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Chair: Mr. Katota (Vice-Chair) . . . . . (Zambia)
later: Mr. Turbék (Vice-Chair) . . . . . (Hungary)

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16-18582 (E)

In the absence of Mr. Danon (Israel), Mr. Katota (Zambia), Vice-Chair, took the Chair.

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

Agenda item 78: Report of the International Law Commission on the work of its sixty-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. Válek** (Czechia) said that his delegation recognized the importance of the draft articles on the topic "Protection of persons in the event of disasters" (A/71/10, para. 48.) as an addition to existing instruments concerning disaster response and prevention. It especially appreciated that the Commission had struck a balance between the principles of non-intervention and sovereignty on the one hand and, on the other, the humanitarian principles and human rights that guided the provision of assistance to the affected State.

3. His delegation welcomed most of the changes made on second reading in the draft articles and the commentary thereto, as they brought more clarity to the text and provided better guidance. Although not all its earlier comments had been reflected in the final draft articles, his delegation especially appreciated the new wording of draft article 18 (Relationship to other rules of international law), in particular regarding the rules of international humanitarian law. However, the commentary to certain draft articles could be elaborated further, for example concerning the concept of serious disruption of the functioning of society.

4. The explicit reference in draft article 17 (Termination of external assistance) to the possibility of termination of external assistance at any time was inappropriate. Although his delegation understood that both the affected State and the assisting actor might need to terminate external assistance, such a provision might be detrimental to the persons affected by the disaster, and it might lead to an abrupt termination of assistance before a new assisting actor could fill the gap.

5. His delegation did not believe it necessary, at the current stage, to elaborate a convention on the basis of the draft articles.

6. With regard to the topic "Identification of customary international law", his delegation appreciated that the Special Rapporteur, in the draft conclusions set out in the Commission's report (A/71/10, para. 62), had placed the determination of rules of customary international law and their content at the centre of consideration and had focused solely on the methodological issue of how the rules of customary international law were to be ascertained.

7. Draft conclusion 3 (Assessment of evidence for the two constituent elements) addressed an important aspect which might seem self-evident, but was often ignored. It was especially relevant in view of the widespread tendency (including in various multilateral forums) to assert the existence of a particular rule of customary international law by focusing on only one of the two constituent elements. His delegation also appreciated the clarification provided in the commentary concerning the phrase in paragraph 1 pursuant to which "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found". It was his delegation's understanding that those three conditions applied equally for ascertaining whether there was general practice and whether that practice was accepted as *opinio juris*.

8. His delegation was not convinced that the current wording of draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), paragraph 3, adequately protected States that did not openly object to a practice of other States from the incorrect assumption that they accepted a developing customary rule. Failure to react had a different significance depending on the extent and degree to which the rights and obligations of a State were affected: States usually formulated open objections or protests when a practice directly or significantly affected their interests, whereas in situations in which a practice affected many or all States, the assessment of whether and how to react was more varied. Moreover, the failure to react must be seen in the overall context of the situation, in particular when the State not reacting to the other State's conduct consistently pursued a different practice in its own conduct vis-à-vis other States.

9. His delegation appreciated the commentary to draft conclusions 11 (Treaties), 12 (Resolutions of international organizations and intergovernmental conferences), 13 (Decisions of courts and tribunals) and 14 (Teachings), as well as draft conclusions 15 (Persistent objector) and 16 (Particular customary international law). The Commission should, however, clarify paragraph (5) of its commentary to draft conclusion 16, according to which particular customary law could develop not only at the regional, subregional or local level, but also among States linked by a "common cause", interest or activity other than their geographical position. The commentary should describe relevant legal concepts in more detail and give specific examples of that type of particular customary law, and the draft conclusion should make it clear that any rule of particular customary international law which operated only in a particular group of States could not create obligations or rights for a third State without its consent.

10. Referring to the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (A/71/10, para. 75), he said that draft conclusion 1 [1a] (Introduction) should reflect the fact that the Vienna Convention on the Law of Treaties dealt with treaties between States. It should not be assumed that the conclusions reached by the Commission concerning the role that subsequent agreements and subsequent practice might play in the interpretation of treaties between States could be automatically transposed to treaties between States and international organizations or between international organizations. The relatively small number of such treaties and of cases in which such issues had arisen in relation to treaties with or between international organizations did not provide sufficient material for a credible study.

11. His delegation welcomed the Commission's decision to recommend the addition of two topics to its long-term programme of work, in particular the topic of succession of States in respect of State responsibility.

12. **Ms. Robertson** (Australia), referring to the topic "Identification of customary international law", said that the draft conclusions provided a flexible and practical methodology for the identification of such rules and their content. Flexibility was essential to ensure that the dynamism which characterized the formation and development of rules of custom was reflected in the Commission's guidance on the topic. Her delegation agreed with the Special Rapporteur that, although a principal objective was to provide practical guidance, the word "conclusions" was appropriate.

13. Her delegation did not have a strong view on the suggestion that draft conclusion 1 could instead be taken up in a general commentary, but if that suggestion was adopted, the current content of draft conclusion 1 should be prominently featured in the commentary to avoid its being lost.

14. Paragraph (2) of the commentary to draft conclusion 3 rightly stressed the need to investigate in each case, in the light of the relevant circumstances, whether there was evidence of the two constituent elements of customary international law. Although the two elements were conceptually distinct and would need to be examined separately, it could not be ruled out that, in some cases, the same evidence might be used to ascertain both practice and acceptance as law (*opinio juris*).

15. Her delegation agreed with the Special Rapporteur that it was not the purpose of the Commission's work to provide guidance on the inherent difficulty of determining when State practice had reached a critical mass such that customary international law was formed. Instead, the draft conclusions provided guidance to practitioners on how to determine the existence or content of a customary rule at a particular point in time.

16. The guidance provided in Part Three of the draft conclusions for evaluating whether a general practice existed was helpful and practical. Her delegation endorsed the recognition that it was first and foremost State practice that contributed to the formation of customary international law. Australia was open to the possibility that the practice of international organizations might contribute to the formation of custom "in certain cases", as suggested in paragraph 2 of draft conclusion 4 (Requirement of practice), but the role of international organizations in the formation of custom, including any assessment of the weight and relevance of their practice, must be approached with caution. Consideration should be given to whether further caveats should be inserted.

17. With regard to draft conclusion 10, paragraph 3, her delegation reiterated its view that inaction should not be assumed to be evidence of acceptance of law. A State would first need to know of a certain practice and have had a reasonable amount of time to respond. States could not be expected to react to everything, and the attribution of legal significance to inaction must depend on the circumstances of the case.

18. Australia agreed that a resolution adopted by an international organization or at an intergovernmental conference could not, of its own right, create a rule of customary international law.

19. Her delegation thanked the Secretariat for its comprehensive and informative memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691). The Commission's approach of regarding national court decisions as a form of State practice, a form of evidence of acceptance as law and potentially as a "subsidiary means" for determining the existence of a customary rule was appropriately reflected in draft conclusions 6, 10, and 13.

