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Summary record of the 20th meeting
Held at Headquarters, New York, on Monday, 24 October 2016, at 10 a.m.

Chair:	Mr. Ahmad (Vice-Chair)	(Pakistan)
later:	Mr. Katota (Vice-Chair)	(Zambia)
later:	Mr. Ahmad (Vice-Chair)	(Pakistan)

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In the absence of Mr. Danon (Israel), Mr. Ahmad (Pakistan), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 78: Report of the International Law Commission on the work of its sixty-eighth session (A/71/10)

1. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10). The Committee would consider the Commission's report in three parts. The first part would cover chapters I to III (the introductory chapters), chapter XIII (Other decisions and conclusions of the Commission), chapter IV (Protection of persons in the event of disasters), chapter V (Identification of customary international law) and chapter VI (Subsequent agreements and subsequent practice in relation to the interpretation of treaties). The second part would cover chapter VII (Crimes against humanity), chapter VIII (Protection of the atmosphere) and chapter IX (*Jus cogens*). The third part would address chapter X (Protection of the environment in relation to armed conflicts), chapter XI (Immunity of State officials from foreign criminal jurisdiction) and chapter XII (Provisional application of treaties).

2. **Mr. Comissário Afonso** (Chairperson of the International Law Commission), introducing the first cluster of chapters of the Commission's report, said that the sixty-eighth session had been the last year of the current quinquennium. As chapter II showed, the Commission had completed its work on the topic "Protection of persons in the event of disasters", by adopting on second reading a draft preamble and 18 draft articles, and had recommended to the General Assembly the elaboration of a convention on the basis of the draft articles. It had also adopted on first reading 16 draft conclusions on identification of customary international law and 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. With reference to both sets of draft conclusions, it had requested that Governments should submit comments and observations to the Secretary-General by 1 January 2018. Moreover, the Commission had made substantial progress on the topics "Crimes against humanity", "Protection of the atmosphere", "Protection of the environment in relation to armed conflicts", "Immunity of State officials from foreign criminal jurisdiction" and "Provisional application of treaties", some of which would soon be completed on first reading. It had begun work on the topic "*Jus cogens*", which it had included in its programme of work the previous year.

3. In chapter III of the report, the attention of Governments was drawn to information on practice whose provision would be particularly useful to the Commission as it continued its consideration of the various topics. In addition, the Commission would welcome the views of States on the two new topics included in its long-term programme of work. It also invited States to make proposals on possible topics for inclusion in the long-term programme of work, accompanied by a statement of reasons in their support, taking into account the Commission's criteria for the selection of new topics.

4. The Commission reiterated its commitment to the rule of law in all of its activities. It had continued its traditional exchanges with the International Court of Justice, as well as its cooperation with other bodies engaged in the progressive development of international law and its codification. The Commission valued highly the feedback it received from the Sixth Committee and from Governments on all aspects of its work. Pursuant to paragraphs 9 to 12 of General Assembly resolution 70/236, the Commission had further exchanged views on the feasibility of holding part of its session in New York, on the basis of additional information provided by the Secretariat regarding estimated costs and relevant administrative, organizational and other factors. Having determined that it would be feasible to hold one half session at United Nations Headquarters in New York in the first year of the next quinquennium (2017) or the second year (2018), it had considered that it would be most convenient for the new Commission to hold the first segment of its seventieth session (2018) in New York, and had requested the Secretariat to proceed accordingly with the necessary preparatory work and estimates. As the seventieth session provided an occasion to celebrate and reflect on its achievements and challenges, the Commission had also recommended holding commemorative events in both New York and Geneva, to be memorialized in a publication, and had requested the Secretariat to start

making the relevant arrangements. He acknowledged the valuable assistance provided by the Codification Division of the Office of Legal Affairs in its servicing of the Commission, and in particular its preparation of memorandums and working papers on a number of current and possible future topics.

5. Introducing chapter IV (Protection of persons in the event of disasters), he said that, nine years after the topic had first been placed on its agenda, the Commission had adopted the draft articles on the protection of persons in the event of disasters on second reading. In accordance with article 23 of its statute, the Commission had decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles. The text of the draft articles and the commentaries thereto were to be found in paragraphs 48 and 49, respectively, of the Commission's report (A/71/10). The reduction in the number of articles compared with the text adopted on first reading in 2014 was a result of the merging of several provisions in order to improve the overall coherence of the text.

6. The draft preamble to the draft articles was a new addition to the text, consisting of five preambular paragraphs. The first focused on the mandate given to the General Assembly, under Article 13, paragraph 1 (a), of the Charter of the United Nations to encourage the progressive development and codification of international law. The second called attention to the frequency and severity of natural and human-made disasters, while the third addressed the essential needs of the persons affected by disasters. The fourth preambular paragraph recalled the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster, which were key concepts underlying the topic, while the final preambular paragraph reaffirmed the primary role of the affected State in providing disaster relief assistance, also a core element of the draft articles.

7. No changes had been made to the formulation of draft article 1 (Scope) adopted on first reading. The text of draft article 2 (Purpose) was presented largely in the form adopted on first reading; the only substantive change was the inclusion of a reference to the "reduction of the risk of disasters". Accordingly, while the main emphasis of the draft articles was on the provision of an adequate and effective response to disasters, the dimension of the reduction of the risk of disasters was also covered.

8. Following various recommendations made in the Sixth Committee and the Commission, the definition of "disaster", which had been located in a separate provision on first reading, had been moved into draft article 3 (Use of terms), as subparagraph (a), with the consequence that the subsequent subparagraphs had been renumbered. The definition now included a reference to "mass displacement" as one of the consequences of a disaster. Subparagraph (b) covered the definition of "affected State", which was central to the entire draft articles. Of all the definitions adopted on first reading, it was the one that had been subject to the most reformulation. In order to clarify which States would be "affected States" for the purposes of the draft articles, the formulation adopted on first reading had been refined to make the territorial link more prominent; however, that had been done solely for the purpose of delimiting the scope of application of the draft articles and was without prejudice to the possibility that a State might enjoy jurisdiction over its nationals present in other territories, for purposes of the application of other rules of international law, including those in international human rights treaties. The texts of the remaining definitions, in subparagraphs (c) to (g), had been streamlined to take into account various suggestions made in the Sixth Committee and in written comments received by the Commission.

9. Draft article 4 (Human dignity) had been reformulated in a manner that left open which entities had the obligation to respect and protect the inherent dignity of the human person. While the Commission had understood that such an obligation could be imposed on States, the comments on the text adopted on first reading had revealed a diversity of opinion as to whether it was appropriate to refer to the possibility of non-State entities having obligations, under international law, to protect the human dignity of an affected person. The formulation of draft article 5 (Human rights) had been aligned with terminology typically found in international human rights treaties, and the phrase "in accordance with international law" had been introduced as a reminder that the draft articles operated within the framework of existing rules of international law. The formulation of draft article 6

(Humanitarian principles) as adopted on first reading had been retained. While the Commission had preferred not to reopen the compromise reached on first reading, it had added several further explanatory elements in the corresponding commentary, including on the intended meaning of the principle of neutrality and the significance of a gender-based approach.

