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Chair: Ms. Kremžar (Vice-Chair). . . . . (Slovenia)

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In the absence of Mr. Biang (Gabon), Ms. Kremžar (Slovenia), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V, XII and XIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Mr. Nguyen** Nam Duong (Viet Nam), welcoming the Commission's adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on second reading, and congratulating the Special Rapporteur for his hard work and dedication, said that subsequent practice, as an authentic means of treaty interpretation in accordance with article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, must be practice that reflected the parties' true and common intention. Other subsequent practice could only be a supplementary means of treaty interpretation under article 32 of the Vienna Convention.

3. His delegation had voiced concern regarding the treatment, in an earlier version of draft conclusion 13, of silence on the part of States with regard to the pronouncements of expert treaty bodies. The final text rightly stated that silence by a party should not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body. Viet Nam shared the view that any *ultra vires* decisions by expert treaty bodies had no legal significance.

4. Turning to the topic of identification of customary international law, he said that his delegation commended the Commission's work on that difficult and highly theoretical topic of general international law. Viet Nam supported a rigorous and systematic approach in examining State practice in order to identify customary international law; selective identification and lowering of the threshold of identification should be discouraged.

5. With regard to draft conclusion 4 (Requirement of practice), the Commission was correct, in paragraph (8) of the commentary thereto, to mention that acts relevant to the formation of rules of customary international law must be acts that a State had endorsed or to which it had reacted, since States should have acknowledged and reacted to actions that could be legally binding on them, directly or indirectly. Accordingly, the Special Rapporteur should reflect that approach by adding the phrase "subject to the extent that States have endorsed or reacted to them" at the end of draft conclusion 4, paragraph 3.

6. With regard to draft conclusion 8 (The practice must be general) and draft conclusion 15 (Persistent objector), it was stated in draft conclusion 8 that no particular duration was required, which suggested that even a short duration might suffice. That formulation might cause difficulties for a persistent objector, when the specific timing for a customary international rule to arise was disputable. In addition, draft conclusion 15, paragraph 2, provided that: "The objection must be clearly expressed, made known to other States, and maintained persistently" and, in paragraph (8) of the commentary to draft conclusion 15, the Commission clarified that the requirement that the objection be made known to other States meant that the objection must be communicated internationally; it could not simply be voiced internally. However, in paragraph (9) of the same commentary, it was stated that States could not be expected to react on every occasion, especially where their position was already well known. Since the Special Rapporteur had not clarified the term "maintained", those two paragraphs of the commentary might send confusing signals to States as to whether an objection must be communicated directly to the States concerned on every occasion, or whether an objection enunciated by a spokesperson at the Foreign Ministry or contained in a diplomatic note would suffice. His delegation looked forward to further clarification by the Special Rapporteur on the matter.

7. **Ms. Abd Kahar** (Malaysia) said that the draft conclusions and commentaries on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted on second reading, would definitely serve as useful guidance in line with the rules contained in the Vienna Convention. Malaysia expressed its full support for the Commission's recommendation to ensure the widest dissemination of the draft conclusions and to commend them, together with the commentaries thereto, to the attention of interpreters of treaties.

8. On the topic of identification of customary international law, her delegation was grateful to the Special Rapporteur for his persistence and determination. Malaysia supported the 16 draft conclusions, and the commentaries thereto. The topic was crucial to the development of international law, as it had a substantive effect on one of the main sources of international law. Malaysia appreciated the fact that most of the concerns it had raised during previous

sessions of the General Assembly had been addressed in the commentaries. Nevertheless, with reference to draft conclusion 5 (Conduct of the State as State practice), Malaysia wished to sound a note of caution: when the draft conclusion was used for the identification of a rule of international customary law, differences in political ideology, the structure of States and whether they were dualist or monist in character should also be taken into account.

9. When the topic had first been introduced, the aim had not been to codify the rules for the identification of customary international law, but rather to produce guidance for those called upon to identify customary international law. It was therefore important to maintain flexibility in the formation of customary law. Accordingly, the draft conclusions should serve purely as guidelines or reference points, and should be read together with the commentaries in order to ensure a comprehensive understanding of the text.

10. Lastly, her delegation appreciated the Secretariat's work in preparing its memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710); it would provide useful guidance as to the availability of customary international law.

11. **Ms. Faure** (Seychelles) said that her delegation appreciated the work conducted by the members of the Commission over the past year and the inclusion of the topic of sea-level rise in relation to international law in the Commission's long-term programme of work. As a small island developing State, Seychelles was vulnerable to the threat posed by sea-level rise. With 90 per cent of its population and socioeconomic activity situated on narrow coastal strips and more than 60 per cent of the islands being low-lying, sea-level rise posed a direct threat to the population's livelihoods.

12. In the light of the clear threats posed by sea-level rise to islands and coastal States, and recognizing that the international community had not addressed the legal implications of sea-level rise in a comprehensive manner, her delegation called on the Commission to move the new topic to its current programme of work in order to examine the international law implications of that threat with the urgency that it deserved.

13. **Mr. Ahmadi** (Islamic Republic of Iran) said that, seventy years after its establishment, the Commission still occupied a unique position in the codification and progressive development of international law, bringing together experts from different regions and the principal legal systems of the world. Since the Commission was an expert body whose recommendations were directly addressed to States, it must be guided, in the selection of its topics, by the recommendations made at its fiftieth session, in 1998, namely that the topics must reflect the needs and priorities of States and be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification. More importantly, it was the Commission's duty to assist the United Nations in the codification and development of international law by interacting with States at the various stages of its work. It should therefore take into account the positions voiced by Member States in the Sixth Committee to ensure that the outcomes of its work reflected the consensus and priority needs of States. The events held in New York and Geneva to commemorate the Commission's seventieth anniversary had provided an occasion to express constructive ideas and recommendations regarding the achievements and prospects of that body. He hoped that the Commission would take those ideas and recommendations into account with a view to strengthening the fulfilment of its mandate.

14. His delegation welcomed the Commission's decision to include in its programme of work the topic "General principles of law". Work on that topic would make a useful contribution to the codification of international law, as it was the basis for other topics, such as peremptory norms of general international law (*jus cogens*) and identification of customary international law, which were currently under consideration by the Commission.

15. The observations and comments of Member States in the Sixth Committee revealed that a common understanding of the concept of universal criminal jurisdiction, including its definition and how it differed from related concepts, had yet to be developed. Since there were significant differences and a diversity of approaches among Member States, it was premature for the Commission to include the topic in its long-term programme of work at the present stage.

16. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that, as indicated in the Commission's report, the draft conclusions adopted on second reading did not address all conceivable circumstances in which subsequent agreements and subsequent practice might play a role in the interpretation of treaties. One aspect not dealt with generally was the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations.

17. His delegation considered that, if the subsequent practice of a sovereign State in application of a treaty was inconsistent with the agreement of other parties to

that treaty regarding its interpretation, it should not be considered as an authentic means of interpretation. It was also his delegation's understanding that a subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a) of the Vienna Convention, was an agreement between all – and not just some – parties to the treaty, reached after the conclusion of the treaty regarding its interpretation or the application of its provisions. Against that backdrop, his delegation wished to reiterate its understanding that subsequent agreements and subsequent practice in relation to the interpretation of treaties were confined to the framework of articles 31 and 32 of the Vienna Convention.

18. In draft conclusion 6, paragraph 1, it was stated that the identification of subsequent agreements and subsequent practice under article 31, paragraph 3, of the Vienna Convention, required a determination whether the parties to a treaty had taken a position regarding its interpretation. The distinction was not quite clear in practice. In his delegation's view, the interpretation of a treaty under article 31, paragraph 3, required an explicit agreement and position taken by the parties. However, if the parties had merely agreed not to apply the treaty temporarily or had agreed to establish a practical arrangement (modus vivendi), the general treaty obligations remained unchanged.

19. With regard to the issue of "evolutionary" interpretation in draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time), his delegation considered that the intention of all parties to a treaty at the time of its conclusion should be taken into consideration and should be ascertained at the time of the act of interpretation.

20. As for draft conclusion 9, his delegation concurred that the weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depended on its clarity and specificity. However, the number of parties to the treaty should also be taken into account.

21. Turning to draft conclusion 10, paragraph 2, he said that silence on the part of a State could be due to diverse political considerations and might not express acceptance of the subsequent practice as establishing agreement regarding interpretation of the treaty. Moreover, the phrase "when the circumstances call for some reaction" was subjective, and it was not clear what the required threshold was for silence on the part of a State to contribute to subsequent practice in the interpretation of a treaty.

22. In connection with draft conclusions 11 and 12, decisions adopted within the framework of a conference of States parties and constituent instruments of international organizations could contribute to subsequent practice in the interpretation of a treaty only when they expressly reflected consent by States in application of the terms of the treaty.

23. His delegation could not agree that a pronouncement of an expert treaty body could give rise to or refer to a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or article 32. While subsequent practice or agreements were understood to refer to the actual practice or agreement of all the States parties to a treaty, the pronouncements of experts serving in their personal capacity could not be regarded as such.

24. Turning to the topic "Identification of customary international law", he said that his delegation commended the Special Rapporteur for his fifth report (A/CN.4/717 and A/CN.4/717/Add.1) and noted the Commission's adoption on second reading of a set of 16 draft conclusions, with commentaries thereto. His delegation wished to emphasize that the practice of States was an indispensable requirement in the formation, expression and identification of rules of customary international law; inaction by States could not be considered State practice, since it was more political than legal in character. Also, the practice of States members of an international organization and that of the organization itself needed to be considered separately, and only the proven practice of States could be considered as evidence for the identification of customary international law.

25. As for draft conclusion 9 regarding the requirement of a general practice as a constituent element of customary international law, *opinio juris* should consist of the practice of all States and all legal systems rather than the practice of affected States.

26. With regard to draft conclusion 11, his delegation did not agree that "widely ratified treaties" were reflective of customary international law. Universal acceptance or wide ratification of treaties could be considered as an indicative element for the identification of customary international law.

27. Concerning draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), the Islamic Republic of Iran still believed that the evidentiary basis of resolutions of international organizations remained open to question, since such resolutions were at times adopted by political organs, were political rather than legal in nature and did not reflect the *opinio juris* of member States.

28. Regarding draft conclusion 13 (Decisions of courts and tribunals), a distinction needed to be made between decisions of the International Court of Justice, the main judicial organ of the United Nations, and those of other international tribunals. The former's decisions were of pivotal significance and could not be considered as having the same weight as the decisions of other international courts and tribunals. Therefore, it was difficult to accept that decisions of other international courts might serve as a subsidiary means for the identification of customary international law. Furthermore, decisions of national courts which reflected the legal system of the State in question could not be considered as subsidiary evidence for the identification of customary international law.

29. With regard to draft conclusion 15 (Persistent objector), his delegation supported the view that where a sovereign State had made an objection to a rule of customary international law that was in the process of formation, had expressed the objection clearly and made it known to other States, that sufficed to establish the objection, and it was not essential for the objection to be repeated in order for it to remain in force.

30. **Ms. Sande** (Uruguay) said that the 16 draft conclusions on identification of customary international law, which the Commission had adopted on second reading, had been explained with academic rigour and would provide substantive guidance. The topic was a particularly important one, given the relationship in some cases between customary law and peremptory norms of international law. The inclusion of failure to react over time as a necessary element in the identification of customary international law was important. The reference to particular customary international law, and the way the requirements for the identification of customary law were altered when the custom was regional, introduced another important element for the consideration of the topic. The stricter application of the two-element approach in the case of rules of particular customary international law, in respect of which practice must be consistent among, and accepted as law by, all – or nearly all – States concerned, was an important new insight. However, her delegation was concerned by the reference to the right to asylum as one of the examples given in connection with the identification of customary international law and the mention of the 1950 judgment of the International Court of Justice in the *Colombian-Peruvian asylum case*, in which the Court had concluded that the right to asylum was not a rule of general customary international law, since it was not universally applied. That said, the right to asylum did have some elements that were general and, as such, were recognized and applied even by States that were not bound to do so by a treaty. The Commission's analysis that there was no common position among States on the right to asylum and no uniform application by them of that right, and that in many cases the decision whether to grant asylum was political rather than legal, meant that a stricter approach was needed to identify the right of asylum as a customary rule. However, it might be interesting to consider international custom from the standpoint of the legal institution of asylum itself rather than from the standpoint of the right to asylum. It might then be possible to identify a rule of customary international law based on the requirements for applying for and granting asylum, bearing in mind that one of the characteristics of the institution of political asylum was that States had the sovereign power to grant or refuse it without explaining their reasons for doing so.

31. The treatment of resolutions of international organizations and intergovernmental conferences was an excellent contribution to the analysis of the role played by such multilateral institutions in the creation of customary international law. Her delegation welcomed the references in the report to the importance of the positions of States in international forums and the form in which their positions were expressed for generating recognition of the formation of *opinio juris*.