20. Her delegation thanked the Special Rapporteur for his work in preparing a draft bibliography on identification of customary international law, which would be an excellent addition to the draft conclusions and commentaries and would assist researchers in academic institutions around the world. It supported future consideration by the Commission of ways of making the evidence of customary international law more readily available. To that end, Governments should, where possible, publicly communicate the legal reasoning underpinning their decisions; that would help to identify common understandings and points on which States' legal analysis differed. As the Special Rapporteur had pointed out, it was not always easy to identify the crystallization of custom, and often the distinction between State practice and *opinio juris* was blurred, hence the need for States to continue to share views between partners and publicly.

21. **Ms. Zeytinoğlu Özkan** (Turkey) said that her delegation noted with interest the Commission's recommendation to hold the first part of its seventieth session in New York. In that connection, she pointed out the difficulty of providing comprehensive observations on the Commission's report during its examination in the Sixth Committee. The time between the publication of the report and its consideration in the Sixth Committee was relatively short, especially since many topics required an examination process involving many institutions and agencies. Further improvements in that regard would be appreciated.

22. Given the long list of topics in its programme of work, the Commission should take up new ones only when the current ones had been completed. Noting the Commission's decision to include in its long-term programme of work a topic on succession of States in respect of State responsibility, her delegation doubted that States would be able to reach a common understanding on that complex issue and was not convinced that the Commission should take up the topic.

23. Regarding the topic "Identification of customary international law", her delegation welcomed the adoption of draft conclusion 15 concerning the persistent objector, which was a well-established concept in international law, and it thanked the Special Rapporteur for the many practical examples cited in the commentary.

24. **Ms. Escobar** (El Salvador), referring first to the topic "Protection of persons in the event of disasters", said that from the outset, her delegation had supported the Commission's decision to opt for a codification and progressive development of the subject. Effective risk management, civil protection and early warning systems were essential to her country, given its history of natural disasters. For that reason, El Salvador had worked actively so that all the draft articles (A/71/10, para. 48) reflected the primary objective of ensuring the effective protection of persons and their inherent rights. Her delegation was pleased that some of its comments had been taken into account in the Special Rapporteur's eighth report.

25. It was particularly important for the draft articles to be in compliance with international human rights law and the obligations of States to respect and guarantee the rights of persons under their jurisdiction, and it was therefore appropriate that the preamble reaffirmed the primary role of the affected State in taking action in the event of a disaster.

26. The third preambular paragraph seemed to have benefited from the terminology of international human rights law and, unlike the fourth and fifth preambular paragraphs, had made reference to the obligation to respect rights. In any case, El Salvador agreed with the changes made to the draft articles and welcomed the final text as well as the commentary thereto (A/71/20, para. 49). The draft articles would make a decisive contribution to improving the legal framework for protecting persons more effectively in the event of disasters, and her delegation therefore endorsed the Commission's proposal for the elaboration of a convention.

27. With regard to the draft conclusions on identification of customary international law (A/71/10, para. 62), her delegation considered that the words "under certain circumstances" in draft conclusion 6 (Forms of practice) meant that inaction could be considered practice only when a State deliberately refrained from acting. Thus, in order to identify practice, mere omission was insufficient; a State must be aware of its inaction and of its effects. However, the words "under certain circumstances" did not reflect the Special Rapporteur's clarification. A specific paragraph on inaction in the framework of international custom should therefore be inserted.

28. On draft conclusion 15, her delegation agreed with the Special Rapporteur on the importance of the time at which the objection was made. However, as noted in paragraph (5) of the commentary, the line between objection and violation might not always be an easy one to draw, which was why the draft conclusion must be formulated with due caution. In particular, the text should make it clear that States could not avail themselves of that rule when an established rule of customary law already existed or when the persistent objector was obligated by other sources of international law, such as treaties or peremptory norms of international law.

29. Her delegation welcomed the reference in paragraph (10) of the commentary specifying that the inclusion of draft conclusion 15 in the draft conclusions was without prejudice to any issues of *jus cogens*, although it would have been preferable to include such a clarification in the draft conclusion itself.

30. Recalling that the method adopted for presenting the results on the topic allowed for a greater latitude in their formulation, and considering that draft conclusions did not contain the formal obligations of draft articles, her delegation felt that a number of further clarifications could be added to the text to make it more complete.

31. As for draft conclusion 16, it was clear that rules of customary international law could exist which were not general and which applied only to certain regions or fields, and her delegation therefore endorsed the definition in paragraph 1, although the word "particular" was somewhat imprecise. On paragraph 2, the translation of the words "States concerned" as "*Estados interesados*" should be checked, since it did not appear to be appropriate for referring to all States in which the customary rule applied.

32. With regard to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, (A/71/10, para. 75), draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation) correctly specified that the weight of a subsequent agreement or subsequent practice depended on its clarity and specificity. However, other criteria identified by the Special Rapporteur should be added, such as the time when the agreement or practice occurred and emphasis given by the parties to a particular agreement or practice.

33. According to draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties did not require such an agreement to be legally binding; however, the wording of the draft conclusion would be improved through the insertion of a reference both to binding agreements and to agreements which, although not binding, might be taken into account. In paragraph 1, her delegation suggested replacing the phrase "*dicho acuerdo no tiene que ser legalmente vinculante*" with "*dicho acuerdo no requiere ser legalmente vinculante*", which would be a better rendering of the phrase "such an agreement need not be legally binding".

34. El Salvador took note of the topics recommended for inclusion in the Commission's long-term programme of work.

35. **Mr. Meza-Cuadra** (Peru) welcomed the Commission's commitment to promoting the rule of law at the national and international levels. Given the interrelationship between the rule of law and the three pillars of the United Nations, Peru was pleased that the Commission was cognizant of the 2030 Agenda for Sustainable Development, and in particular Goal 16, which recognized the need to promote the rule of law and good governance at all levels.

36. On the topic "Protection of persons in the event of disasters", his delegation considered that the draft articles contained a good balance between the rights of persons affected by a disaster, including the inherent dignity of the human person, and the principle of the sovereignty of States. That was reflected, for example, in draft article 11 (Duty of the affected State to seek external assistance), which was a function of the extent to which a disaster manifestly exceeded an affected State's response capacity. Peru also stressed the interaction between the draft articles and international humanitarian law, reflected in draft article 18, which made it possible to safeguard the integrity of that special legal regime as *lex specialis*.

37. His delegation welcomed draft article 9 (Reduction of the risk of disasters), which drew inspiration from several international environmental law principles, including the "due diligence" principle. That was fully in line with the position of the international community, as set out in the World Conference on Natural Disaster Reduction (Yokohama, 1994), the Hyogo Framework for Action and the Sendai Framework for Disaster Risk Reduction 2015-2030.

38. With regard to the topic "Identification of customary international law", Peru took note of the adoption on first reading of the 16 draft conclusions and the commentary thereto, and it welcomed the decision to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available. His delegation also took note of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and of the adoption of the 13 draft conclusions and the commentary thereto.