10. With regard to draft article 7 (Duty to cooperate), the Commission had decided to interpret the provision as being sufficiently broad to encapsulate cooperation for disaster risk reduction. Accordingly, the former draft article 10, as adopted on first reading, concerning cooperation for disaster risk reduction, had been removed. Its deletion should be understood not as a change of mind on the part of the Commission but as a function of the streamlining of provisions adopted over several years in first reading. Forms of cooperation in the response phase were now covered by draft article 8, and the types of disaster risk reduction measures envisaged in the international cooperation referred to in draft article 7 were detailed in draft article 9, paragraph 2. Draft article 8 (Forms of cooperation in the response to disasters), as adopted on second reading, was substantively the same as the text adopted on first reading. The Commission had decided not to include a reference among the forms of cooperation to the provision of financial support, for fear of reopening the consensus text adopted on first reading. Its decision had been taken on the understanding that the list of forms in the draft article was not exhaustive and that other forms, including the provision of financial assistance, might exist.

11. Draft article 9, which dealt with the duty to reduce the risk of disasters, had been introduced towards the end of the first reading, when the scope of application of the draft articles had been extended to the pre-disaster phase. In light of the Commission's decision to integrate the notion of disaster risk prevention more fully into the text adopted on second reading, draft article 9 had become the key provision on the question. The provision had been adopted largely along the lines of the text adopted on first reading, with several drafting improvements.

12. In draft article 10 (Role of the affected State), only paragraph 1 had been subject to modification. A reference to "or in territory under its jurisdiction or control" had been included at the end of the paragraph, in order to align the text with the expanded scope of the term "affected State", defined in draft article 3. Consequently, the reference in the text adopted on first reading to the affected State having a duty "by virtue of its sovereignty" no longer fully reflected the prevailing legal position and had been removed. Bearing in mind that that phrase had been key to the compromise reached on first reading, through which an emphasis had been placed on the bond between sovereign rights and concomitant duties, its deletion should not be understood to indicate that the Commission had changed its mind on the origin of the duty on the affected State to protect persons on its own territory; rather, it had simply been motivated by the need to accommodate the expanded definition of "affected State". It should also be recalled that a reference to the principle of sovereignty had been included in the draft preamble, which qualified the entire set of draft articles.

13. Draft article 11 (Duty of the affected State to seek external assistance) had undergone several drafting refinements. In particular, a new qualifier, "manifestly", had been added before "exceeds its national response capacity" in order to establish a new threshold requirement. Furthermore, the reference to "other potential assisting actors" had been aligned with the corresponding definition in draft article 3. Other than those drafting refinements, draft article 11 had been retained largely as adopted on first reading, on the understanding that an appropriate provision should be included in the draft articles on the obligations of potentially assisting States.

14. Draft article 12 (Offers of external assistance) included that aspect as one of its key features. The original provision concerning offers of external assistance had been adopted on first reading as draft article 16; however, the Commission had decided to move it to its current position after draft article 11. It had also been redrafted during the second reading and was now organized in two paragraphs, the first of which was based on the text of former draft article 16, with some drafting refinements, and the second of which was new. Paragraph 2 had been included to address concerns that the draft articles did not sufficiently cover the obligations of potentially assisting States and other assisting actors. The Commission had thus sought to introduce greater balance within the text by providing a parallel

obligation to that in draft article 13, paragraph 3, namely the obligation of the affected State to make known its decision regarding an offer of external assistance in a timely manner.

15. Paragraph 2 of draft article 12 had three components. First, the seeking of external assistance by the affected State triggered the application of the provision. Whereas in draft article 11 the duty on the affected State was a general duty to "seek" assistance, the scenario in draft article 12, paragraph 2, was one where specific assistance was sought by the affected State "by means of a request addressed to" the enumerated list of potential assisting actors. Second, the paragraph referred to the addressees of a request for assistance, namely other States, the United Nations and other potential assisting actors. The United Nations had been singled out for special mention given the central role it played in receiving assistance requests. Third, there was an obligation on the addressee or addressees of the specific request not only to give due consideration to the request, but also to inform the affected State of its or their reply thereto. The term "expeditiously" denoted an element of timeliness.

16. With regard to draft article 13 (Consent of the affected State to external assistance), paragraphs 1 and 2 were identical to the text adopted on first reading, while the formulation of paragraph 3 had been refined, in particular with a view to placing emphasis on the importance of receiving timely responses in the context of a disaster. Draft article 14 (Conditions on the provision of external assistance) had been adopted in the version agreed to on first reading, while the text of draft article 15 (Facilitation of external assistance) remained substantially the same as that adopted on first reading, with a technical modification in paragraph 1 (a). Draft article 16 (Protection of relief personnel, equipment and goods) was substantially the same as the provision adopted on first reading; it reflected the same understanding of the flexibility inherent in the word "appropriate", which took account of the ability of the affected State to perform the envisaged actions.

17. Draft article 17 dealt with termination of external assistance. That provision, which was now composed of three sentences, had been restructured to take into account some concerns raised with regard to the text adopted on first reading. The first sentence confirmed the basic right of the actors concerned to terminate external assistance at any time, it being understood that the reference to termination included partial termination. The second sentence reflected the text of the last sentence of the provision adopted on first reading, while the third sentence reproduced, in substance, the text of the first sentence of the first-reading version.

18. Draft article 18 (Relationship to other rules of international law) was the successor to draft articles 20 and 21, as adopted on first reading. The Commission had accepted the suggestion that the relationship of the draft articles both to other applicable rules and to the rules of international humanitarian law could be covered by a single provision, but had preferred to divide that provision into two paragraphs. Paragraph 1 covered the relationship of the draft articles to other applicable rules of international law, such as existing treaties dealing with disaster response or disaster risk reduction. Like the provision adopted on first reading, it was still formulated as a "without prejudice" clause; however, its drafting had been simplified. Paragraph 2 dealt with the relationship of the draft articles to the rules of international humanitarian law, a question that had been the subject of extensive discussion in the comments and observations received. After considering various alternatives, the Commission had decided to retain, in substance, the approach taken on first reading and, rather than providing a simple saving clause, had indicated that the draft articles did not apply to the extent that the response to a disaster was governed by the rules of international humanitarian law. In so doing, it had drawn inspiration from article 55 of the articles on the responsibility of States for internationally wrongful acts. Accordingly, the draft articles could conceivably apply in contexts of armed conflict, to the extent that the rules of international humanitarian law did not apply. That would also allow for the parallel application of the draft articles in the context of "complex emergencies".