32. Uruguay welcomed the fact that the Commission had included in its long-term programme of work the topics "Sea-level rise in relation to international law" and "Universal criminal jurisdiction". It would be useful for the Commission to begin its consideration of the latter topic as soon as possible and to deal with its definition, scope, application and content, with a view to facilitating the work of the Sixth Committee and clarifying a concept that was at present rather vague, resulting in disagreements and mistrust.

33. **Mr. Escalante Hasbún** (El Salvador), referring to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that his delegation appreciated the Special Rapporteur's fifth report, which took into account the comments and observations received from States. With regard to the draft conclusions adopted on second reading, the Commission should clarify in the commentary to draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time) that the precise interpretation of treaty terms did not depend solely on the common will of the parties, but that it was also relevant to apply the principle of contemporaneous interpretation, understood as that by virtue of which a treaty should be interpreted in the light of the circumstances that had existed at the time of its conclusion.

34. Concerning draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation), it should be made clearer that the term "*inter alia*" encompassed such elements as the importance accorded by the parties to a specific agreement or practice and the circumstances in which the agreement or practice had taken place. The International Court of Justice had made some important pronouncements on that subject. For example, in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, it had found that any subsequent agreements and subsequent practice in relation to the treaty should be considered together with the context. His delegation considered that that point should be emphasized in the commentary to the draft conclusion.

35. The wording of draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty) failed to clearly reflect the proposition that even if an agreement was not binding, it could subsequently be taken into account. Although it was somewhat complex to canvass the relevant precedents, examples could be found in State practice, including that of his own country, of agreements which, while not binding, had to be taken into account to guide the implementation of a given treaty. Such had been the case with the Association Agreement between Central America and the European Union.

36. Turning to the topic of identification of customary international law, he said that his delegation appreciated the fifth report of the Special Rapporteur and the wealth of international case law that had been compiled. In draft conclusion 6, it did not seem necessary to include a restrictive list of forms of practice; what mattered most was that the practice should express a legal conviction as to the binding nature of such practice. That subjective element had been recognized in the case law of the Salvadoran courts, especially in the decisions of the Constitutional Chamber of the Supreme Court of Justice, which had determined that international declarations, even if not binding, contributed significantly to the formation of binding sources of international law, whether by anticipating the binding character of a certain State practice or by promoting the conclusion of a treaty based on certain recommendations. The reference to inaction "under certain circumstances" in paragraph 1 of the draft conclusion was not effective: inaction, when imbued with legal conviction, could always become a form of practice.

37. As for draft conclusion 16, his delegation endorsed the definition of "particular customary international law" set out in paragraph 1, namely that it applied only among a limited number of States, but it considered that the term "particular" was somewhat vague and that a better formulation would be "regional custom", as used in the literature. Moreover, the phrase "States concerned" in paragraph 2 should be clarified: regional custom developed among a group of States which were bound by customary practices as a result of the legal conviction that they gave to those practices; it went beyond the mere fact that they were "concerned" States.

38. His delegation welcomed the commemoration of the Commission's seventieth anniversary, which had been the occasion for important interactions with the Sixth Committee. Such contacts should be renewed in the future, with a view to opening up discussion on structural challenges relating to the working methods used and the impact of the Commission's work on State practice. El Salvador supported the Commission's future work on the topics approved for inclusion in its long-term programme of work, namely universal criminal jurisdiction and sea-level rise in relation to international law.

39. **Mr. Chakarov** (Bulgaria) said that the 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted on second reading would provide helpful guidance and assistance to States, international organizations and courts, both domestic and international, when interpreting international treaties. Bulgaria welcomed the focus on specific cases of subsequent agreement and subsequent practice, such as the role of decisions adopted within the framework of a conference of State parties to international treaties; the practice of international organizations in the application of their constituent instruments; and the pronouncements of expert treaty bodies. His delegation especially welcomed draft conclusion 2, which acknowledged the role of articles 31 and 32 of the Vienna Convention as part of customary international law and would clear away any misunderstanding regarding the applicability of the two articles. The draft conclusions, and especially the commentaries thereto, would provide much-needed guidance to legal practitioners faced with interpreting the provisions of international treaties, and in that regard, would help to increase confidence and certainty among States with respect to the task of treaty interpretation.

40. Turning to the topic of identification of customary international law, he said that his delegation welcomed the Commission's adoption of the set of 16 draft conclusions, and the commentaries thereto, on second reading. It appreciated the Commission's balanced approach in the drafting of the draft conclusions and commentaries, both taking into account universally recognized principles and methods such as the "two-

element approach" – general practice and acceptance as law (*opinio juris*) – and drawing conclusions with respect to specific instances requiring special attention. Despite the complex theoretical issues and scholarly debates associated with the topic, the Commission had followed a careful approach aimed at preventing the premature identification of rules of customary international law by examining a broad range of evidence. His delegation especially welcomed draft conclusion 11, which considered the interplay between treaties and customary international law, drawing several well-founded conclusions on their mutual influence and interaction. The draft conclusions and commentaries would be a valuable and useful tool for all legal practitioners when faced with the difficult task of identifying specific instances of customary international law.

41. **Mr. Mhango** (Malawi) said that the two sets of draft conclusions adopted on second reading by the Commission, on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law", represented a significant step forward in the codification of international law. They would provide guidance to those who were called on to interpret treaties or to identify rules of customary international law, not only international courts and tribunals, but also States, including national courts, as well as international organizations and others.

42. His delegation took note of the inclusion of the topic "General principles of law" in the Commission's programme of work and looked forward to discussing the work of the Commission on that topic. Turning to the Commission's long-term programme of work, he said that his delegation supported the inclusion of the topic "Sea-level rise in relation to international law." It came at a most opportune time, when the effects of climate change continued to devastate the world and were even more pronounced for developing States and small island States. The effects of sea-level rise on statehood required careful study. Having commemorated its seventieth anniversary, the Commission was now entering into its maturity, choosing topics that would contribute to global solutions on such critical issues as the environment.