39. Concerning the Commission's other decisions and conclusions, his delegation welcomed the recommendation that the first part of the seventieth session (2018) should be held in New York. That could play an important role in improving the interaction between the Commission and the Sixth Committee. It also took note of the decision to add two new topics to the Commission's long-term programme of work, and it looked forward to the consideration by the Commission of the memorandum prepared by the Secretariat on possible future topics, bearing in mind the list of topics established in 1996.

40. Peru welcomed the Secretariat's efforts to ensure timely processing of documents so that they were available to the Member States in the official languages of the United Nations.

41. **Ms. Melikbekyan** (Russian Federation), referring first to the topic "Protection of persons in the event of disasters", said that her delegation continued to believe that the best and most effective form for the draft articles would be as guidelines.

42. Many of the comments made by the Russian Federation on the draft articles adopted on first reading had not been taken into account in the new version. Those comments continued to be relevant. In comparison with the first reading, draft article 8 (Forms of cooperation in the response to disasters) adopted on second reading had added the qualifier "in the response to disasters" and had left out the pre-disaster stage. Her delegation supported that approach, but continued to believe that draft article 7 (Duty to cooperate) must distinguish between cooperation of States among themselves, in application of a fundamental principle of international law, and the duty to cooperate with international organizations, non-governmental organizations and "other assisting actors". The question arose as to the extent to which it could be asserted that those organizations and actors had such a duty.

43. It was her delegation's understanding that draft article 9, as an example of the progressive development of international law, concerned an obligation of conduct rather than of result. In draft article 10 (Role of the affected State), the reference to the affected State's "primary" role was somewhat confusing; her delegation enquired whether that meant that responsibility for the direction, control, coordination and supervision of relief assistance might be shared with actors playing a secondary role. With regard to

draft article 13 (Consent of the affected State to external assistance), the Commission was on very shaky ground in paragraph 2, because it was not clear how the degree of arbitrariness could be defined.

44. The draft articles were imbalanced in that they focused on the duties of the affected State, and said little about its rights, and even less about the duties of States and other actors offering assistance. The Commission had sought to correct the imbalance by adding to draft article 13 the duty of the affected State to make known its decision regarding an offer of external assistance in a timely manner. In her delegation's view, the Commission could go one step further and stipulate that the personnel directing the assistance provided by a State or another actor must respect the national legislation of the affected State and must not interfere in its internal affairs when on its territory. The failure to include such a provision was odd, given the extent of the duties of the affected State under draft article 15 (Facilitation of external assistance) and draft article 16 (Protection of relief personnel, equipment and goods) to facilitate the provision of assistance.

45. Turning to the topic "Identification of customary international law", her delegation drew attention to several aspects that still needed consideration, for example the existence of a treaty rule in an area in which practice was developing that might provide evidence of the emergence of a new rule of customary international law. In other words, the question was whether the conduct of a State that was contrary to a rule of an international agreement could contribute to the formation of a rule of customary international law. In such a case at least, there should be an assumption that no rule existed. In the course of second reading, the Commission should include a separate provision on that question, or it should add a conclusion stating that the draft articles were without prejudice to the relationship between customary international law and other sources of international law, including *jus cogens*. The contours of such a provision already appeared in paragraph (5) of the commentary to draft conclusion 1.

46. On a related matter, the Commission had decided not to consider, under the topic, the emergence of rules of customary international law and their modification. However, paragraph (5) of the commentary to draft conclusion 2 referred to an "indivisible regime", and paragraph (3) to "underlying principles" in the context of rules of customary international law. That should all be regarded as the overall context of evidence for the two constituent elements to which draft conclusion 3 referred.

47. In that case, the issue concerned previously existing rules of customary international law. That question should be considered separately, and should not be "hidden" behind a general phrase about the presence of an "overall context", which in the absence of commentary might be confusing. International law had developed to such an extent that it could be said that rules did not exist in a vacuum, but had become part of the overall "picture".

48. Her delegation was in full agreement that each of the two constituent elements must be separately ascertained. However, it preferred a reference to "settled practice", which was the formulation used by the International Court of Justice in the *North Sea Continental Shelf* cases. "General practice" might be too lightweight. The Russian Federation also agreed with the Commission that the rules for the identification of customary international law should be applied equally in all areas of international law.

49. With regard to draft conclusion 4, her delegation had doubts about the use of the word "primarily" in paragraph 1. In its view, it was precisely the practice of States that formed or expressed rules of customary international law. Her delegation was not convinced of the accuracy of the statement in paragraph 2 that international organizations might contribute to that process. The commentary to the draft conclusion did not cite any practice or other sources as evidence that such practice could form rules of international law. Moreover, paragraphs (5) and (6) of the commentary suggested that international organizations basically formed practice that might be taken into account for the identification of rules applicable to themselves. What was more, the authority of practice differed from one international organization to another. United Nations practice, for example, could not be put on a par with the practice of regional organizations. Those points should be reflected in the draft conclusions.

50. Draft conclusion 4, paragraph 2, should be more limited to indicate that the practice of international organizations could contribute to the formation of rules

of customary international law that applied to the organizations themselves and could under certain circumstances embody rules of customary international law.

51. Paragraph (9) of the commentary to draft conclusion 4, paragraph 3, raised several questions. It was not entirely clear why, in addition to non-governmental organizations (NGOs) and private individuals playing an important direct role in the identification of rules of customary international law, reference was also made to non-State armed groups and transnational corporations. A clarification should be added to the effect that only the reaction of States to the behaviour of such actors was important.

52. Concerning draft conclusions 5 and 6, her delegation noted that the practice of State bodies and different branches of government might be considered the practice of a State for the purpose of customary international law, depending on the circumstances. However, it was not convinced that there was no predetermined hierarchy among the various forms of practice. In the commentary it was pointed out that such a hierarchy could in fact exist in certain instances. For example, if the courts of a State refused to apply State immunity in a particular case, whereas the Ministry of Foreign Affairs insisted on its application in the courts and on the international scene, her delegation doubted that the decisions of the courts and the opinion of the Ministry of Foreign Affairs had the same weight for the purpose of the identification of customary international law; that it was sufficient to say that in such a case, diversity of practice weakened its importance; and that the provision was helpful for the identification of practice. It would be preferable to say that a hierarchy existed in the vertical power structure (the higher body had more importance than the lower one) and as a function of the role of the body concerned: the practice on the international scene of representatives of executive bodies was more important than the practice of bodies having responsibility primarily in the area of a State's internal affairs.

53. With regard to draft conclusion 8 (The practice must be general), her delegation would have preferred the phrase "both extensive and virtually uniform" used in the *North Sea Continental Shelf* cases instead of "sufficiently widespread and representative". It was not convinced that the draft conclusion should specify that no particular duration was required for practice to be understood to be general; although in exceptional cases, rules might develop in a relatively short period of time, that could not serve as a basis for a generalization.

54. Draft conclusion 10 again posed the question of whether evidence of acceptance as law could be found in documents that were primarily of domestic importance for States, for example decisions of national courts. It should be borne in mind that the draft conclusion referred primarily to documents with an external orientation.