19. Introducing chapter V of the report, he said that the Commission had had before it the fourth report of the Special Rapporteur on the topic of identification of customary international law (A/CN.4/695 and A/CN.4/695/Add.1), which contained suggestions for the amendment of several draft conclusions in light of the comments by Governments, addressed ways and means for making the evidence of customary international law more readily available, and provided

a bibliography on the topic. The Commission had also had before it the memorandum by the Secretariat concerning 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). Following its consideration of the Special Rapporteur's report, the Commission had referred the amendments to the draft conclusions contained therein to the Drafting Committee. It had also established an open-ended working group to assist the Special Rapporteur in preparing the draft commentaries to the draft conclusions that were to be adopted by the Commission. A set of 16 draft conclusions and commentaries thereto had been adopted by the Commission on first reading and were set out in the Commission's report (A/71/10, paras. 62 and 63). The draft conclusions concerned the methodology for identifying rules of customary international law and sought to offer practical guidance on how to determine the existence, or non-existence, of such rules, and their content. They were divided into seven parts.

20. Part One consisted only of draft conclusion 1 (Scope), an introductory provision stating that the draft conclusions concerned the way in which the existence and content of rules of customary international law were to be determined. Part Two, which comprised two draft conclusions, set out the basic approach to the identification of customary international law. Draft conclusion 2 (Two constituent elements) specified that the identification of a rule of customary international law required an inquiry into whether general practice existed, and whether such general practice was accepted as law (in other words, accompanied by *opinio juris*). That two-element approach, namely the consideration of both general practice and *opinio juris*, applied to the identification of the existence and content of rules of customary international law in all fields of international law. Draft conclusion 3 (Assessment of evidence for the two constituent elements) set out as an overarching principle that the assessment of any and all available evidence must be careful and contextual, and stated that in order to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, which required an assessment of evidence for each element.

21. Part Three comprised five draft conclusions offering more detailed guidance on general practice. Draft conclusion 4 (Requirement of practice) specified whose practice was to be taken into account when determining the existence of a rule of customary international law and the role of such practice; draft conclusion 5 provided that, in order to qualify as State practice, the conduct in question must be that of the State; draft conclusion 6 addressed forms of practice, stating that practice could take a wide range of forms and might, under certain circumstances, include inaction; draft conclusion 7 provided that all the available practice of a particular State must be taken into account and assessed as a whole; and draft conclusion 8 stated that the relevant practice must be general.

22. Part Four, comprising two draft conclusions, provided further guidance on the second constituent element of customary international law, namely, the acceptance as law (*opinio juris*) of the practice in question. Draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)) sought to encapsulate the nature and function of that element, explaining that the relevant practice must be undertaken with a sense of legal right or obligation and emphasizing that, without acceptance as law (*opinio juris*), a general practice could not be considered to create or express customary international law, but would be deemed a mere usage or habit. Draft conclusion 10 concerned the forms of evidence from which acceptance of a given practice as law could be deduced.

23. Part Five, comprising four draft conclusions, addressed certain categories of materials that were frequently invoked in the identification of customary international law. Draft conclusion 11 addressed the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law, while draft conclusion 12 concerned the role that resolutions adopted by international organizations or at intergovernmental conferences might play in the determination of rules of customary international law. Draft conclusion 13 addressed the role of decisions of international and national courts and tribunals for the determination of such rules; and draft conclusion 14 (Teachings) specified that the words of the most highly qualified publicists might serve as a subsidiary means for the determination of the same. The Commission had decided not to include

at the current stage a separate conclusion on its output. However, it had indicated in the commentary that such output did merit special consideration, although the weight to be given to its determinations depended on various factors, including sources relied upon by the Commission, the stage reached in its work and, above all, States' reception of its output. Parts Six and Seven each comprised a single draft conclusion, dealing with the persistent objector and with particular customary international law, respectively.

24. He drew attention to the Commission's recommendation, pursuant to articles 16 to 21 of its statute, that the draft conclusions should be transmitted, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2018. With regard to the Commission's request for the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, the Secretariat had invited Governments to provide information regarding their practice by replying to a questionnaire by 1 May 2017.

25. Turning to chapter VI of the report (Subsequent agreements and subsequent practice in relation to the interpretation of treaties), he said that the Commission had had before it the fourth report of the Special Rapporteur on the topic (A/CN.4/694), which concerned the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert treaty bodies and of decisions of domestic courts. In the report, the Special Rapporteur had proposed draft conclusions 12 and 13 on those issues and the inclusion of a new draft conclusion 1a, and suggested a revision to one of the 11 draft conclusions already adopted. It had also discussed the structure and scope of the draft conclusions.

26. After its consideration of the report, the Commission had referred draft conclusions 1a and 12, as presented by the Special Rapporteur, to the Drafting Committee. Subsequently, upon consideration of the report of the Drafting Committee, the Commission had adopted, on first reading, the set of 13 draft conclusions, which, together with commentaries thereto, were contained in paragraphs 75 and 76 of the Commission's report (A/71/10). The Commission had reordered several of the draft conclusions adopted in previous years, with a view to improving the overall coherence of the text, and had divided the draft conclusions into four parts. For ease of reference, the prior numbers of draft conclusions adopted at earlier sessions were indicated in square brackets in the report. Other than the reordering and a few technical adjustments, no substantive changes had been made to the 11 draft conclusions adopted at previous sessions.

27. Draft conclusion 1 [1a] (Introduction) indicated that the draft conclusions concerned the role of subsequent agreements and subsequent practice in the interpretation of treaties. As indicated in the commentary, the draft conclusions situated subsequent agreements and subsequent practice within the framework of the rules on interpretation of the 1969 Vienna Convention on the Law of Treaties, by identifying and elucidating relevant authorities and examples, and by addressing certain questions that might arise when applying those rules. They did not address all conceivable circumstances in which subsequent agreements and subsequent practice might play a role in the interpretation of treaties. The aim of the draft conclusions was to facilitate the work of all those called upon to interpret treaties, including international courts and tribunals, national courts, Government officials, international organizations and even non-State actors.

28. Draft conclusion 13 [12], which contained four paragraphs, provided that pronouncements of expert treaty bodies, as a form of practice under a treaty or otherwise, might be relevant for its interpretation, either in connection with the practice of States parties, or by themselves. Paragraph 1 defined an expert treaty body as a body whose members served in their personal capacity. It was not concerned with bodies that consisted of State representatives; moreover, it excluded from its definition bodies that were organs of an international organization and provided that expert treaty bodies must be established under a treaty. Paragraph 2 served to emphasize that any possible legal effect of a pronouncement by an expert treaty body depended, first and foremost, on the specific rules of the applicable treaty itself. Such possible legal effects might therefore be very different and must be determined by applying the rules on treaty interpretation set forth in the Vienna Convention. The ordinary meaning of the term by which a treaty

designated a particular form of pronouncement, for example, “views”, “recommendations” or “comments”, usually gave a clear indication that such pronouncements were not legally binding. The general term “pronouncements” used in paragraph 2 was intended to cover all forms of action by expert treaty bodies.

