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Chair: Mr. Kohona . . . . . (Sri Lanka)

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13-54912 (E)

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (*continued*) (A/66/10 and Add.1 and A/68/10)

1. **Mr. Misonne** (Belgium) said, in response to the Commission's request for information on State practice concerning the provisional application of treaties, that article 167 of the Belgian Constitution as revised in 1994 set out the basic principle that all treaties must be submitted for approval to the Parliament or to the competent assembly or assemblies, and that approval was necessary for treaties to have effect in Belgian law. Neither article 167 nor the Cooperation Agreement of 8 March 1994 among the Federal State, the Communities and the Regions of the Kingdom of Belgium in relation to the modalities of concluding mixed treaties (in the Belgian constitutional sense) contemplated the provisional application of treaties. While the provisional application of treaties could be agreed between the parties and produce effects in international law, it was therefore limited with respect to the domestic law of Belgium as a result of the constitutional requirement of approval. If the provisional effect sought pertained to domestic law, the agreement for provisional application and the treaty provisions concerned were subject to the approval process.

2. Prior to the revision of the Constitution, Belgium had provisionally applied some agreements, including agreements on air transport and on raw materials, without the prior approval of the competent assemblies. With regard to the legal effects of provisional application, his delegation considered that, in most cases, if the parties agreed to the provisional application of a treaty, its provisions would apply just as if it had entered into force.

3. With regard to the protection of the environment in relation to armed conflicts, his delegation was of the view that very often environmental protection treaties provided for obligations of means and not of result, so that they should be interpreted differently in a conflict situation than they would be in peacetime. However, Belgium had no recent practice in that area. His delegation intended to ask the Belgian Interdepartmental Commission on Humanitarian Law to consider the matter and would in due course provide the Commission with a more thorough answer in writing. It would also provide written comments on the questions posed by the Commission concerning the immunity of State officials from foreign criminal jurisdiction and the formation and evidence of customary international law.

4. **Mr. Momtaz** (Islamic Republic of Iran), speaking on the topic, "Formation and evidence of customary international law", said that his delegation welcomed the decision to change the title of the topic to "Identification of customary international law" and did not consider that it would affect the scope of the topic or the mandate given to the Commission. The question of the source of peremptory norms (*jus cogens*) should be excluded from the topic for several reasons: the concept was more closely related to the hierarchy of norms, and the formation of *jus cogens* followed a different path from that of customary international law. Some of the rules that applied to the latter, such as the notion of the "persistent objector", had no place in the formation of *jus cogens*. Nevertheless, the interest in peremptory norms and the lack of generally accepted criteria for identifying them was a subject that merited consideration by the Commission, which might attempt to determine under what conditions an ordinary rule reached the status of *jus cogens*.

5. In order to preserve the unity of the rules of customary international law, the Special Rapporteur should avoid approaching each branch of international law differently. The tendency to give priority to *opinio juris* at the expense of State practice in certain fields, such as international criminal law, endangered the unity of international law. In all cases, a customary rule of international law did not emerge unless both those elements were firmly established. The Special Rapporteur rightly stressed the need to consider State practice in all legal systems and all regions of the world, an approach that would ensure the universality of international law. To that end, the Commission should not rely heavily on the jurisprudence of tribunals mandated to settle specific disputes. Unfortunately, access to State practice was not always easy: it was rare that all States systematically compiled and published their practice of international law in one of the official languages of the United Nations, and some States did not have the expertise and capacity to make their practice known.

6. Resolutions of the General Assembly of the United Nations adopted year after year by a large majority, particularly the resolutions given the status of

declarations, could also contribute to the formation of customary international law. The Commission should avoid according the same value to the practice of non-State actors, since the contributions of a group of experts to the identification of State practice, in the absence of approval by States, could not be considered proof of the existence of a rule of customary international law.

7. With regard to the topic, "Provisional application of treaties", his delegation had doubts about the assessment that provisional application was consistent with the definitive commitment of States pursuant to their constitutional procedures. The commitment to provisionally apply the treaty must be based on the agreement of the States parties and was justified by the intention of the parties to achieve its purpose quickly. Some treaties, particularly those including rights and obligations for individuals, could not be applied provisionally. Similarly, provisions creating monitoring mechanisms could not be subject to provisional application. On an exceptional basis only, States might utilize provisional application as a measure of confidence-building and good will. To the extent that provisional application produced obligations identical to those resulting from the entry into force of the treaty, the decision to put an end to its application could create complex situations. In sum, from many points of view the topic was not ripe for consideration by the Commission.

8. His delegation welcomed the Commission's decision to include the topic "Protection of the environment in relation to armed conflicts" in its work and supported the Special Rapporteur's proposal to address the topic from a temporal perspective rather than from the perspective of international humanitarian law. While the rules of international humanitarian law concerning the protection of the environment during international armed conflict were sufficiently developed, that was not the case for the rules applicable in peacetime to prevent environmental disasters in the event of a possible outbreak of armed conflict. For example, provisions might be envisaged to encourage States to move military objectives, to the extent possible, far from ecologically fragile zones.

9. The Commission should focus in particular on the measures that States needed to take once hostile activity had ceased in order to rehabilitate the environment. The question of the environmental consequences of war had interested States since the First World War, but no real steps had been taken to resolve the problem. Vast parts of the territory of his country still bore environmental scars as a result of operations carried out by an aggressor. Among other things, the Commission should address issues related to demining. It was the duty of the States or non-State actors that had done the mining to communicate, within the framework of ceasefire agreements, the information they possessed on the position of planted mines. Moreover, solutions should be sought to rehabilitate the areas of refugee camps, which sometimes had a very negative impact on the environment.