55. Silence as a form of *opinio juris* was a very delicate matter. The Commission had formulated that rule in a rather restrictive manner. The question arose as to how many States must remain silent for the formation of a rule of customary international law. The number of silent States needed to be limited: surely a rule of customary international law was not formed if only 10 States reacted to a practice and all the others remained silent.

56. Her delegation endorsed the wording of draft conclusion 11 (Treaties). It would have been preferable, however, to add the last sentence of paragraph (2) of the commentary, which stated that, in and of themselves, treaties could not create customary international law. In that context, it should also be pointed out that, as noted in paragraph (4) of the commentary to draft conclusion 9, the conduct of States parties to a treaty with regard to treaty obligations did not, by itself, lead to an inference as to the existence of a rule of customary international law. The draft conclusion should make it clear that reference was being made to multilateral treaties.

57. Her delegation agreed with the approach taken in draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), but had doubts as to whether a resolution adopted by an international organization could be regarded as an act of that organization, which was a rather broad term that could include not only decisions of bodies composed of States. Her delegation was not sure whether it was right to give such a broad interpretation to the resolution of an international organization. The draft conclusion should also reflect the fact that the authority of the act of the organization depended on its

universality and its status in international relations. Perhaps the draft conclusion could include a direct reference to the United Nations.

58. Draft conclusion 13 should make it clear that decisions of courts were required only for the contesting States, as stipulated in Article 38 of the Statute of the International Court of Justice and that, as specified in footnote 346 of the Commission's report, decisions of international courts and tribunals could not be said to be conclusive evidence for the identification of rules of international law. Some of the ideas contained in paragraph (3) of the commentary to draft conclusion 13 should also be reflected in the draft conclusion itself, to the effect that the weight of the court's decision depended on the reception of the decision by States and on the status of the court in the system of international relations: a decision of the International Court of Justice could hardly be placed on a par with the decisions of an ad hoc tribunal or a court of arbitration established under a bilateral agreement.

59. The Russian Federation endorsed draft conclusion 15. Its sole doubt concerned the need for the objection to be maintained persistently. It was important to take into consideration the functioning of government bodies not only in well-organized developed States, but also in States with small ministries of foreign affairs and without the resources to maintain their objection persistently, even in situations in which their interests were directly concerned.

60. Her delegation agreed with the wording of draft conclusion 16. It noted that the Commission had not begun to formulate any rules applicable to the constituent elements of such a particular rule. Perhaps the matter should be examined further, including the question of whether a particular custom could be formed in the presence of an objecting State.

61. The Russian Federation was continuing its examination of the draft conclusions under the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

62. **Ms. Orosan** (Romania), referring to the topic "Protection of persons in the event of disasters", said that her delegation agreed for the most part with the approach in the draft articles and the emphasis on preventive measures and disaster relief assistance. The draft articles constituted a good balance between the principle of State sovereignty, the primary role of the affected State in seeking external assistance should its national response capacity be exceeded, and the requirement that offers of external assistance must be consented to by the affected State. How States and the international community could best respond to natural disasters and help the victims was a legitimate concern, and from that perspective the draft articles should be further developed.

63. Significant progress had been made on the topic "Identification of customary international law". Her delegation agreed with the Commission's approach of widening the scope of the analysis to include the practice of international organizations alongside that of States, which were the primary sources of customary international law, but which, by transferring competences to international organizations, had created a role for the latter in the identification of customary international law. Generally speaking, the draft conclusions were reflective of the status quo.

64. Her delegation was pleased that the new draft conclusion 1 [1a] of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties explicitly reflected the relevance of the topic. It noted, however, that paragraph (2) of the commentary thereto stressed that the draft conclusions did not address the subsequent agreements and subsequent practice in relation to treaties between States and international organizations. Romania believed that, given the extensive treaty relations between States and international organizations and the participation of international organizations in international treaties, some consideration should be given to those aspects as well.

65. With regard to the relevance of the "nature" of a treaty in determining whether more or less weight should be given to certain means of interpretation, her delegation felt that the concept should be excluded as an element influencing the analysis, in order to preserve the unity of the interpretation process and to avoid a characterization of treaties; it was unnecessary for identifying a general and uniform rule concerning subsequent agreement and subsequent practice as relevant for treaty interpretation.

66. Romania endorsed draft conclusion 12 [11] (Constituent instruments of international organizations) and draft conclusion 13 [12] (Pronouncements of expert treaty bodies) and the commentaries thereto and appreciated the wide practice cited in support of the conclusions.

67. Her delegation did not consider that pronouncements of expert treaty bodies represented a form of practice with regard to the interpretation of the international treaty in relation to which they were made, because they did not in themselves represent practice within the meaning of the Vienna Convention on the Law of Treaties, but drew on State practice in respect of the application of the treaty in question. Although such pronouncements could be useful in clarifying the exact meaning of an international treaty and the standard of application of the rule — which was important for identifying how, in the application of the treaty, internal rules must be drawn up or how they must themselves be interpreted in order to confirm the treaty provisions — that did not suffice to make such pronouncements subsequent practice within the meaning of article 32 of the Vienna Convention. Consequently, her delegation favoured a wording in line with paragraph (26) of the commentary but considered the language in draft conclusion 13 [12], including paragraph 4, to be sufficient.

68. Her delegation welcomed the Commission's intention to consider the topic "The settlement of international disputes to which international organizations are parties". It would be useful if the analysis would include an in-depth examination of disputes of a private-law nature involving an international organization, a clarification of the legal implications of such situations, and the limitations of private-law disputes from the jurisdictional point of view. On the other hand, the topic "Succession of States in respect of State responsibility" was of limited contemporary relevance. Romania was ready to listen to arguments in favour of engaging in a research exercise and its proposed outcome, since it was thought that such an assessment would help to complete the codification of succession of States in respect of treaties, State property, archives, debts and nationality. It should be borne in mind that that not all the conventions referred to in annex B, paragraph 4, of the Commission's report had entered into force.

69. **Mr. Reinisch** (Austria), referring to the topic "Protection of persons in the event of disasters", noted that several of his delegation's proposals had been reflected in the new text, such as those on draft article 2 and draft article 18. However, other comments had not been taken into account regarding the definitions of "disaster" and "assisting actor" in draft article 3; regarding draft article 7, which should not be understood as affecting the principle of voluntariness; and regarding draft article 8, which had only a declaratory effect. Concerning draft article 11, it was still unclear whether the word "manifestly" meant "obviously" or "substantially"; the commentary did not provide guidance on that question. On draft article 15, practice showed that more issues had to be addressed by national laws than those cited, such as confidentiality, liability, reimbursement of costs, control and competent authorities.

70. Draft article 18 confirmed that the draft articles also applied to situations of armed conflict, albeit in a subsidiary manner in relation to international humanitarian law, in that they did not impede the further development of that law. However, the wording of draft article 18, paragraph 2, raised the question of whether the draft articles gave way only to those rules which specifically addressed disaster relief or to all rules of international humanitarian law.

71. It would be premature to elaborate a convention at the current time; instead, States should first have time to familiarize themselves with the draft articles. In a few years, the General Assembly would have a better understanding of whether State practice warranted a convention.