29. The purpose of paragraph 3 was to indicate the role that a pronouncement of an expert treaty body might perform with respect to a subsequent agreement or subsequent practice by the parties to a treaty. The first sentence of that paragraph provided that such pronouncements could not, by themselves, constitute subsequent agreement or subsequent practice under article 31, paragraph 3 (a) or (b), of the Vienna Convention, since that would require the agreement of all treaty parties regarding the interpretation of the treaty. Such a pronouncement might, however, give rise to, or refer to, a subsequent agreement or subsequent practice by the parties which established their agreement regarding the interpretation of the treaty. The expression “give rise to” addressed situations in which a pronouncement came first and the practice and the possible agreement of the parties occurred thereafter. The term “refer to”, on the other hand, covered situations in which the subsequent practice and a possible agreement of the parties had developed before the pronouncement, and where the pronouncement was only an indication of such an agreement or practice.

30. The second sentence of paragraph 3 set out a presumption against silence as constituting acceptance of the pronouncement of an expert treaty body as subsequent practice under the Vienna Convention. States parties could not usually be expected to take a position with respect to every pronouncement by an expert treaty body, whether it was addressed to another State or to all States generally. Apart from possibly giving rise to, or referring to, subsequent agreements or subsequent practice of the parties themselves under articles 31, paragraph 3 (a) and (b), and 32 of the Vienna Convention, pronouncements by expert treaty bodies might also otherwise contribute to, and thus be relevant for, the interpretation of a treaty. Draft conclusion 13, paragraph 4, addressed that possibility by way of a “without prejudice” clause.

31. He drew attention to the Commission’s recommendation, in accordance with articles 16 to 21 of its statute, that the draft conclusions should be transmitted, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2018.

32. *Mr. Katota (Zambia), Vice-Chair, took the Chair.*

33. **Mr. Ávila** (Dominican Republic), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that the Community, at its fourth Presidential Summit, held in Quito in January 2016, had reiterated its firm commitment to the principles of international law. CELAC acknowledged the leading role played by the International Law Commission in the progressive development of international law and its codification. Many multilateral treaties had derived from the Commission’s work on various topics, and even the Commission’s draft documents, or excerpts therefrom, had been referred to in judgments of the International Court of Justice, which clearly illustrated that the Commission’s work could influence that of the Court. CELAC also recognized the role of the Commission in the promotion of the rule of law. As the Commission itself had noted in its report (A/71/10), it was aware of the interrelationship between the rule of law and the three pillars of the United Nations and of the role that the rule of law in played in the 2030 Agenda for Sustainable Development.

34. CELAC urged delegations to participate in a fruitful exchange of views during their consideration of the Commission’s report and to engage in discussions with members of the Commission, in order to enhance further that body’s contribution to the progressive development and codification of international law. It would be particularly relevant in the final year of the current quinquennium for the Committee to continue its review of those international law topics of new or renewed interest to the international community that might be included in the Commission’s future programme of work.

35. In pursuance of its functions, the Commission required doctrinal material, case law and examples of State practice in the area of international law. The contribution of Member States was therefore critical, as was that of international, regional and subregional

courts and tribunals. The Community highlighted the need for all Member States to continue providing strong support for the Commission's work. However, owing to disparities in resources among teams of international lawyers in different countries, many States and their legal departments faced difficulties in providing the Commission with the information requested; in that regard, the Commission's report should be circulated sufficiently in advance to allow for its consideration by Member States. Every effort must be made to ensure that all States could participate actively in the discussions, in order to enhance the legitimacy of the progressive development and codification of international law.

36. CELAC reiterated its call for the Commission to hold half of its sessions at United Nations Headquarters in New York. That would enable Sixth Committee delegates to attend the deliberations as observers and would foster an early engagement in the topics under consideration, including by capitals, even before the Commission's report was circulated. In addition, it would have a positive impact on the quality of the interaction with capitals when Member States submitted comments and observations in written form to the Commission. The Community therefore welcomed the Commission's recommendation, contained in paragraph 326 of its report, that it should hold part of its seventieth session in New York; it also welcomed the initiative taken by some delegations to hold informal discussions with members of the Commission throughout the year. Furthermore, it commended the Commission's recommendation that a seventieth anniversary commemorative event should be held, in both New York and Geneva, during its seventieth session in 2018.

37. CELAC welcomed the work accomplished by the Commission during its sixty-eighth session and noted in particular the completion of its second reading of the draft articles on the protection of persons in the event of disasters, as well as its conclusion of the first reading of two sets of draft conclusions, on the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", respectively. It was important for Governments to submit comments and observations on the latter two topics by 1 January 2018; furthermore, as requested in chapter III of the Commission's report (A/71/10), they should submit information by 31 January 2017 on the topics "Crimes against humanity", "Protection of the atmosphere", "Provisional application of treaties", and "*Jus cogens*", as well as on the specific issues listed in paragraph 35 concerning the topic of immunity of State officials from foreign criminal jurisdiction.

38. It was worth noting that, further to the Community's request that questionnaires prepared by special rapporteurs should focus on the main aspects of the topic under study, the General Assembly, in resolution 67/92, had drawn the attention of Governments to the importance for the Commission of having their views on all the specific issues identified in the report. CELAC also noted the inclusion of the topics "The settlement of international disputes to which international organizations are parties" and "Succession of States in respect of State responsibility" in the long-term programme of work of the Commission, and the Commission's recommendation that the potential topics identified by the Secretariat in its working paper (A/CN.4/679/Add.1) should be further considered by the Working Group on the Long-term Programme of Work at its sixty-ninth session.

39. CELAC welcomed the voluntary contributions made to the United Nations Trust Fund for the International Law Seminar and invited Member States to consider making additional contributions to the Trust Fund. Participation in the Seminar by legal advisers from all regions could make a significant contribution to the work of the Sixth Committee and the Commission.

40. While CELAC recognized and appreciated the efforts made in recent years, it believed that more could be done to strengthen cooperation and dialogue between the Commission and Member States. It was regrettable, for example, that owing to budgetary constraints, not all special rapporteurs on topics under consideration could come to New York to attend the discussions, which should always be scheduled on a date close to the meeting of legal advisers and should not overlap with other relevant meetings of the General Assembly that might prevent them from attending.

41. The Commission's productivity must be matched by adequate funding in order to ensure the necessary dissemination of documents that were vital to the progressive development and codification of international law. Consequently, CELAC could not

accept that periodic publications by the Codification Division of the Office of Legal Affairs might be endangered for financial reasons. It reaffirmed its support for the continued issuance of those legal publications (as referred to in paragraph 335 of the report), in particular *The Work of the International Law Commission*. It welcomed the dissemination activities carried out by the Codification Division and the Division of Conference Management and the voluntary contributions made to the Trust Fund on the backlog relating to the *Yearbook of the International Law Commission*, and it invited States to consider making additional contributions to the Trust Fund. In that regard, it welcomed the measures taken to streamline the editing of the Commission's documents.