43. **Ms. Abbar** (Morocco) said that her delegation welcomed the Commission's constant efforts to promote the consideration of emerging issues in international law. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, her delegation congratulated the Special Rapporteur on the outcome of his work. In particular, it welcomed the fact that the text of the draft conclusions adopted on second reading reinforced the spirit of the Vienna Convention by designating subsequent agreements and subsequent practice as authentic means of interpretation, in draft conclusion 3. Regarding the weight of subsequent agreements and subsequent practice as a means of interpretation, there seemed to be a disparity between draft conclusion 9, paragraph 3, in which subsequent practice was described as a supplementary means of interpretation under article 32 of the Vienna Convention, and draft conclusions 3 and 4, which designated it as an authentic means of interpretation under article 31, paragraph 1 (b), of the Vienna Convention. That gave the impression that there were two different and unrelated categories of subsequent practice, an impression that might be dispelled by incorporating into the text of draft conclusion 9 some of the explanations contained in the commentary.

44. Similarly, her delegation took a nuanced view of the legal effect of silence. While the Commission, in draft conclusion 10, paragraph 2, stated that silence might constitute acceptance of subsequent practice when the circumstances called for some reaction, the viability of that statement depended on whether or not the means for becoming aware of a subsequent practice were available to the parties to a treaty. Hence the acts constituting subsequent practice under article 31 of the Vienna Convention needed to be sufficiently well known for parties to be able to become aware of the practice and to react to it.

45. Lastly, her delegation endorsed the formulation of draft conclusion 12, paragraph 1, by means of which the Commission indicated that the practice of an international organization could be used to interpret its constituent instrument. However, Morocco took the view that the practice must be exclusively that of States that could be expected to be conversant with and to have accepted the constituent instrument, and that the acts constituting the practice must be in no way incompatible with that instrument.

46. **Mr. Botto** (Monaco) said that his delegation welcomed the Commission's decision to include the item "Sea-level rise in relation to international law" in its long-term programme of work. Annex B to the Commission's report raised interesting points under the three main categories of issues that had been identified. Given the inherent threats and legal issues arising from sea-level rise, for all States and in particular for low-lying coastal States and small island developing States, his delegation supported the call for the Commission to include the item in its current programme of work and to consider it as soon as possible.

47. **Archbishop Auza** (Observer for the Holy See) said that as the Commission had warned in its report, more than 70 States – in other words, more than one third of the members of the international community – were, or were likely to be, directly affected by sea-level rise. Many other States were likely to be affected indirectly, not only by land loss, but also by the displacement of peoples and by the loss of natural resources. The global rise in sea-level was thus a major challenge which required a global response.

48. Addressing such a complex reality demanded an integrated ethical approach. Attention could not be given to marine and coastal ecosystems without considering the men and women who relied on them, since the human and the natural environment flourished or deteriorated together. In his encyclical letter *Laudato Si'*, Pope Francis had underscored the need for an integral ecology, one which clearly respected the human and social dimensions of nature. For example, environmental degradation could not be adequately combated without attending to causes related to human and social degradation.

49. An ethical approach to the challenges posed by sea-level rise must also respect the rights and needs of future generations. As Pope Francis had stated, intergenerational solidarity was not optional; it was rather a basic question of justice, since the world also belonged to following generations. While care for humankind's common home benefited everyone, it was also a gift to future generations, sparing them from paying the price of environmental deterioration and ensuring that they were able to enjoy the world's beauty, wonder and fullness.

50. Building on that ethical approach, the Holy See welcomed the Commission's decision to include the topic "Sea-level rise in relation to international law" in its long-term programme of work. It was particularly grateful to those members of the Commission who had mapped the legal challenges posed by sea-level rise in the areas of the law of the sea, statehood, human rights and human migration. Since the humanitarian repercussions of sea-level rise were particularly pressing, however, his delegation urged the Commission to move the question of the legal protection of persons displaced internally or that migrated to its current programme of work, with a view to studying it with the urgency that it deserved.

51. Such a study should not be just an academic exercise but rather a pointed effort towards the progressive development of international law in order to respond to the ever-growing humanitarian needs of populations threatened by sea-level rise. The attention given by the Commission to that question would fill a lacuna in current international law and would better prepare those States and communities directly concerned, as well as the international community as a whole, to meet the challenges that faced them.

52. **Ms. Requena** (Observer for the Council of Europe), referring to the specific issues on which comments would be of particular interest to the Commission, said that her delegation welcomed the progress made on the topic of succession of States in respect of State responsibility. The matter was of particular importance for the Council of Europe, in view of the enlargement of its membership following the numerous cases of succession of States in central and eastern Europe in the 1990s and the subsequent legal consequences.

53. For a pilot project of the Council of Europe on State practice regarding State succession and issues of recognition, carried out under the aegis of the Committee of Legal Advisers on Public International Law (CAHDI), 16 member States of the Council of Europe had submitted national reports covering official documents and statements made by all three branches of State power. The detailed study published on the basis of that project could be of interest for the work of the Commission.

54. Turning to subsequent agreements and subsequent practice in relation to the interpretation of treaties, she said that the Special Rapporteur's fifth report was of particular importance to the Council of Europe, which had many expert treaty bodies. Her delegation welcomed the fact that, in the commentaries to several of the draft conclusions adopted on second reading, the Commission had referred to the interpretation of the European Convention on Human Rights and related case law of the European Court of Human Rights. For example, as mentioned in paragraph (27) of the commentary to draft conclusion 4, the European Court of Human Rights had held in *Loizidou v. Turkey* that its interpretation had been confirmed by subsequent practice of the Contracting Parties, denoting practically universal agreement amongst those Contracting Parties, and it had relied on subsequent practice of the parties by referring to national legislation and domestic administrative practice as a means of interpretation. With regard to paragraph (20) of the commentary to draft conclusion 5, her delegation agreed that mere social practice was not sufficient to constitute relevant subsequent practice, although it might be relevant when assessing the subsequent practice of the parties in the application of a treaty. However, the case law of the European Court of Human Rights, which originated in State practice, also influenced State practice and could

therefore influence the subsequent practice of parties to a treaty. Such had been the case, for example, in relation to the rights of homosexuals and of children born out of wedlock.

55. Draft conclusion 11 (Decisions adopted within the framework of a conference of States parties), was of great relevance for the interpretation of treaties. The Council of Europe had extensive experience in that domain, as it organized numerous conferences of State parties under many of its 223 conventions.

56. Concerning draft conclusion 13 (Pronouncements of expert treaty bodies), her delegation concurred with the role ascribed by the Commission to such bodies. The Council of Europe had long-standing practice with convention-based monitoring bodies whose members served in a personal capacity and which had made a significant contribution to the interpretation of treaties. In addition, the European Court of Human Rights had used and continued to use the conclusions and recommendations of independent human rights monitoring mechanisms in its case law.

