on the text adopted on first reading (A/CN.4/696). In the work on the topic of identification of customary international law, the importance of custom in State practice had to be taken into account. With regard to subsequent agreements and subsequent practice in relation to the interpretation of treaties, she said that the means of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties should be used in concert, without one taking precedence over another. Concerning draft conclusion 5 (Attribution of subsequent practice), she said that the

conduct of non-State actors should not be deemed relevant to subsequent practice under articles 31 and 32, since such actors could not be considered parties to a treaty. A distinction should be drawn in draft conclusion 6 between a practical arrangement and the adoption of a position by the parties: a practical arrangement was conciliation in order to avoid confrontation when States had not arrived at an agreement, whereas a position of the parties was an unchanging and unequivocal approach taken by States.

23. **Mr. Spacek** (Slovakia) said that as an active provider of humanitarian aid and disaster relief, Slovakia was pleased that the draft articles on the protection of persons in the event of disasters had been adopted by the Commission on second reading, and took note of the recommendation that the General Assembly should prepare a convention on the basis of the draft articles. Disasters, whether natural or human-made, had instant, damaging impacts on human beings; his Government therefore welcomed the strong accent placed on the principles of respect for human dignity and protection of human rights in the draft articles. Concerning the role of the affected State, he said that the State in whose territory or in territory under whose jurisdiction or control a disaster had occurred was best placed to take immediate action. Nevertheless, the severity of disasters might create demands for disaster relief assistance that could hardly be met by the affected State. The duty to cooperate, of which the duty to seek assistance was a special form, could significantly contribute to disaster relief action and, in practice, could strengthen solidarity between States. His Government accordingly welcomed the careful balance reached in draft article 13 between the duty to seek external assistance and respect for the sovereignty of the affected State. As to the form of the final text, his Government had some concerns about the elaboration of a convention; it would rather consider the possibility of adopting the draft articles as guidelines.

24. Concerning the topic of identification of customary international law, he said that the 16 draft conclusions adopted by the Commission on second reading and the commentaries thereto were a tangible and valuable outcome that would help judges and legal practitioners in identifying customary international rules in practice. Slovakia endorsed the two-element approach to the identification of customary international law, involving general practice and *opinio juris*. The two elements were separate but interconnected, in that a piece of evidence of general practice might reflect *opinio juris*, and vice versa. The distinction might in certain cases be just a minor detail, but each element had to be considered and examined separately, and neither should have primacy over the other. Similarly, there should be no hierarchy between the different forms of evidence of the two elements. His delegation therefore welcomed the fact that the enumeration of different forms of practice and *opinio juris* was not exhaustive, but demonstrative, leaving space for the analysis of new forms in the future. With regard to particular custom, he stressed the importance of geographical affinity or link as a predominant characteristic of particular groups of States. Although there was no reason why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity or constituting a community of interest, the lack of any examples made such a conclusion hard to accept. The commentary should provide more clarity and examples on that subject.

25. With regard to other decisions and conclusions of the Commission, his delegation noted with satisfaction the Commission's request to the Secretariat to prepare a memorandum on ways and means of making the evidence of customary international law more readily available, which would not only contribute to the work of the Commission but would also help to enhance knowledge of the law in general. It also noted with satisfaction the request to the Secretariat to prepare a memorandum on State practice in respect of treaties deposited or registered in the last 20 years with Secretary-General, which would provide tangible input for the Commission's ongoing work. Slovakia also welcomed the establishment of a Planning Group as a suitable institutional mechanism for the long-term planning of the Commission's work.

26. As to the new topics included in the long-term programme of work, the settlement of international disputes to which international organizations were parties was a natural progression from the text adopted earlier on the responsibility of international organizations. On the scope of the topic, he noted that several international organizations had well-elaborated mechanisms for settling disputes between their constituent organs, as well as between themselves and their member States. Any future work should thus give due regard to the relevant practice of such organizations.

27. Regarding the second new topic, succession of States in respect of State responsibility, he said that it definitely merited the Commission's attention and would complement its earlier work relating to the succession of States. As a State that had faced that very problem in the past, Slovakia considered the topic useful but drew attention to the possible difficulties in identifying general rules and principles governing succession of States in respect of State responsibility.

28. As to the proposed holding of part of the Commission's seventieth session in New York, his delegation continued to believe that changing the long-standing practice of holding the sessions in Geneva lacked sufficient merit. The Commission was an independent body of experts, and interaction with the Sixth Committee should occur primarily during the Committee's consideration of the report of the Commission, not during the sessions of the Commission.

29. **Mr. Remaoun** (Algeria) said that his Government took note of the Commission's recommendation that the General Assembly should elaborate a convention on the basis of the draft articles on the protection of persons in the event of disasters and was open to examining the appropriate follow-up to be given to the text.

30. Concerning the identification of customary international law, and with specific reference to the role that resolutions adopted by international organizations or at intergovernmental conferences might play in the determination of rules of customary international law, he said that the resolutions of the General Assembly, a plenary organ of near universal participation which provided a legitimate and authoritative source of international law, should not only be given special attention, as indicated in the commentary to draft conclusion 12, but should be treated as a distinct category in the context of resolutions of international organizations and intergovernmental conferences.