42. CELAC welcomed the significant progress being made in the Commission's work. However, its relations with the Sixth Committee must continue to be improved so that the General Assembly could better process and utilize the Commission's invaluable work. The Community reiterated its firm commitment to contributing to that process and to working towards the common goal of progressively developing and codifying international law.

43. *Mr. Ahmad (Pakistan), Vice-Chair, resumed the Chair.*

44. **Mr. Gussetti** (Observer for the European Union), speaking on behalf of the European Union; the candidate country Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia and Ukraine on the topic "Protection of persons in the event of disasters", said that the European Union was actively engaged in humanitarian aid and disaster response. It was pleased that the Commission had decided to include protection of persons in the event of disasters in its programme of work and had participated actively in the Commission's consideration of the topic. While not all of the comments and observations it had submitted were reflected in the draft articles and the commentaries thereto, the European Union was pleased that the commentaries contained a reference to regional integration organizations and that they envisaged the possibility of the draft articles being applied in the context of complex emergencies, as it had suggested. The draft articles had made a significant contribution to the field of international disaster response law, and the European Union would readily participate in any efforts designed to follow the Commission's recommendation to elaborate a convention based on the draft articles, should the General Assembly elect to do so.

45. In reference to the topic "Identification of customary international law", it was important to consider the overall balance of the draft conclusions on the topic adopted by the Commission and the commentaries thereto and their practical value for the courts. As an organization that participated in a large number of multilateral and bilateral treaties, the European Union expected the Commission's output to reflect its potential to contribute to customary international law, including in such areas as fisheries and trade. The European Union saw merit in including such a reference in either the draft conclusions or the commentaries thereto.

46. Speaking on behalf of the European Union; the candidate country Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Ukraine on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and the commentaries thereto would provide important guidance on treaty interpretation and enhance understanding of the rules of international law on the matter.

47. The Commission rightly stated in paragraph 1 of draft conclusion 2 [1] that the rules contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties also applied as customary international law. The European Union, in exercising its treaty-making powers, adhered to the rules of international law, including customary international law. It was its understanding that the Commission's stipulation in paragraph (2) of the commentary to draft conclusion 1 [1a] that "one aspect not dealt with specifically in the draft conclusions was the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations" was not intended to and would not have an impact on the relevance of the Commission's conclusions in cases where the rules of articles 31 and 32 of the Vienna

Convention were applied as a matter of customary international law.

48. **Ms. Lehto** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the draft articles on protection of persons in the event of disasters constituted a comprehensive framework for the reduction of risks associated with disasters and protection of persons, and indicated that the affected State had a duty to offer such protection, although external assistance also had a role to play in that regard. The draft articles emphasized human dignity and human rights and underscored the need for cooperation and respect for sovereignty, while recognizing that response to disasters must take place in accordance with the principles of humanity, neutrality, impartiality and independence. A gender perspective should be mainstreamed into humanitarian assistance to ensure that it was effective, impartial and reached all segments of the population, and to address the heightened risk of sexual and gender-based violence associated with disasters and other emergencies.

49. The draft articles struck an appropriate balance between the rights and obligations of both the affected State and assisting States. Draft article 13, for instance, provided that the provision of external assistance required the consent of the affected State, but that such consent must not be withheld arbitrarily. The Commission had indicated, in its commentary to the draft article, that the recognition that consent could not be withheld arbitrarily reflected the dual nature of sovereignty as entailing both rights and obligations. It had also noted that under certain conditions the refusal of assistance could constitute a violation of the right to life. The Commission had also referred in its commentary to the reaffirmation by the Security Council in its resolution 2139 (2014) concerning the conflict in Syria, indicating that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, could constitute a violation of international humanitarian law.

50. In its explanation of the term “arbitrary”, the Commission had concluded that there would be a strong inference that a decision to withhold consent was arbitrary if the offer of assistance was made in accordance with the draft articles or if consent was withheld in a manner that was unreasonable, unjust, lacking in predictability or was otherwise inappropriate. The affirmation in draft article 9 that States must take appropriate disaster risk reduction measures was also important. The Nordic countries were open to discussing the possibility of concluding an international convention on the basis of the draft articles.

51. The topic of identification of international customary law, although somewhat theoretical in nature, was of great practical importance. The Nordic countries commended the Special Rapporteur for providing further guidance on the concept of “acceptance as law” (*opinio juris*) in his report (A/CN.4/695). They welcomed the explicit reference in the draft conclusions to the fact that general practice and acceptance as law (*opinio juris*) should be separately ascertained, while admitting that there were circumstances where the same evidence might be used to establish the existence of both elements. Those delegations also agreed that *opinio juris* must be distinguished from extralegal motives for action or inaction, such as comity, political expedience or convenience, by means of a thorough analysis of the context.

52. The Nordic countries welcomed the inclusion in the draft conclusions of the persistent objector rule, whereby a customary rule might not apply to particular States in certain circumstances. Nonetheless, the category of rule to which the State objected should be taken into account and particular consideration must be given to universal respect for fundamental rules, especially those relating to the protection of individuals. While those delegations welcomed the expansion of the commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) and the reference therein to the General Assembly as a plenary organ of near-universal participation, they felt that the unique characteristics of the General Assembly could be further developed in the commentary to that draft conclusion. The draft conclusions would undoubtedly become a useful tool for practitioners in identifying the existence and scope of customary law.

53. Turning to the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, he said that the Nordic countries had already expressed their position on the newly adopted draft

conclusion 13 [12] at the seventieth session of the General Assembly (A/C.6/70/20). Nonetheless, they agreed with the Commission that the pronouncement of an expert treaty body could not, in and of itself, constitute subsequent practice establishing the agreement of the parties as to the interpretation of the treaty. Similarly, the Commission was right to say that pronouncements of expert treaty bodies might, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties. With regard to the notion of "might give rise to", however, additional tools might be needed to establish that all parties had accepted a particular pronouncement of an expert body as a proper interpretation of the treaty. The weight of a general comment of an expert treaty body, for the purpose of interpretation, depended on the applicable rules of the treaty and on whether the comment reflected a considered view of the legal content of certain provisions of the treaty.

54. Lastly, the Nordic countries took note of the suggestion by the Commission to include in its long-term programme of work the topics "The settlement of international disputes to which international organizations are parties" and "Succession of States in respect of State responsibility". However, considering the Commission's heavy workload on important topics, the Commission should focus first on finalizing the items on its current programme of work before taking on any new topics.