57. With respect to the identification of customary international law, her delegation was grateful to the Special Rapporteur for his outstanding work and for his continuous and close cooperation with the Council of Europe. The 16 draft conclusions adopted on second reading reflected the approach adopted by States, as well as by international courts and organizations. The subject area was certainly of great interest to the Council of Europe and CAHDI.

58. Concerning draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), her delegation concurred with the Commission that the practice developed within the framework of international organizations could be useful in the identification of customary law. For example, the Declaration on Jurisdictional Immunities of State-owned Cultural Property, which had prepared by CAHDI in 2013, in support of the recognition of the customary nature of certain provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, had been signed by the Ministers for Foreign Affairs of 20 States to date.

59. With regard to draft conclusion 13, which addressed the role of decisions of courts and tribunals, including regional human rights courts, in the identification of rules of customary international law, it should be noted that the case law of the European Court of Human Rights contained references to existing norms of customary international law. A 2010 decision, for example, had cited the prohibition of the use of chemical weapons as a norm of customary international law.

60. Her delegation welcomed the memorandum prepared by the Secretariat on the topic (A/CN.4/710), and in particular, the references to the work of CAHDI, including its publication entitled "*State Practice regarding State Immunities*". The Council of Europe supported the suggestions in the memorandum that cooperation could be fostered between the Commission and other bodies, including CAHDI, and that States could be encouraged to participate in regional efforts for the progressive development and codification of international law.

61. **Mr. Bawazir** (Indonesia) said that his delegation appreciated the valuable interaction between the Committee and the Commission that had taken place earlier that year in New York during the Commission's seventieth session. Speaking on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that the Commission's impressive work could make a constructive contribution to future work on treaty interpretation, while the detailed analysis contained in the commentary would serve as useful guidance for Member States. Indonesia welcomed the fact that in draft conclusion 5, judicial conduct was included as subsequent practice. The role of the judiciary, which his delegation understood as referring to domestic courts, in the interpretation and application of law was essential, being distinct from the practice of other State organs, which were mostly political in nature. Moreover, the output of domestic courts was widely accepted and implemented by all parties at the national level.

62. On draft conclusion 8, his delegation was of the view that caution must be exercised in reaching the conclusion that the meaning of a treaty was capable of evolving over time, as there was no standard for such an interpretation and it might undermine the general rule of interpretation as stated in article 31 of the Vienna Convention. Fortunately, the commentary extensively explained that the draft conclusion should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaties in general.

63. With regard to the topic "Identification of customary international law", the draft conclusions and commentaries thereto adopted on second reading were a very detailed and comprehensive product that would contribute to identifying the existence or formation of customary international law. His delegation supported the inclusion of the persistent objector rule in draft conclusion 15 and appreciated the comprehensive and

balanced explanations provided in the commentary. As mentioned therein, important aspects of that rule were the timeliness of the objection and the fact that it must be communicated internationally.

64. Turning to the topic of sea-level rise in relation to international law, he said that climate change, especially the risks associated with rising sea levels, placed increasing pressure on archipelagic and island States like Indonesia. Oceans and seas constituted a much larger geographical area for such States than their inland territory, which meant that their level of dependence on them was higher than that of other countries. Indonesia had felt the impact of sea-level rise, which had now become a common concern and a matter of survival for many States. That was the main reason why Indonesia was organizing a ministerial-level meeting of archipelagic and island States which shared common geographical characteristics, to discuss and find solutions to the impact of climate change. It supported the inclusion of the topic in the Commission's long-term programme of work but recommended that it be approached with caution because of its sensitivity, particularly in relation to the issues of borders and delimitation. Moreover, the deliberations must not undermine the existing regime under the United Nations Convention on the Law of the Sea.

65. With regard to the topic of universal criminal jurisdiction, Indonesia reiterated its position that ending impunity and denying safe haven to individuals who committed heinous crimes was the international community's responsibility. However, only a few countries had established universal criminal jurisdiction in their domestic law or had cases involving application of that principle; furthermore, existing practice revealed differences in the scope and list of crimes. Indonesia was therefore of the view that it was premature to bring the issue to the Commission for discussion.

66. **Ms. Goriatcheva** (Observer for the Permanent Court of Arbitration) said that the topics before the Sixth Committee included several issues in which the Permanent Court of Arbitration was closely involved. In 2018, the International Bureau of the Court had provided registry support for 174 arbitration and conciliation proceedings involving, directly or indirectly, more than 50 States. The proceedings ranged from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and other bilateral and multilateral treaties to investor-State disputes under investment treaties and contract cases involving State entities or intergovernmental organizations. While some proceedings were confidential, others were public and resulted in arbitral awards that might be of interest to the Commission and the Sixth Committee.

67. With regard to the topic of sea-level rise in relation to international law, which the Commission had recently included in its long-term programme of work, a tribunal of the Permanent Court of Arbitration, in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, had addressed the relevance of sea-level rise to the delimitation of maritime boundaries. In that case, the tribunal had found that while maritime features used in the process of delimitation might be affected by sea-level rise, the boundary itself, identified by geodetic coordinates, would remain fixed. That made it clear that maritime boundaries, just like land boundaries, must be stable and definitive in order to ensure a peaceful relationship between the States concerned in the long term, particularly when the exploration and exploitation of the resources of the continental shelf were at stake. It should, however, be noted that the tribunal made no findings regarding the possible ambulatory nature of baselines and outer limits of maritime zones, which would involve separate considerations.

68. Another case conducted under the auspices of the Permanent Court of Arbitration, the *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, raised questions regarding the legal effects of sea-level rise on the classification of maritime features and the corresponding maritime entitlements of coastal States. Bearing in mind that that the United Nations Convention on the Law of the Sea provided that rocks which could not sustain human habitation or economic life of their own should have no exclusive economic zone or continental shelf, the tribunal in that case had considered that human habitation should be assessed by reference to the "natural capacity" of the maritime feature rather than to any obstacles to habitation generated by humankind, such as war, pollution and environmental harm. Those observations gave rise to the question of whether the gradual submersion of maritime features as a result of climate change ought to be viewed as a natural or human-made change; that question would have consequences for the status of the feature and its ability to give rise to maritime entitlements. Should the Commission take up the topic of sea-level rise in relation to international law, it might wish to consider that question.

69. With regard to the topic of general principles of law, the Commission had already identified as relevant to the topic the *Russian Claim for Indemnities (Russia v. Turkey)* arbitration of 1912 and *The Pious Fund of the Californias (The United States of America v. the United Mexican States)* arbitration of 1902, both of them

conducted under the auspices of the Permanent Court of Arbitration. However, there were many more recent cases, both in the inter-State and the investor-State context, that had also dealt with general principles of law. Information about those cases could be found in the full version of her statement, available on the PaperSmart portal.