72. On "Identification of customary international law", his delegation continued to support the Commission's aim to clarify important aspects of public international law by formulating draft conclusions with commentaries. Regarding draft conclusion 13, Austria was not convinced that a distinction should be made between decisions of international courts and tribunals and those of national courts. Article 38 of the Statute of the International Court of Justice did not do so, and a distinction would also fail to give sufficient attention to important decisions of national courts which, as draft conclusion 6 confirmed, were a form of State practice of relevance for the formation of customary international law.

73. Possible differences between decisions, whether of international courts and tribunals or of national courts, resulted only from their different persuasive force with which they served as evidence of customary international law. His delegation concurred with the concluding remarks in the Memorandum by the Secretariat (A/CN.4/691) that "the authority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law" In the view of his delegation, those remarks also applied to decisions of international courts and tribunals.

74. Maintaining a strict distinction between international and national courts was difficult in practical terms. That was illustrated by regional courts, such as the European Court of Human Rights and the Court of Justice of the European Union, which exercised functions both as international courts and, at the same time, as quasi-national or even constitutional courts.

75. In 2015, his delegation had welcomed the elaboration of draft conclusion 15 and had recommended that it should also be interpreted to mean that a single State was not in a position to prevent the creation of a rule of customary international law. Austria thus endorsed the formulation in paragraph (2) of the commentary, which distinguished individual persistent objections from a situation where the objection of a substantial number of States to the formation of a new rule of customary international law prevented its crystallization altogether.

76. His delegation appreciated that paragraph (5) of the commentary to draft conclusion 16 stressed that the phrase "whether regional, local or other" had been chosen in order to acknowledge that particular customary international law might also develop among States linked by a common cause, interest or activity. It would be useful to include a few examples in the commentary, such as the development of an understanding that the death penalty and the use of nuclear weapons were already prohibited by particular customary international law. As far as the death penalty was concerned, the emerging customary nature of that prohibition had been referred to in a statement made by New Zealand in the United Nations Human Rights Council on 16 September 2016 on behalf of a group of several States, including Austria, recognizing and welcoming the emerging customary rule that considered the death penalty to be a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, consistent with the spirit of article 6, paragraph 6, of the International Covenant on Civil and Political Rights.

77. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation commended the Commission on the streamlining of draft conclusion 13 [12] and was in agreement with the Commission's core finding that such pronouncements could not as such constitute subsequent practice under article 31, paragraph 3 (b), of the Vienna Convention, since that provision required subsequent practice of the parties that established their agreement regarding the treaty's interpretation. That important proviso should also be referred to in the wording of draft conclusion 13 [12], paragraph 3, which currently merely reflected the consideration that a pronouncement of an expert body "may give rise to, or refer to," a subsequent agreement or subsequent practice by parties.

78. The final version of the draft conclusions should also address decisions of domestic courts, which might constitute State conduct in the application of a treaty and thus relevant State practice for the interpretation of a treaty.

79. Concerning other decisions and conclusions of the Commission, his delegation supported the inclusion in the Commission's agenda of the topic "The settlement of international disputes to which international organizations are parties", but any future work on the subject should not be limited to disputes and relationships governed by international law. As discussions in meetings of the Committee of Legal Advisers on Public International Law of the Council of Europe had shown, it was disputes with private parties, which were a matter for domestic law, that were most relevant in practice and had raised important questions, including the scope of privileges and immunities enjoyed by international organizations and the need for adequate dispute settlement mechanisms, as required by most instruments conferring privileges and immunities on international organizations; those aspects should also be covered.

80. Succession of States in respect of State responsibility was a highly controversial topic that had been excluded from the previous work of the Commission. It had been recently discussed by the *Institut de Droit International* with an outcome which Austria found difficult to accept. An examination of the highly controversial issues in relation to State responsibility was unlikely to lead to an acceptable result at the current stage.

81. **Ms. Mulvein** (United Kingdom) said her delegation commended the Codification Division for the support it provided to the Commission and its assistance to States. It appreciated in particular the continuous updating and maintenance of the Commission's website, which was an invaluable and user-friendly source. Her delegation also took note of the Commission's recommendation to include two new topics in its long-term programme of work.

82. On the topic "Protection of persons in the event of disasters", the United Kingdom remained in broad agreement with the substance of the draft articles as adopted by the Commission on second reading. It appreciated the careful balance achieved in draft article 13 and endorsed paragraph 2, which provided that the consent of affected States to the provision of external assistance must not be withheld arbitrarily; in the context of armed conflict, such a refusal could amount to a breach of international humanitarian law.

83. Her delegation continued to believe that the development of guidelines, rather than a legally binding instrument, to inform good practice would be most helpful for States and others engaged in disaster relief. Such guidelines were more likely to enjoy widespread support and acceptance.

84. As for the topic "Identification of customary international law", the United Kingdom was pleased with the progress on that work to date and supported the "two-element approach" underpinning the draft conclusions. The topic was of real practical value. Parties to litigation before the domestic courts in the United Kingdom increasingly invoked arguments based on customary international law in a wide variety of contexts. In a situation where it was asserted before the domestic court that there was, or was not, a rule of customary international law, important guidance was to be found in the jurisprudence of the International Court of Justice, but there was currently no other authoritative point of reference to which a domestic judge could turn.

85. The draft conclusions and commentaries were a valuable, accessible tool for judges and practitioners who needed to decide whether a customary rule of international law existed. The High Court of England and Wales had already made reference to the draft conclusions.

86. The United Kingdom took note of the divergence of views on the practice of international organizations in connection with draft conclusion 4, paragraph 2. States should be encouraged to provide comments on that issue, which merited further consideration by the Commission during second reading.

87. Her delegation agreed with the Commission that renewed consideration of ways and means for making the evidence of customary international law more readily available could prove useful. It therefore welcomed the Commission's request for the Secretariat to prepare a memorandum on the subject.

88. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the United Kingdom considered that written comments and observations by States could be particularly useful were they to address the issues raised in Part Four of the draft conclusions, which concerned difficult aspects of the effect of subsequent agreements and subsequent practice.

89. **Ms. Patto** (Portugal) said her delegation was pleased to note that the Commission had recommended the holding of the first part of its seventieth session in New York and of a commemorative event in 2018 in New York and in Geneva. It also welcomed the more frequent practice of informal briefings held by the Special Rapporteurs in New York before and after the annual sessions of the Commission.

90. Portugal welcomed the inclusion of the two new topics in the Commission's long-term programme of work and took note of six potential topics referred to in paragraph 313 of the Commission's report. When including new topics in the programme of work, the Commission should continue to be attentive to the needs of States and their concerns, and Member States should be active in identifying potential new topics.

91. On the topic “Protection of persons in the event of disasters”, her delegation believed that, although the draft articles constituted a good framework, some issues needed further study or clarification. It was pleased that the draft articles reflected the rights-based approach that the Commission had taken in analysing the topic, and it shared the view that they struck a good balance between State sovereignty and the need to protect human rights.