55. **Mr. Egan** (United States of America) said that while his delegation appreciated that the Commission and the Special Rapporteur had considered the comments of Member States on the draft articles on the protection of persons in the event of disasters adopted on first reading, it appeared from his delegation's — albeit as yet incomplete — review of the draft articles adopted on second reading that not all of its concerns had been addressed. Moreover, the United States remained convinced that the topic should be addressed through the provision of practical guidance for affected and assisting States rather than in the form of a convention.

56. The draft conclusions on identification of customary international law and the commentaries thereto were already an important resource for practitioners and scholars. The United States had not yet completed its review of the text but wished to draw attention to two initial areas of concern. First, some elements of the draft conclusions and commentaries appeared to go beyond the current state of international law, resulting in progressive development of international law rather than codification. Recommendations concerning progressive development were inappropriate for some topics covered by the Commission, such as the identification of customary international law, as its purpose and primary value was to provide non-experts in international law, such as national court judges, with a clear guide to the established rules regarding the identification of customary international law. Including elements of both progressive development and codification in the draft conclusions and commentaries thereto could confuse and mislead readers and undermine the utility and authority of the text. Any recommendations concerning progressive development that the Commission wished to include should be clearly identified as such and distinguished from elements that reflected the established state of the law.

57. Draft conclusion 4, in particular, gave the impression that the practice of international organizations could in some cases constitute directly relevant practice, on a par with State practice, in the formation and identification of customary international law. However, that proposition was not supported by the practice or *opinio juris* of States or relevant case law. Furthermore, the commentary to the draft conclusion provided very little support for that position, and the supporting elements that were given were not sufficient to justify the broad language of the draft conclusion. The draft conclusion unnecessarily confused matters by implying that any analysis of the existence of a rule of customary international law must involve examining the practice of international organizations with widely varying competences and mandates. Draft conclusion 4 was thus essentially a proposal for progressive development of the law, which gave cause for concern.

58. Second, certain parts of the text should be adjusted to avoid potentially misleading the reader. For example, the draft conclusions and commentaries thereto could give the impression that customary international law was easily formed or identified. The commentary might need to emphasize that customary international law was formed only when the strict requirements of extensive, virtually uniform practice of

States, including specially affected States, accompanied by *opinio juris*, were met.

59. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that his delegation's comments were based solely on its initial review of the draft conclusions adopted by the Commission on first reading.

60. Draft conclusion 12 [11], paragraph 3, stated that the practice of an international organization in the application of its constituent instrument might contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32 of the Vienna Convention on the Law of Treaties. In its commentary to the draft conclusion, the Commission explained that the purpose of paragraph 3 was to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created, which appeared to indicate that the draft conclusion was referring to the practice of the international organization as an entity in and of itself as opposed to the practice of its member States.

61. By making no reference in draft conclusion 12 to article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties, the Commission rightly recognized that the practice of international organizations did not constitute subsequent practice for the purposes of that paragraph, because an international organization was not a party to its constituent instrument and its practice as such could therefore not contribute to the establishment of an agreement of the parties regarding the interpretation of that instrument. However, the draft conclusion erred in stating that consideration of the practice of an international organization was appropriate under article 31, paragraph 1, and article 32 of the Convention. The factors to be considered pursuant to article 31, paragraph 1 — namely ordinary meaning, context, object and purpose — did not encompass subsequent practice, whether the actor was a party to the constituent instrument of the organization or the organization itself. Moreover, in its commentary to the draft conclusion did not explain how article 31 could be interpreted in such a way as to conclude that they did. Article 32 might provide grounds for the consideration of the practice of an international organization, in particular where the parties to the treaty were aware of the practice and had endorsed it. However, the circumstances in which the practice of an international organization might fall within the scope of article 32 should be explained in the commentary.

62. Lastly, the language of draft conclusion 5, paragraph 1, should be reconsidered. The draft conclusion stated that subsequent practice might consist of any conduct in the application of a treaty which was attributable to a party to the treaty under international law. In reality, there were many acts, for example the actions of a State agent taken contrary to instructions, that were attributable to a State for the purposes of State responsibility but were not considered State practice for the purposes of the interpretation of treaties. Draft conclusion 11 could be taken to suggest that the work of conferences of States parties frequently involved acts that might constitute subsequent agreement or subsequent practice in the interpretation of a treaty. His delegation would examine the commentary bearing in mind that such outcomes were by far the exception, not the rule.

63. **Mr. Xu** Hong (China) said that his delegation supported the adjustments that had been made to the draft articles on the protection of persons in the event of disasters adopted on second reading, as they had drawn on some of the comments submitted by States and international organizations and reflected a better balance between the rights and obligations of affected States and those of assisting States and would do more to enhance the effectiveness of international disaster relief cooperation, compared with the draft articles adopted on first reading. The new draft articles set a higher threshold for the obligation of an affected State to seek external assistance, as the phrase "to the extent that a disaster exceeds its national response capacity" had been amended to read "to the extent that a disaster manifestly exceeds its national response capacity". Furthermore, draft article 12 (Offers of external assistance) had been amended to make it non-binding; it had previously provided that certain actors had the right to offer assistance but now stated that they might do so. The latest draft also included an obligation for potential assisting actors to expeditiously give due consideration to requests for assistance.

64. Despite those improvements, the draft was still rather heavy on *lex ferenda*. While the obligations to seek external assistance and to refrain from arbitrarily

withholding consent to external assistance were positive in terms of the progressive development of international law on disaster relief and the protection of affected persons, they did not reflect general State practice and were far from becoming *lex lata*. Whether they would become binding on States in the future would depend on their acceptance by individual States.

65. Turning to the topic of identification of customary international law, he said that State practice was the most important element of evidence in the establishment of rules of customary international law. Such evidence should be comprehensive, consistent and fully representative, taking into account both past and current State practice. As developing countries were becoming increasingly active on the international stage and playing an increasingly visible role in the development of international norms and the international legal order, their practice should be given due attention and regarded as an important source of evidence of the formation of rules of customary international law.

66. With regard to the topic of the identification of customary international law, his delegation had concerns about draft conclusion 4 (Requirement of practice), which stated that the conduct of other actors might be relevant when assessing the practice of States and international organizations. The conduct of entities that were not States or international organizations did not meet the requirement of practice and as such could not contribute to the formation or expression of customary international law. It was also doubtful whether an ambiguous phrase such as "may be relevant" should be retained in the draft conclusion.

67. With regard to draft conclusion 6 (Forms of practice), caution must be exercised when determining whether inaction could serve as evidence of *opinio juris*. State consent was the foundation of customary international law. Inaction could not be treated as implied consent; the State's knowledge of the relevant rules and its ability to react should be taken into account in determining whether a State's inaction was intentional and, thus, could serve as evidence of *opinio juris*.

68. The role of decisions of national courts and the views of scholars had a limited, subsidiary role to play in the formation of customary international law. Decisions of national courts simply reflected the legal system of the State in question and therefore had limited relevance to international law. While the views of public law scholars had historically served as an important basis for international law, the increase in international law-making had led to international treaties becoming the most important source of international law.