70. Turning to the topic of protection of the atmosphere, she said that the Permanent Court of Arbitration welcomed the inclusion of draft guideline 12 (Dispute settlement), which highlighted the importance of the peaceful resolution of disputes relating to the protection of the atmosphere and referred to their distinctive, fact-intensive and science-dependent character. The recommendation contained in the draft guideline, that due consideration be given to the use of technical and scientific experts, conformed to her organization's own experience with environmental disputes: experts were often needed. They could be appointed by the parties to the disputes or by the arbitrators or conciliators. For example, in the *South China Sea Arbitration*, which had concerned allegations of harm to the marine environment, the tribunal had appointed an expert hydrographer, three experts on coral reef systems and an expert on navigational safety issues. Technical and scientific experts could also be selected to sit on tribunals as arbitrators or conciliators; the Indus Waters Treaty 1960, under which the arbitral tribunal for the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* had been constituted, provided that at least one member of the tribunal should be a high-ranking engineer. The importance of technical and scientific expertise had been recognized in the Court's specialized rules for the arbitration and conciliation of environmental disputes. The Court maintained a specialized list of arbitrators considered to have expertise in that area and a list of scientific and technical experts who could be appointed as expert witnesses.

71. In addition, the distinctive character of environmental disputes might also call for consideration of other features of dispute settlement. For example, the approach to be taken to evidence might require particular consideration. An illustration of such possible evidentiary difficulties was provided by the *Peter A. Allard (Canada) v. Government of Barbados* investor-State arbitration, in which the investor had alleged that certain actions and inactions of the State had caused environmental harm to a wildlife sanctuary. The tribunal, noting in particular the dearth of information regarding the initial ecological state of the sanctuary, had found that neither the alleged harm nor its causal link to the conduct of the State had been established. In the *Indus Waters Kishenganga Arbitration*, the tribunal had recognized that a degree of uncertainty was inherent in any attempt to predict environmental responses to changing conditions. In such situations, consideration might be given to the use of site visits for evidence-gathering purposes. In the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, the tribunal had conducted a site visit to observe coastal and maritime features potentially affected by climate change and had prepared a video and photographic record of the visit, which the parties could submit into the record as evidence. Site visits had also taken place in investor-State arbitrations such as *1. Chevron Corporation and 2. Texaco Petroleum Company v. The Republic of Ecuador* (case No. 2009-23).

72. In environmental cases, non-State actors and non-parties might have a stake in the outcome of the dispute, something that raised questions of transparency and third-party participation in proceedings. In the *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, which had concerned the arrest of a Greenpeace vessel following a "Save the Arctic" protest action, the tribunal had issued regular press releases during the proceedings and at the end of the case had provided for the publication of documents such as pleadings and transcripts.

73. The recent case law of the Permanent Court of Arbitration thus lent support to draft guideline 12 while also pointing to additional considerations arising from the distinctive nature of disputes related to the environment generally and protection of the atmosphere in particular. Should the Commission wish to go further into such considerations, the Court would be pleased to provide further information.

74. **Mr. Harland** (Observer for the International Committee of the Red Cross) said that his organization commended the Commission for the adoption, on second reading, of 13 draft conclusions, together with commentaries, on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The International Committee of the Red Cross (ICRC) was undertaking an ambitious project to update the commentaries to the Geneva Conventions of 1949 and the 1977 Additional Protocols thereto, with a view to providing up-to-date legal interpretations based on the latest practice of States, case law, academic writing and ICRC experience. The Commission's work on the use of subsequent practice in treaty interpretation had greatly assisted ICRC in the development and application of its own methodology for the interpretation of the Geneva Conventions, and there were parallels in the approaches adopted by the two bodies.

75. Turning to the topic of identification of customary international law, ICRC congratulated the Commission for its adoption on second reading of the 16 draft conclusions on that topic, and the commentaries thereto. The way in which the existence and content of rules of customary international law were to be determined was of great importance to ICRC. The main treaties in the field of customary international humanitarian law enjoyed widespread – and, in the case of the Geneva Conventions, universal – support, and customary international humanitarian law remained vital in the regulation of many armed conflicts. In 2005, ICRC had published a study on customary international humanitarian law, for which it had been required to consider many of the questions the Commission was now addressing in the draft conclusions and commentaries on identification of customary international law. Again, there were parallels between the ICRC study and the Commission's approach.

76. On protection of the environment in relation to armed conflicts, he commended the Commission for its continued commitment to the topic, which was, by its nature, of great interest to ICRC. It was important to ensure that the Commission's work remained in line with existing rules of international humanitarian law. At the same time, that work could also help to promote the dissemination of the existing rules, which together with increased implementation and enforcement, was needed to ensure protection of the natural environment during armed conflicts. ICRC would continue to contribute to the work of the Special Rapporteur, including on issues related to the protection of the natural environment during non-international armed conflicts and the role of non-State armed groups.

77. **Mr. Nolte** (Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"), responding to comments made during the Sixth Committee's final debate on the topic, said he was pleased that so many States had presented their overall assessment of the Commission's work and that its outcome had been so favourably received. He wished to thank all those who had contributed to and supported the work during the past six years – a fairly short time for the completion of such a project –and was grateful to Member States for all their comments and observations, which had helped to improve the work and make the outcome generally acceptable. He hoped that Member States would now follow the Commission's recommendation regarding the outcome of its work on the topic and that all those who were called upon to apply treaties would find that outcome useful.

78. **Sir Michael Wood** (Special Rapporteur for the topic "Identification of customary international law"), responding to comments made during the discussion, said that he wished to thank all members of the Sixth Committee for their thoughtful and constructive comments and observations over the years, which had informed the Commission's work on identification of customary international law. He was grateful to all past and present members of the Commission for their contributions, and to the Codification Division for its outstanding support. Work on the topic had been a collegial effort, in which the interpreters, the translators and the précis-writers had also participated, continuing to do their essential and meticulous work despite resource constraints.

79. The aim of the draft conclusions was to offer clear guidance without being overly prescriptive. He hoped that they would prove helpful to States and to all who were called upon to identify rules of customary international law.