31. On the draft guidelines on protection of the atmosphere, his delegation appreciated the addition of the fourth preambular paragraph concerning the special situation and needs of developing countries; the notion of equity was thereby taken into account. A recognition of the atmosphere as the common heritage of humankind should likewise be included in the preamble, and it should further be specified that the largest share of global pollutant emissions currently originated in developed countries. Draft guideline 8 [5] (International cooperation) still did not address all aspects of international cooperation, such as the notion of assistance, including technology transfer. The different levels of development between various countries should be borne in mind in that connection. Cooperation should operate in accordance with common but differentiated responsibilities of States and their respective capabilities and social and economic conditions. Having said that, his delegation recognized that those proposals could be addressed under the question of the interrelationship of the law of the atmosphere with other fields of international law, a subtopic suggested by the Special Rapporteur.

32. In conclusion, he recalled that Algeria had proposed that Mr. Ahmed Laraba should be elected for a second term as member of the International Law Commission.

33. **Mr. Mahnič** (Slovenia) said that his Government fully supported the 18 draft articles on the protection of persons in the event of disasters, which preserved a balance between the protection of disaster victims and their human rights, on the one hand, and the principles of State sovereignty and non-intervention, on the other. The Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles. Despite the benefits to be derived from discussing such a convention, since disaster relief, although practised for centuries, had not yet been comprehensively codified, Slovenia was confident that, even without a decision by the Sixth Committee to work on a convention, the rules prepared and adopted by the Commission would be used widely in practice and gain global acceptance, thereby serving the ultimate goal of the project — to draft a universal legal framework to benefit disaster victims.

34. With regard to the identification of customary international law, he said that Slovenia welcomed the Commission's decision to request the Secretariat to prepare a memorandum on the present state of the evidence of customary international law and to make suggestions for its improvement.

35. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, and with specific reference to draft conclusion 13 [12] (Pronouncements of expert treaty bodies), he said that although, technically, the Commission was not an expert body established under

a particular treaty, its discussions and possible pronouncements could certainly have an impact on how treaties under which no other expert body had been established were understood by States and international organizations. The question therefore arose as to whether draft conclusion 13 [12] could be understood as applying to the Commission, and if not, whether the Commission's role could merit amending that conclusion, amending the commentary thereto, or drafting a separate draft conclusion.

36. With respect to the other decisions and conclusions of the Commission, Slovenia welcomed the inclusion in the long-term programme of work of the topic of succession of States in respect of State responsibility. However, different types of succession entailed different types of State responsibility. For example, in the dissolution of a federally organized predecessor State, as had been the case in the former Yugoslavia, the responsibility of a successor State for internationally wrongful acts could not be treated in the same manner as in secession from a centrally organized State. They were two very distinct situations. The work on the topic should cover such specificities. In addition, it would be helpful to consider whether several already codified provisions dealing with State succession might have gained the status of customary international law.

37. On other possible future topics, Slovenia welcomed the statement in chapter XIII of the report that guidance in their selection should be sought from new developments in international law and the pressing concerns of the international community as a whole. The list of possible future topics contained some suggestions that corresponded to those selection criteria.

38. Lastly, with regard to the drafting of the Commission's report, the practice of including the summary of the discussion within the Commission in the chapters of some topics should be extended to all topics, to make the whole report more coherent. His delegation considered that its comments on topics that were not accompanied by commentaries were preliminary in nature.

39. **Mr. Mattar** (Egypt) said that the complementarity between the work of the Sixth Committee and that of the Commission was the driving force for the development of international law. His delegation welcomed the proposal to hold the first part of the seventieth session in New York, as it would provide an opportunity to coordinate the activities of the two bodies.

40. The text adopted on second reading on the protection of persons in the event of disasters would help to clarify the rights and duties of States in disaster situations and could be used in the drafting of bilateral and regional conventions, without prejudice to the principle of State sovereignty.

41. The draft conclusions on the identification of customary international law, adopted on first reading, would be of assistance to courts and practitioners alike. With regard to the role of resolutions of international organizations and intergovernmental conferences in the development of international law, his delegation emphasized the special importance of the resolutions of the General Assembly, which had worldwide membership. However, it had reservations about taking into account other sources, such as texts from academic institutions or non-State entities.

42. Concerning crimes against humanity, Egypt hoped that the laudable progress made would result in a draft convention to criminalize such acts at the international level. It endorsed the methodology used by the Commission in adopting the draft articles, which was in line with the objectives of the future convention and took account of disputed issues such as the immunity and liability of legal persons in the context of crimes against humanity.

43. The draft conclusions and commentaries thereto on subsequent agreements and subsequent practice in relation to the interpretation of treaties supplemented the rules on interpretation in the Vienna Convention on the Law of Treaties and would help countries to fulfil their commitments in the context of changing circumstances.

44. Egypt also welcomed the provisional adoption of two draft conclusions on *jus cogens* and the work done on conceptual matters and the historical context. The Commission should take a global approach permitting the review of all sources: practice, case law and legal doctrines.

45. On the protection of the atmosphere, his delegation welcomed the Commission's dialogue with scientists and supported the five draft guidelines that had been adopted. The adoption of draft guidelines on

protection of the environment in relation to armed conflicts, a similar topic, was an important step forward.

46. Egypt supported the Commission's inclusion in its long-term programme of work of two new topics that would help to fill gaps in international law. Lastly, the Commission should regularly review its working methods and the Sixth Committee should take positive steps regarding the texts submitted to it on State responsibility, diplomatic protection and transboundary aquifers.

47. His delegation supported the candidacy of Mr. Hussein Hassouna for another term as a member of the Commission, and also expressed gratitude for the memorial service held for former Secretary-General Boutros Boutros-Ghali, who had been a member of the Commission from 1979 to 1981.

The meeting rose at 4.30 p.m.