69. Draft conclusion 15 (Persistent objector) was still problematic. The very concept of a persistent objector was a constraint on the effect of customary international law and, as such, might have no place in the draft conclusions. Furthermore, the failure of a State to object to an emerging rule of customary international law could not be considered to constitute acceptance of the rule, unless it had been determined that the State had been aware of the rule and that it had been under an obligation to object explicitly and persistently in order not to accept it. In addition, measures should be taken to deter States from evading in bad faith their explicit treaty obligations through a selective application of customary international law.

70. The work of the Commission and the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties had clarified the topic and provided helpful guidance on the interpretation of treaties. Treaties should be interpreted in strict accordance with article 31 of the Vienna Convention on the Law of Treaties; subsequent agreements and subsequent practice should play a supplementary role in the interpretation of treaties. Unless generally accepted or approved, subsequent practice should not contravene the object and purpose of a treaty. Furthermore, it should not be used as a tool to expand the scope of interpretation or to covertly amend the treaty. There was also a need to be judicious when determining whether the pronouncements of expert treaty bodies gave rise to subsequent agreements and subsequent practice. In that connection, expert treaty bodies should avoid overstepping their mandates and should fully heed the views of States parties in order to avoid confusion in the interpretation of treaty obligations.

71. **Mr. Alabrune** (France), speaking on the topic of protection of persons in the event of disasters, said that his delegation had doubts about the proposal to elaborate a convention on the basis of the draft articles. It was an open question whether such a convention

would be of such interest that it would garner sufficient support from States and justify the mobilization of resources for its negotiation. Instead, it was preferable to consider, first, how the Commission's work might be used in the subsequent practice of States.

72. With regard to the identification of customary international law, his delegation particularly welcomed the efforts of the Special Rapporteur to take into account the practice of the different national legal systems and traditions. The commentaries to the draft articles would benefit from the inclusion of examples of cases in which a rule of customary international law had been deemed to exist, as almost all of the examples in the current draft concerned cases in which the existence of a rule had been rejected.

73. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that his delegation approved the general approach of focusing on treaties between States, as the Commission had traditionally dealt with treaties between States and treaties between States and international organizations as separate elements. Moreover, the current work was related to articles 31 and 32 of the Vienna Convention, which addressed treaties between States. However, draft conclusion 13 (Pronouncements of expert treaty bodies) was problematic. The pronouncements of expert treaty bodies should not be considered to give rise to subsequent practice, as the function of those entities was not to apply the provisions of treaties but rather to interpret the law and ensure that it was applied by States. Their pronouncements were thus a "subsidiary means" of interpretation of the rules but did not constitute practice in the application of the treaty.

74. The draft articles on crimes against humanity were detailed and precise, while allowing States a useful measure of discretion in a number of situations. The International Criminal Court had a central role to play in the prosecution of crimes against humanity, although States bore the primary responsibility for the prosecution of crimes committed by their nationals or on their territory. France had no objection to the principle behind the provision on the liability of legal persons which, although not provided for in the Rome Statute of the International Criminal Court, was recognized by the national laws of France and a number of other States. However, States should be given a certain amount of procedural freedom in order to avoid abusive judicial proceedings; they should also be given some discretion with regard to the choice of penalty. It should be recalled, nonetheless, that France and other European Union member States actively supported the elimination of the death penalty and all physical punishment amounting to inhuman and degrading treatment, however serious the offence.

75. States should also be given a degree of procedural freedom with regard to the establishment of national jurisdiction over crimes against humanity, given the complexity of the crimes in question, the difficulties that courts might have in conducting proceedings, and the risk of jurisdictional conflicts. With regard to draft article 8 (Preliminary measures when an alleged offender is present), his delegation had concerns about the impact that the obligation of a State to report the findings of an inquiry to another State might have on the outcome of an ongoing investigation or inquiry.

76. France continued to have concerns about the direction in which the Special Rapporteur on protection of the atmosphere wished to take that topic, taking into account the understanding arrived at when the topic had been included on the programme of work in 2013. There were three major problems with the current approach. First, the draft guidelines transposed several principles formulated in relation to the protection of the environment to the issue of degradation of the atmosphere. For example, draft guideline 4 concerned an obligation to ensure that environmental impact assessments were undertaken, even though in principle such an obligation only applied where there was a risk that an industrial activity might have a significant adverse impact in a transboundary context, as the International Court of Justice held in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Second, the assertions in draft guidelines 5 and 6 that the atmosphere should be utilized in a sustainable, equitable and reasonable manner were problematic, as the meaning of the phrase "utilization of the atmosphere" was far from clear. The phrase suggested that the atmosphere was an exploitable natural resource, which was highly debatable. While the atmosphere certainly had a limited capacity to assimilate pollution, the emission of pollutants did not constitute "utilization" of the atmosphere. Third, draft guideline 7 (Intentional large-scale modification of the

atmosphere) was not based on any relevant existing rules or practices, as the Special Rapporteur had admitted. That approach was entirely inconsistent with the one agreed upon in 2013, according to which the work should not seek to fill lacuna in international law. Draft guideline 7 should therefore be deleted.

77. With regard to the topic of *jus cogens*, it was surprising that the draft conclusions had already been drawn up, given that the topic had only been on the long-term programme of work of the Commission for two years and it had only been one year since a Special Rapporteur had been appointed. It would be more appropriate for the Special Rapporteur and the Commission to first examine the diverging practices and positions of States, to avoid an overly theoretical or ideological approach to the topic that would not address the real needs of States. The Special Rapporteur's intended direction for the work was questionable, in particular with regard to his tendency to go beyond the law of treaties into other areas of international law, including issues of State responsibility. The concept of *jus cogens* must not be conflated with that of fundamental norms; norms could be considered to reflect fundamental values, of a particular region, for example, or possess an *erga omnes* character without being *jus cogens* norms. Including issues of State responsibility in the Commission's work on *jus cogens* could undermine the balance of the articles on the responsibility of States for internationally wrongful acts. That would be regrettable, since international courts and tribunals frequently referred to them, and because the possibility of elaborating a convention on the basis of the articles was again under consideration.

78. In his report (A/CN.4/693), the Special Rapporteur stated that France was not a persistent objector to the concept of *jus cogens* and accepted it in principle, disregarding the reservations that had been expressed by France, including in recent years. Those reservations related less to the norm itself than to its implications and effects. It was because of those reservations that France had not become a party to the Vienna Convention on the Law of Treaties, despite its opinion that the Convention largely reflected the state of customary international law.

79. It was regrettable that a number of the draft principles on the protection of the environment in relation to armed conflicts had no grounding in practice or case law. Moreover, several of them, such as draft principles I-3 (Status of forces and status of mission agreements) and IV-1 (Rights of indigenous peoples) did not seem to bear any relation to the topic.