92. Her delegation had stated many times that, as a matter of principle, the results of the Commission’s work should be translated into legally binding instruments. However, owing to the complex and sensitive nature of the topic, it would be beneficial to have more time before taking a final decision.

93. The topic “Identification of customary international law” was of high practical value for legal advisers and practitioners around the world. A set of practical and simple conclusions to assist in the identification of rules of customary international law would be a useful tool.

94. The amendments proposed to the draft conclusions in light of the comments received, in particular with regard to draft conclusion 3 and draft conclusion 12, were a step in the right direction to address some of the concerns that her delegation had expressed in 2015. Other improvements were still possible, and Portugal looked forward to a second reading. A further review of the commentaries would also help deal with some of the issues discussed in the Sixth Committee.

95. Concerning the future outcome of the draft conclusions, her delegation welcomed the proposal for a further review of ways and means for making the evidence of customary international law more readily available and looked forward to the memorandum that the Secretariat had been requested to prepare.

96. On the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, her delegation believed that the draft conclusions offered valuable guidance in the interpretation of treaties and reflected existing customary international law. It was pleased that the Commission’s work remained within the limits of the Vienna Convention, and it welcomed draft conclusion 13 [12] and the commentary thereto.

97. **Mr. Troncoso** (Chile) said that, owing to the complexity of the issues involved in a number of technical, scientific and other specialized areas, the cooperation of technicians, scientists and specialists was essential for the Commission to perform its mandate. On previous occasions, the Commission had held meetings with experts on shared natural resources, aquifers, the most-favoured-nation clause and the protection of the atmosphere. Chile encouraged the Commission and the other Special Rapporteurs to follow that approach in tackling other complex issues.

98. Referring to the topic “Protection of persons in the event of disasters”, he noted that Chile had been hit by a number of major disasters in the past. In its efforts to alleviate suffering promptly and effectively and rebuild the country, it had enjoyed the generous assistance of many States, organizations, entities and individuals. Similarly, when disasters had occurred in other parts of the world, especially in its own region, Chile had responded quickly and to the extent of its abilities. Thus, from the outset Chile had supported the Commission’s work on elaborating binding rules to protect persons in the event of disasters. It was pleased that the Special Rapporteur had taken its comments into account in producing the draft articles, which constituted an important step towards the regulation of the matter in international law. Chile endorsed the Commission’s recommendation that they should serve as the basis for a convention.

99. On the topic “Identification of customary international law”, his delegation endorsed the wording of draft conclusion 1 and, for the most part, draft conclusions 2 and 3. Draft conclusion 4, paragraph 3, correctly stated that the conduct of other actors was not relevant to the formation or expression of international practice but might be relevant when assessing the practice referred to in paragraphs 1 and 2. His delegation supported the wording of draft conclusion 5 and agreed with the point made in paragraph (5) of the commentary that, to qualify, the practice must be publicly available or at least known to other States.

100. Draft conclusion 6 must be read in conjunction with the commentary so as to ensure a proper understanding of the delicate issue of inaction. For the inaction of a State to constitute a practice, i.e. an element of custom, it must be a deliberate act of the State, conducted in full awareness and intentionally for

that sole purpose. The Commission should give closer attention to the importance to be attached to inaction. His delegation endorsed the wording of draft conclusion 6, paragraphs 2 and 3, and the commentary thereto, and agreed with the wording of draft conclusions 7 and 8.

101. Draft conclusion 10 was appropriate; his delegation stressed the importance of the qualification in the commentary to paragraph 3. Chile endorsed the wording of draft conclusions 11, 12, 13 and 14 and the commentary thereto, but noted the absence of a section on the work of the International Law Commission. That could perhaps be reflected in draft conclusion 12, since, generally speaking, once the Commission had completed its work on a draft, the General Assembly took steps to adopt it as an annex to a resolution. In any case, one of the draft conclusions should contain a specific reference to the Commission. When presenting his final report for adoption on second reading, the Special Rapporteur should indicate why draft conclusion 12 failed to mention the generating and crystallizing effects referred to in draft conclusion 11.

102. Chile endorsed the wording of draft conclusion 15 and the commentary thereto. For an exception to the rule to be justified, it must meet the specified requirements exhaustively and unequivocally. By their very nature, the rules of customary international law must apply generally and equally to all members of the international community; it was the responsibility of the State seeking to challenge the application of the custom to do so at the very beginning of the process of its formation, and not once the custom had already emerged. The objector was responsible for ensuring that its objection was not considered to have been abandoned. Where the rules of *jus cogens* were concerned, the persistent objector institution did not apply; a reference to that effect should be inserted in the text as a new paragraph 3 in draft conclusion 15.

103. His delegation welcomed draft conclusion 16. It was only natural that different geographical regions and peoples, even those sharing similar interests, should have customary rules that were not general in nature. That point had been recognized by the Commission and had been accepted by the International Court of Justice in cases regarding the right to asylum and the right of passage.

104. **Mr. Martín y Pérez de Nanclares** (Spain), commending the Commission for updating its Yearbook and its website, said that the two new topics included in the Commission's long-term programme of work met the criteria for selection. He reiterated his delegation's concern, however, about the large number of topics on the agenda and again insisted on the need to ensure that the six official languages of the United Nations were given equal treatment.

105. With regard to the topic "Protection of persons in the event of disasters", he said that the draft articles struck the necessary balance between respect for the sovereignty of the affected State and the necessary cooperation of other States. Spain was pleased that several of its observations had been reflected in the final document.

106. On the topic "Identification of customary international law", a formulation should be added in paragraph (5) of the commentary to draft conclusion 5 to make it clear that practice must be publicly available or at least known to other States in order to give them the opportunity to object.

107. For Spain, the draft articles in Part Five (Significance of certain materials for the identification of customary international law) were problematic. In draft conclusion 11, paragraph 1, the phrase "*norma enunciada en un tratado*" ("rule set forth in a treaty") was not correct. His delegation understood the reasons for not choosing the word "*disposición*" in the Spanish version, but it was not clear why the text did not use another word, such as "*previsión*" ("provision"), which did not refer to a specific article of a treaty. "*Norma*" (rule) was unsuitable: unlike "*obligación*" (obligation), it should only be used to indicate rules of customary origin whose opposability did not require the express consent of the subject in question. It was tautological to state, as in draft conclusion 11, paragraph 1, that "[a] rule set forth in a treaty may reflect a rule of customary international law" and to affirm, as in paragraph 2, that "[t]he fact that a rule is set forth in a number of treaties may [...]indicate that the treaty rule reflects a rule of customary international law".

108. His delegation failed to see why draft conclusion 12 could not be expressed in the same terms as draft conclusion 11. It was true that, as such resolutions were not usually binding, States could pay less attention to them than to treaties. However, the

importance of certain resolutions was apparent to all; the best example of that was a General Assembly resolution. The wording used in draft conclusion 11, pursuant to which a rule set forth in a treaty "may reflect a rule of customary international law", was sufficiently flexible to adapt to the circumstances of each resolution and each international organization.

109. The lack of parallels between draft conclusions 11 and 12 might be a problem. To cite one example, draft conclusion 12, paragraph 1, stated that "A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law". However, neither could treaties, yet that point was not made in draft conclusion 11.