10. His delegation's comments on some other topics in the Commission's report were available on the PaperSmart portal and the website of the Permanent Mission of the Islamic Republic of Iran to the United Nations.

11. **Mr. Li** Zhenhua (China) said that his delegation endorsed the Special Rapporteur's proposal to extend the temporal scope of the topic "Protection of persons in the event of disasters" to include pre-disaster preparedness, reflecting the consensus in the international community on the importance of disaster prevention and reduction. In that regards, his Government had initiated a process to build mechanisms for disaster prevention, preparedness and reduction at home while actively promoting international cooperation abroad. A distinction should be made between natural and man-made disasters, and no excessive responsibilities should be imposed on States for disasters difficult to predict.

12. Since space technology, including remote sensing, earth observation, meteorological observation and satellite navigation, had greatly helped national efforts in disaster prevention and reduction, his delegation proposed that the Commission should devote attention to the role of those new technologies in the protection of persons in the event of disaster and consider including the following formulation in the draft articles: "encourage States to find innovative ways to apply space technology in disaster prevention, preparedness and reduction".

13. With regard to the topic "Formation and evidence of customary international law", the new title, "Identification of customary international law", better defined the elements to be considered under the topic and was better aligned with its objectives. His

delegation considered that the approach to identifying customary international law should not vary for different branches of international law but should be uniform. Since *jus cogens* and customary international law were two distinct concepts, the Commission should not deal with *jus cogens* under the topic but should focus on clarifying the relationship between customary international law on the one hand and treaties and general principles of law on the other. As for the possible outcome of the topic, the Commission should formulate a set of guidelines for identifying and applying customary international law in practice.

14. With respect to provisional application of treaties, the relevant rules had never been clarified or unified, and the relevant provisions of the Vienna Convention on the Law of Treaties were short on details. States were uncertain whether or how to resort to provisional application, and disputes had occurred in that context. There was therefore an obvious practical need for study of the topic, which should be based on an in-depth review of the relevant international and national practice and should focus on the legal effects of provisional application. The Commission might provide guidance on the following points: whether a signatory State would become bound by the treaty as a consequence of provisional application; whether the rights and obligations under a treaty would expire upon the unilateral decision of a State to terminate provisional application; and, once a treaty had entered into force, what the relations were, in terms of rights and obligations under the treaty, between States that continued to apply it provisionally and States that had completed the domestic process for ratification.

15. Moreover, the Commission should study the relationship between provisional application and national constitutions and legislation. Of the treaties being provisionally applied, most required that provisional application should not contravene the domestic laws of the State party. As a result the legal effects of provisional application had been repeatedly challenged, and the practice had given rise to problems relating to the separation of powers between the executive and legislative branches. Some States had sought to resolve the problem by requiring provisional application to be approved by the legislature, and some treaties stipulated that provisional application was possible only after a State had completed its domestic process of ratification but before the treaty entered into force. His delegation believed that the key to the solution lay in a reasonable balance between provisional application and domestic law; the effects of provisional application should be clarified as a rule of international law, but States should have leeway to decide on provisional application in accordance with their domestic law.

16. **Mr. Jilani** (Observer for the International Federation of Red Cross and Red Crescent Societies), commenting on the new draft articles 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to reduce the risk of disasters) on the protection of persons in the event of disasters, said that over the past several decades the 187 national societies that made up the International Federation of Red Cross and Red Crescent Societies (IFRC) had come to realize the need to promote and prioritize disaster risk reduction and had transformed their working methods accordingly. Many States had also made substantial changes in their approach to managing disasters.

17. IFRC strongly supported the Commission's conclusion that States should be considered to have a duty to take appropriate measures to reduce the risk of disasters, not only because the issue was critical to saving lives and safeguarding development gains, but also because the affirmations of States in many existing international instruments could lead to no other conclusion. Moreover, IFRC contacts with governmental disaster management officials around the world showed that the acknowledgement of such a duty was fully consistent with their thinking and with a great many national laws and policies. IFRC was working with the United Nations Development Programme on a comparative study of disaster risk reduction in 31 countries worldwide. A preliminary finding was that, notwithstanding the strong international consensus on the importance of the issue, accountability gaps remained a frequent barrier to greater success. A clearly affirmation of an international duty would be a helpful tool.

18. In the list of key disaster risk reduction measures given in draft article 16, paragraph 2, some critical elements had been left out. In addition to assessing risk, it was also important to assess and reduce the vulnerability of communities faced with natural hazards and increase their resilience. What set States apart from other stakeholders involved in disaster risk reduction was that they could require or prohibit behaviours to make people safer, for example, through land-use planning, watershed management and building

codes. That use of incentives and disincentives was not adequately reflected in the draft article. In addition, States could empower communities to make themselves safer through information, education and engagement in disaster risk reduction planning and activities. Lastly, although the draft article referred to preparedness as well as prevention, specific preparedness measures, such as contingency planning and simulation exercises, were not mentioned.

19. **Mr. Niehaus** (Chairman of the International Law Commission) stressed that the Commission counted on the views and reactions of Governments for guidance both on the general direction of its work and on specific questions. The views expressed by States orally or in writing were highly valuable to the Commission. In particular, he would like to reiterate the appeal to Governments to submit their written comments on the draft articles on expulsion of aliens adopted on first reading and on the specific issues raised in chapter III of the Commission's report on the work of its sixty-fifth session (A/68/10).

The meeting rose at 3.50 p.m.