80. With regard to the topic of the immunity of State officials from foreign criminal jurisdiction, his delegation was surprised that the Commission had begun its debate on the fifth report of the Special Rapporteur (A/CN.4/701), concerning limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, at a point when the document was only available in two languages, only one of which was a working language of the United Nations. His delegation would make more extensive comments on the matters covered in the report at the next session of the Committee, once it had had time to examine the French version of the text. However, it wished to draw attention to an error in the Special Rapporteur's interpretation of French case law, which should be corrected. The report stated that the Court of Appeal of Paris had declared an exception to the principle of immunity *ratione personae* in the *Teodoro Nguema Obiang Mangue* case. However, Mr. Nguema Obiang Mangue, who was being prosecuted in France, was not a Head of State, a Head of Government or a Minister for Foreign Affairs.

81. With regard to the future programme of work, he said that two new topics had been added to the Commission's already lengthy long-term programme of work. Since the proliferation of topics did nothing to facilitate the timely completion of work or the study of each subject by States, work on new topics should not begin until consideration of the topics on the current programme of work had been completed.

82. The Commission's working conditions in Geneva were ideal and there did not seem to be any reason to hold part of its future sessions in New York. His delegation welcomed the Commission's reaffirmation of its commitment to multilingualism and the efforts of the Legal Counsel in that regard. The failure to respect that principle in the consideration of the topic of the immunity of State officials from foreign criminal jurisdiction should not be repeated. His delegation also welcomed the establishment of a new system for editing the Commission's documents. It hoped that the new system would enable the Commission's report to be

distributed in the six official languages simultaneously, which would help States to prepare their comments in a timely manner.

83. **Mr. Tiriticco** (Italy) said that the eighth report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/697) reflected the convergence of views on the Commission's work in that area. In the wake of the recent unprecedented number of natural disasters around the world that had taken many lives and sparked massive international response efforts, the draft articles on the protection of persons in the event of disasters represented a codification effort which would provide much-needed clarity, coherence and guidance and result in more effective action.

84. There was a need for codification because the growing number of bilateral, regional and multilateral instruments on disaster prevention, management and response had created a spontaneous legal framework lacking in harmonization in terms of terminology, definitions, principles and the nature and scope of obligations. The effects of that framework were also rather unbalanced, and much depended on regional practice. There was therefore a need for coordination to create greater legal stability and avoid ambiguity, confusion and overlaps.

85. The draft articles were underpinned by several principles that Italy considered fundamental and on which a broad consensus had emerged. Italy supported the rights-based approach embodied in draft articles 5 to 7. The material loss, chaos and law enforcement challenges caused by disasters resulted in an increased risk of human rights violations, making it essential to recognize human dignity and human rights as absolute principles that must be upheld during a humanitarian response. While protection must be extended to all affected persons, it was right that the articles emphasized the needs of the most vulnerable, since disasters disproportionately disrupted the lives of children, women, the elderly and persons with disabilities.

86. The Commission's work on risk prevention reflected the significant advances that had been made in the practice of disaster law, for example in the areas of risk reduction, early-warning mechanisms, enhanced cooperation and information-sharing, since the adoption of the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters and the subsequent Sendai Framework for Disaster Risk Reduction.

87. Italy was at a constant high risk of disasters and had consequently established a national civil protection service in 1992, which was responsible for risk reduction, disaster management and resilience. Based on its national experience, Italy strongly supported cooperation between humanitarian and civil protection authorities on disaster risk reduction. As more countries developed and refined national instruments, the draft articles would strengthen the links between risk reduction and the duty of States to cooperate with one another. The draft articles gave prevention the same importance as response, which was a significant achievement.

88. Legal instruments on emergencies customarily emphasized information exchange and assistance request and delivery mechanisms, which had to be activated by the affected State. The draft articles took a bolder approach by recognizing that a State affected by a disaster that exceeded its national response capacity had a duty to seek assistance. The draft articles achieved a satisfactory compromise between the conflicting principles of the rights-based approach and State sovereignty: while the determination of the response capacity rested solely within the sovereign prerogatives of the affected State, under draft article 11, the protection of certain universal rights was not solely dependent on the response capacity of the State. While the draft articles were an important step in the area of disaster law, which had been characterized by a relative lack of universal vision, there was room for further improvement, in particular from a normative perspective.

89. With regard to the topic of the protection of the atmosphere, the draft guidelines constituted a small but important element of progress in the vast area of environmental protection. The participation of scientific experts in the field of international environmental law was very useful. For example, dialogue with the expert community had contributed to the definition of the term "atmosphere" and the notions of atmospheric pollution and degradation, which had laid the groundwork for the guidelines. The involvement of scientists demonstrated, as made clear in draft guideline 7, that expertise in various fields was

needed in order to draft an adequate legal response. His delegation appreciated that the draft guidelines drew on both scientific and legal sources while remaining remarkably concise.

90. While the draft guidelines would be non-binding, the inclusion of principles and concrete measures to address environmental problems that could endanger the atmosphere was important. Under draft guideline 3, States had an obligation to exercise due diligence in taking measures to prevent, reduce or control atmospheric pollution and atmospheric degradation. The obligation for States to ensure that environmental impact assessments were undertaken would help to control private and public activities. The draft guidelines also promoted the sustainable and equitable use of the atmosphere in any activities aimed at its intentional large-scale modification. The Commission's work took into account the relevant decisions of international tribunals, from the landmark 1997 case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* to the recent *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case, as well as the 2030 Agenda for Sustainable Development and the Paris Agreement on climate change.

91. The topic of the provisional application of treaties involved addressing both theoretical and practical questions. The work done thus far had sought to achieve a balance between the international rules established by the Vienna Convention on the Law of Treaties and the implications of the provisional application of treaties for domestic law. Ideally, international rules should allow some accommodation of domestic law, which would result in a balanced, two-tiered legal framework. European Union member States had been discussing how provisional application fit into the general dovetailing mechanisms between European Union law and national law. The experience of the European Union should provide useful insights for the debate. Within Italy, there was little doctrinal convergence on the applicability prior to ratification of treaties entered into outside the European Union context. The Italian Constitution set strict requirements for the application of treaties that needed parliamentary approval to gain legal force. There was a need to build on the work that had been done in order to elucidate the complex issue of provisional application.

92. With regard to the Commission's future work on the provisional application of treaties, Italy favoured a practice-based approach, such as providing States with a toolkit that they could use as appropriate. Model clauses could be particularly useful. A more thorough analysis of State practice was needed, which should be undertaken with care. Draft guidelines 7 (Legal effects of provisional application) and 8 (Responsibility for breach) were among the most contentious from a theoretical perspective. More nuanced language for those draft guidelines should be considered, although the final wording would largely depend on the consensus that States reached on the overall scope of provisional application.

The meeting rose at 1.10 p.m.