80. **The Chair** invited the Committee to begin its consideration of chapters VI, VII and VIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

81. **Mr. Valencia-Ospina** (Chair of the International Law Commission), introducing chapters VI, VII and VII of the Commission's report on the work of its seventieth session, and referring to chapter VI, on the topic "Protection of the atmosphere", said that in 2018 the Commission had had before it the Special Rapporteur's fifth report (A/CN.4/711), and had adopted on first reading a draft preamble and a set of 12 draft guidelines, together with commentaries. Both human and natural environments could be adversely affected by certain changes in the condition of the atmosphere, caused primarily by the introduction of harmful substances that caused transboundary air pollution, ozone depletion and changes in atmospheric conditions giving rise to climate change. In addressing the topic, the Commission sought to assist the international community as it dealt with critical questions relating to transboundary and global protection of the atmosphere.

82. Of the 12 draft guidelines now before the Sixth Committee, 9 had been provisionally adopted at previous sessions. The draft preamble, which remained as previously adopted, consisted of 8 paragraphs and provided the contextual framework in which the draft guidelines had been developed and were to be understood. Draft guidelines 1 and 2 were introductory and definitional in nature. Draft guideline 1 (Use of terms), remained as previously adopted. Draft guideline 2 (Scope of the guidelines), consisted of four

paragraphs. Paragraph 1 provided that the draft guidelines concerned the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The term "concern" had been used to replace previous alternative formulations. No changes had been made to paragraphs 2 to 4.

83. Draft guidelines 3 to 9 formed the core of the draft guidelines and remained substantially as previously adopted. In draft guideline 3, the Commission set out the obligation to protect the atmosphere, which was central to the draft guidelines. Draft guidelines 4, 5 and 6 addressed, respectively, the obligation to ensure that an environmental impact assessment was undertaken, the sustainable utilization of the atmosphere and the equitable and reasonable use of the atmosphere, all of which flowed from draft guideline 3. Draft guideline 7 covered intentional large-scale modification of the atmosphere, in other words, activities whose very purpose was to alter atmospheric conditions. Draft guideline 8 addressed international cooperation among States, as well as between States and international organizations. In draft guideline 9 (Interrelationship among relevant rules), the Commission sought to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law.

84. Draft guidelines 10 to 12, which the Commission had adopted at its most recent session, addressed, respectively, questions of implementation, compliance and dispute settlement. Draft guideline 10 dealt with the implementation of obligations under international law relating to the protection of the atmosphere and referred to measures that States might take to make treaty provisions effective at the national level, including through implementation in their national laws. Draft guideline 10, paragraph 1, addressed existing obligations under international law, including those referred to in other draft guidelines, namely, the obligation to protect the atmosphere (draft guideline 3), the obligation to ensure that an environmental impact assessment was undertaken (draft guideline 4) and the obligation to cooperate (draft guideline 8). Paragraph 2 provided that States should endeavour to give effect to the recommendations contained in the draft guidelines, in other words, the parts of the draft guidelines where the word "should" was used.

85. Draft guideline 11, which complemented draft guideline 10 on national implementation, referred to compliance at the international level. The term "compliance" was used to refer to mechanisms or procedures at the level of international law that verified whether States in fact adhered to the obligations of an agreement or other rules of international law. Paragraph 1 reflected the principle *pacta sunt servanda* and was general in nature. Paragraph 2 dealt with the facilitative or enforcement procedures that might be used by compliance mechanisms, as provided for under existing agreements to which States were parties, and which might be used in differing circumstances and contexts as appropriate. Paragraph 2 (a) provided that, in cases of non-compliance, facilitative procedures might include providing "assistance" to States, since some States might be willing to comply but were unable to do so for lack of capacity. In contrast, paragraph 2 (b) referred to enforcement procedures, which aimed to achieve compliance by imposing a penalty on the State concerned and should be adopted only for the purpose of leading that State to return to compliance.

86. Draft guideline 12 concerned dispute settlement between States. Paragraph 1 thereof described the general obligation of States to settle their disputes by peaceful means. In paragraph 2, it was recognized that disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation could be "fact-intensive" and "science-dependent". It therefore emphasized the use of technical and scientific experts in the settlement of inter-State disputes, whether by judicial or other means.

87. The Commission had decided to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

88. Chapter VII of the Commission's report concerned the topic "Provisional application of treaties". In 2018, the Commission had had before it the fifth report of the Special Rapporteur (A/CN.4/718), as well as an addendum providing a bibliography on the topic (A/CN.4/718/Add.1) and a memorandum by the Secretariat (A/CN.4/707) reviewing State practice in respect of bilateral and multilateral treaties, deposited or registered in the last 20 years with the Secretary-General, that provided for provisional application, including treaty actions related thereto.

89. In his fifth report, the Special Rapporteur had continued his analysis of views expressed by Member States, provided additional information on the practice of international organizations and addressed the topics of termination or suspension of the provisional application of a treaty as a consequence of its breach, formulation of reservations and amendments. The Special Rapporteur had also proposed eight draft model clauses on different aspects of provisional application, drawn from identified State practice.

90. At its most recent session, the Commission had adopted, on first reading, a complete set of 12 draft guidelines, as the draft Guide to Provisional Application of Treaties, together with commentaries thereto. As indicated in the general commentary, the objective of the Guide was to direct States, international organizations and other users to answers that were consistent with existing rules and most appropriate for contemporary practice.

91. Draft guidelines 1 to 11 had been provisionally adopted by the Commission in 2017 and had been renumbered as a result of the adoption of further provisions in 2018. Based on the Special Rapporteur's proposals, the Commission had adopted a new draft guideline 7 on reservations and a new draft guideline 9 on termination and suspension of provisional application, which incorporated the former draft guideline 8 on termination. The Commission had also made substantive changes to draft guideline 6 on the legal effect of provisional application.

92. No changes had been made to draft guidelines 1 to 5, as provisionally adopted in 2017. Draft guidelines 1 and 2 concerned, respectively, the scope and the purpose of the draft guidelines. Draft guideline 2 stated that the guidelines were based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

93. Draft guideline 3 stated the general rule on the provisional application of treaties, which was that a treaty or a part of a treaty might be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provided, or if in some other manner it had been so agreed. Draft guideline 4 dealt with forms of agreement on the basis of which a treaty, or a part of a treaty, could be provisionally applied, in addition to when the treaty itself so provided. The structure of the provision followed the sequence of article 25 of the 1969 and 1986 Vienna Conventions. Draft guideline 5 (Commencement of provisional application) was modelled on article 24, paragraph 1, of those two Conventions.