110. Draft conclusions 13 and 14 stipulated that judicial decisions and teachings were or might serve as a "subsidiary means" for the determination of rules of customary international law. However, the fact that judicial decisions and teachings were not independent sources of international law, but were subsidiary to independent sources, did not mean that, in relation to that determination of law, they played a secondary role to treaties and resolutions of international organizations. In order to take into account the observations in the commentary to those two draft conclusions regarding the variable value of judicial decisions and teachings, it would be sufficient to delete the word "subsidiary".

111. Draft conclusion 15 should include a proviso concerning peremptory norms. A *jus cogens* norm would be binding on a State, no matter how many times that State continuously and unequivocally objected. In view of its importance, that clarification, which appeared in the commentary, should be reflected in the draft conclusion itself. A draft conclusion should also be inserted regarding the burden of proof of the existence and content of customary rules.

112. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation said with reference to the most significant new item, namely draft conclusion 13 [12], that, since such bodies existed and had often been established under human rights treaties, it seemed appropriate to include a specific draft conclusion on them. The use of the word "pronouncements" was correct. It was a generic term that encompassed the instruments through which such expert bodies expressed their opinions, whatever their specific names. However, the phrase "experts serving in their personal capacity" in the definition in paragraph 1 should be replaced with "independent experts".

113. Concerning paragraph 3, it was his delegation's understanding that draft conclusion 13 [12] covered situations in which such pronouncements gave rise to a subsequent agreement or subsequent practice by the parties to the treaty. He failed to see why it also provided for cases in which such pronouncements related to a subsequent agreement or subsequent practice by the parties, or what an expert body would contribute in such circumstances. What counted would be the subsequent agreement already reached by the parties or their subsequent practice. The commentary to that draft conclusion did not provide any examples of such a case.

114. Reiterating a comment made during the 2015 session of the Sixth Committee, his delegation noted that, as article 32 of the Vienna Convention did not refer to practice of any kind, it did not seem appropriate, in the Spanish version of draft conclusion 12 [11], paragraphs 1 and 2, to use the phrase "*en el sentido del artículo 32*", which should be replaced with "*en virtud del artículo 32*". That comment also applied to other draft conclusions which used that phrase.

115. **Mr. Koch** (Germany), speaking first on the topic "Protection of persons in the event of disasters", said that the latest revision of the draft articles in the light of comments and observations by States had improved the text. His delegation welcomed in particular the clarifications and editorial improvements made, such as the alignment of the wording with the terminology typically found in international human rights treaties; the introduction of "manifestly" as a new qualifier in draft article 11 as an objective threshold for the duty of the affected State to seek assistance; the introduction of a new paragraph 2 in draft article 12 specifying the obligations of potential assisting States and other assisting actors and thus providing a better balance between the obligations of different actors addressed by the articles; and the general understanding of the sovereignty of States as the principle underlying the draft articles, in line with which States enjoyed rights and privileges but also bore responsibilities for the

protection of persons in the event of disasters, as reflected especially in draft articles 10 to 13 and the corresponding commentaries. In their entirety, the draft articles continued to provide good recommendations that supported international practice.

116. Turning to the topic "Identification of customary international law", his delegation continued to support the Special Rapporteur's careful and balanced approach. It was pleased that the Commission had included in the commentary the views expressed in past years by Germany and others. Paragraph (5) of the commentary to draft conclusion 4, paragraph 2, rightly noted that, where Member States had transferred exclusive competences to an international organization, the practice of the organization could be equated with the practice of those States. His delegation welcomed the specific reference to the European Union in that context.

117. Paragraph (5) of the commentary to draft conclusion 7, paragraph 2, correctly specified that, in a federal system, the status of a particular organ must be taken into consideration when assessing its impact on a State's practice. His delegation welcomed that differentiated approach; the constraints on consistency that came with a pluralistic society should not automatically diminish the influence of the practice and *opinio juris* of such a State.

118. His delegation welcomed the Commission's decision to request the Secretariat to prepare a memorandum on ways and means of making the evidence of customary international law more readily available. That would prove very useful for legal practitioners.

119. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties ", his delegation referred to the "without prejudice" clause contained in draft conclusion 13 [12], paragraph 4, which left open further discussion of other ways in which a pronouncement by an expert treaty body could contribute to the interpretation of a treaty. His delegation would appreciate it if that matter could be taken up again on second reading.

120. It would be beneficial if the Commission were to cover the question of how decisions of domestic courts applying international treaties might constitute relevant subsequent practice for their interpretation. A draft conclusion on that matter had been proposed by the Special Rapporteur, but it did not form part of the draft conclusions adopted on first reading. The advantages and disadvantages of the different possible roles of decisions of domestic courts must be carefully weighed. It would be helpful to have the Commission's guidance on that question after the second reading of the draft conclusions. The draft conclusions and commentaries adopted so far already offered excellent orientation for interpretation without unduly restraining State practice.

121. **Mr. Bailen** (Philippines) said that the topic "Protection of persons in the event of disasters" was of immediate importance for his country, given the many devastating natural disasters which had struck the Philippines over the past 20 years and the catastrophic destruction they had caused. His delegation therefore welcomed the draft articles, and in particular the emphasis which they placed on human dignity, human rights, especially the right to life, and humanitarian principles. It was his delegation's understanding that the draft articles applied with flexibility to both natural and human-made disasters outside the realm of international humanitarian law and that they did not discriminate on the basis of nationality or legal status, since they focused on both the needs and rights of the victims.

122. Draft articles 10, 11 and 13 were essential, because they recognized, as historical experience had shown time and again, that a disaster could manifestly exceed the affected State's capacity to respond. An affected State, without adequate resources, could and would seek assistance from other States, the United Nations, international non-governmental organizations and the private sector. Creating a qualified consent regime for the affected State, to be exercised in good faith, balanced the right of State sovereignty with the sovereign State's obligation to protect human life and human rights during disasters in a timely manner.

123. The affected State, on the one hand, and other States, the United Nations, and other potential assisting actors, on the other, thus had the duty to cooperate, as recognized in draft article 7, which codified a principle of international law found in many instruments, including the Charter of the United Nations.

124. His delegation endorsed draft article 16, which recognized the affected State's duty to guarantee the

protection of relief personnel, equipment and goods and not to cause harm to them. It appreciated the clarification that that duty should not entail the creation of unreasonable and disproportionate hurdles for the already compromised ability of the affected State to provide security and protection to its own people as well as to relief personnel and their accompanying equipment and goods. Draft article 15 stressed that that limitation should not prevent relief personnel from assisting disaster victims.

125. It was essential to reduce levels of risk and avoid creating new risk by ensuring that public and private investments did not increase the exposure of persons and economic assets to natural hazards. The typhoon Haiyan had forced the Philippines to undertake a paradigm shift in disaster risk reduction and management, focusing on early warning systems through more sophisticated methods of gauging the impact of typhoons, better disaster preparedness and more efficient response systems.

126. The Philippines therefore welcomed the obligation set out in draft article 9 to reduce the risk of disasters, subject to the capacity to do so. It had codified legal developments in the field over the past 20 years, including the Sendai Framework for Disaster Risk Reduction 2015-2030. His delegation agreed with paragraph (4) of the commentary to draft article 9 that protecting human rights, especially the right to life, entailed a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters.

127. The commentary referred to the 2005 ASEAN Agreement on Disaster Management and Emergency Response, the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action. Such references showed the important role that regional organizations played in disaster relief and risk reduction.

128. **Ms. Lijnzaad** (Netherlands), focusing first on the topic "Protection of persons in the event of disasters", said that her Government did not favour the elaboration of a convention based on the draft articles, which reflected not only codification of contemporary international law, but also progressive development of the law, on which views differed. To achieve agreement among States on a legally binding instrument might be difficult and the outcome unsatisfactory. Her Government would prefer the adoption of guidelines, which could assist States, international organizations and NGOs in developing good practices and would provide the clarity and stability needed for disaster relief, thereby ensuring better protection of persons in the event of disasters.

129. Turning to the topic "Identification of customary international law", she reiterated her delegation's earlier comments about the accessibility of both practice and *opinio juris* expressed in other than the official United Nations languages. The topic concerned general international law created by a diverse group of States with different legal traditions in different parts of the world and using different languages. Language was an essential aspect of law; without it, law would be without a crucial vehicle to carry the system of international norms and obligations that States had created. Some correspondence and exchanges on legal matters between the Netherlands and some of its neighbours did not take place in any of the United Nations languages, but her Government was convinced that such correspondence and exchanges might contribute to the creation of customary law *inter se*, even though it might not be in a language accessible to other States. That would also be the case for other States that used their own language in the conduct of international relations, and from which customary law might develop.

130. The importance of language and, indeed, the limitation of only relying on easily available practice or *opinio juris* in mainstream languages was frequently overlooked when discussing customary law. That aspect could have been addressed in draft conclusion 6, paragraph 2, and draft conclusion 7, paragraph 1, if only in the commentary. After all, in order to identify customary law, that law, and the two constituent elements, ought to be available and accessible. There was an issue in terms of ensuring that all relevant practice or *opinio juris* might not be available in the languages that were considered to be the contemporary lingua franca of international law.

131. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", her delegation welcomed the introduction of a draft conclusion on the pronouncements of expert bodies. Even though such pronouncements were

usually not legally binding, they often contained an authoritative interpretation of the treaties through which they had been established and would therefore be relevant as a subsequent interpretation of a treaty.

132. The functions of the treaty bodies had been conferred upon them by the States parties, and the Special Rapporteur acknowledged that the exercise of such functions might in practice lead to interpretations. However, her Government would have welcomed a more elaborate discussion of the legal characterization of such practice. Treaty bodies' case law might reflect a settled position on a question of interpretation, for example through similar pronouncements in individual communications. Consistent practice might also emerge in the application of a treaty, for example it might be reproduced or stimulated by general comments or general recommendations. Yet it was not clear how that institutional framework created by the States parties should be characterized in terms of subsequent practice.

133. The findings of the treaty bodies themselves would not amount to State practice, but they did play a role as subsequent practice in relation to the interpretation of treaties. In the Netherlands, when new legislation was drafted or existing legislation amended, the legislator was required to verify whether the proposed legislation was compatible with international law binding upon the State, in particular human rights law; a paragraph must be included in the explanatory memorandum confirming the draft legislation's compatibility with existing international legal obligations. For the interpretation of those international legal obligations, such paragraphs would usually take pronouncements of expert bodies explicitly into account to ensure the compatibility of draft legislation with the requirements of the treaties concerned.

134. Similarly, the judiciary in the Netherlands referred to pronouncements of expert bodies when requested to interpret the meaning of a right or obligation stemming from a treaty or to determine compatibility in a specific case. Thus, such pronouncements were clearly relevant with respect to interpretation of treaties, but it was difficult to say whether they constituted subsequent practice within the meaning of article 31, paragraph 3 (b), of the Vienna Convention. Her delegation would have appreciated a more in-depth analysis of that aspect.

135. **Mr. Mohamed** (Sudan) recalled the important role conferred upon the Commission by General Assembly resolution 174 (1947) in the promotion of the progressive development of international law and its codification; that constituted a means of implementing the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

136. Referring first to the topic "Protection of persons in the event of disasters", his delegation underscored the principle of the sovereignty of States and thus the primacy of the responsibility of the affected State to evaluate the scale of international assistance required when a disaster manifestly exceeded its national response capacity. International assistance was, at base, a humanitarian issue.

137. His delegation drew particular attention to the topic "Identification of customary international law", an important source of international law alongside international conventions and treaties. It supported the Commission's approach of focusing on the two constituent elements, namely general practice and acceptance as law (*opinio juris*). The two were closely interconnected, and each should be carefully considered in order to ascertain that a new rule of customary international law had been established. Such an assessment should take into consideration the various forms of evidence, which should be assessed in a specific manner and while taking the context into consideration. The two elements should be ascertained separately.

138. The main challenge posed for general practice to be accepted as law (*opinio juris*) was that of the establishment of elements that constituted such a practice, given the great diversity of legal systems throughout the world. In order to make a truly effective contribution to the development of international law, the principle of *opinio juris* must take into consideration all parts of the world and all the legal systems in force. Rules identified in that manner would be better suited to the development of legal solutions to such problems as domestic conflicts and disputes between States.

139. For that purpose, it was important that developing countries should have access to technical assistance. As

pointed out by the delegation of the Netherlands, the language used must not be an obstacle to exchanges.

140. Draft conclusion 13 (Decisions of courts and tribunals) required more thorough study. In particular, the decisions of the International Court of Justice were of pivotal importance and could not be seen as having the same weight as the decisions of other international courts.

141. His delegation stressed with regard to draft conclusion 12, concerning resolutions of international organizations and intergovernmental conferences, that the role of international organizations could not be compared to that of States. When assessing the decisions of international organizations, it was important to focus on the organ within the organization that had the broadest membership. Only intergovernmental organizations should be considered, and the context and means of adoption of the decision should be taken into account.

142. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation underscored the importance of draft conclusion 2 [1] (General rule and means of treaty interpretation), paragraph 2. His delegation believed that the provisions of international conventions were being interpreted as being binding on other parties without their consent, something that ran counter to the fundamental principles of international law. That expansion did not serve the development of international law, and it gave rise to serious contradictions between various texts of international law; it therefore became impossible to apply international law. That situation needed to be avoided at all cost.

143. His delegation had taken note of the two new topics included in the Commission's agenda. The topic of the settlement of international disputes to which international organizations were parties was vital, given the growing number of such cases, and there was a need to codify their settlement as part of the progressive development of international law. The topic of succession of States in respect of State responsibility was also timely. It was to be hoped that the Commission would continue to examine the topics, given the need created by current circumstances, and that conclusions could be reached that would contribute to the progressive development and codification of international law.

144. *Mr. Turbék (Hungary), Vice-Chair, took the Chair.*

The meeting rose at 1.05 p.m.