94. Draft guideline 6 (Legal effect of provisional application) had been modified to address comments made by Member States and members of the Commission, indicating that two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that was being provisionally applied. Draft guideline 6 therefore provided that the provisional application of a treaty or a part of a treaty produced a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provided otherwise or it was otherwise agreed. The reference to "a legally binding obligation" was intended to add more precision in the depiction of the legal effect of provisional application.

95. Draft guideline 7, provisionally adopted in 2018, dealt with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. As indicated in the commentary, owing to the relative lack of practice on the matter, the Commission was only at the initial stage of considering the question. In paragraph 1 of the draft guideline, the Commission stated that, in accordance with the relevant rules of the Vienna Convention, applied mutatis mutandis, a State might, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty. Some rules of the 1969 Vienna Convention applicable to reservations were indeed relevant in case of provisional application. The formulation of the paragraph was neutral on the question as to whether reservations excluded or modified the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such. Paragraph 2 provided for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1.

96. Draft guideline 8, which had been adopted in 2017 as draft guideline 7, had not been modified. It dealt with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that was being provisionally applied.

97. In draft guideline 9 on the termination and suspension of provisional application, the Commission had expanded on the provision adopted in 2017 as draft guideline 8 (Termination upon notification of intention not to become a party), by including two new paragraphs that covered additional scenarios. Paragraph 1 addressed termination of provisional application upon entry into force, which was the most frequent way in which provisional application was terminated. Paragraph 2 covered cases where the State or international organization provisionally applying a treaty or a part of a treaty notified the other States or international organizations between which the treaty or a part of a treaty was being provisionally applied of its

intention not to become a party to the treaty. It followed closely the formulation of article 25, paragraph 2, of the 1969 and 1986 Vienna Conventions. Paragraph 3 confirmed that draft guideline 9 was without prejudice to the application, mutatis mutandis, of the relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension.

98. The texts of draft guidelines 10 to 12 remained unchanged from the draft guidelines adopted the previous year; only their titles had been slightly modified to avoid translation issues. Draft guideline 10 dealt with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Draft guideline 11 addressed the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. Draft guideline 12 related to the limitations on States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty.

99. In accordance with articles 16 to 21 of its statute, the Commission had decided to transmit the draft guidelines to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

100. Because of a lack of time, the Commission had been unable to conclude its consideration of the draft model clauses proposed by the Special Rapporteur, the text of which was reproduced in footnote 996 of the Commission's report. The Commission intended to resume such consideration at its seventy-first session in 2019, to allow States and international organizations to assess the draft model clauses before the second reading of the draft guidelines took place during its seventy-second session in 2020.

101. Turning to chapter VIII of the report, on the topic "Peremptory norms of general international law (*jus cogens*)", he said that the Commission had considered the third report of the Special Rapporteur (A/CN.4/714 and A/CN.4/714/Corr.1) on the consequences and legal effects of peremptory norms, in which 13 draft conclusions had been proposed. The Commission's debate had focused on the specific issues addressed in each of the draft conclusions; various opinions had been expressed and proposals had been made. The draft conclusions had been referred to the Drafting Committee on the understanding that draft conclusions 22 and 23 would be dealt with by means of a "without prejudice" clause. The draft conclusions were still under consideration by the Drafting Committee. Its Chair had presented two interim reports to the Commission on the progress made.

102. The Commission would appreciate being provided by States with information relating to their practice on the nature of *jus cogens*, the criteria for its formation and the consequences flowing therefrom, as expressed in official statements, including before legislatures, courts and international organizations; and decisions of national and regional courts and tribunals, including quasi-judicial bodies.

103. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Armenia, the Republic of Moldova and Ukraine on the topic "Protection of the atmosphere", said that the European Union appreciated the work that the Special Rapporteur for the topic had undertaken to date and noted the Commission's adoption of all the draft guidelines, and the commentaries thereto, on first reading. It was, however, disappointing that the Commission had not included in the preamble references to specific agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Long-range Transboundary Air Pollution, including the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, and the need for its ratification, and resolution 3/8 of the United Nations Environment Assembly regarding air pollution, as his delegation had suggested. In that regard, the Commission should consider wording draft guideline 3 in such a way as to encourage States to join, ratify or implement multilateral environmental agreements, which would be consistent with the broad scope of the draft guidelines as set out in draft guideline 2.

104. In the preamble, the Commission referred to the protection of the atmosphere as a "pressing concern of the international community as a whole". The European Union suggested that the expression "common concern of humankind" be used instead, since that formulation was more established and was often used in international environmental law.

105. His delegation was pleased to note that in paragraph (9) of the commentary to draft guideline 7, the Commission expressly stated that the draft guideline did not seek either to authorize or to prohibit geo-engineering. However, the European Union

remained concerned about the possible environmental impact of geo-engineering and called on the Commission to consider new formulations to urge prudence, referring in particular to the precautionary principle. Although the European Union appreciated the Commission's effort to recognize various principles applicable to international relations in draft guideline 2, paragraph 2, it believed it necessary to address the intentional large-scale modification of the atmosphere with reference to the precautionary principle or by recourse to any other means of taking into account environmental concerns. The European Union proposed that draft guideline 7 be amended to read: "Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to a positive assessment by all potentially affected States Members of the United Nations, members of United Nations specialized agencies or regional economic integration organizations, following a multinational environmental impact assessment based on the precautionary principle, public consultations and any other applicable rules of international law."

106. With regard to draft guideline 9, paragraph 3, the European Union reiterated that poorer parts of the national population should also be mentioned under vulnerable groups of people, since, even in developed countries, people in poorer neighbourhoods tended to be more affected by air pollution owing to their proximity to busy roads, their lifestyles or their limited access to health care. Recent developments within the United Nations in the area of human rights and environmental rights and the initiative to launch a global pact for the environment were also likely to be relevant for the Commission's work on the topic.

107. The European Union welcomed the inclusion of draft guideline 10 (Implementation). However, it noted that the Commission's recommendations contributed to the implementation of existing obligations under international law, such as those arising under the Paris Agreement. The wording of paragraph 2 should therefore encourage States to express their political commitment to giving effect to the recommendations contained in the draft guidelines.

108. Lastly, the European Union welcomed the addition of draft guideline 12 (Dispute settlement) and fully endorsed the reaffirmation of the principle of the peaceful settlement of disputes in the context of the protection of the atmosphere from atmospheric pollution and atmospheric degradation. It also appreciated the reference to the scientific dimension of environmental matters. However, it urged the Commission to consider incorporating a science-based policy as a general principle in the draft directives.

109. Speaking also on behalf of the candidate countries Albania, Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, the Republic of Moldova and Ukraine on the topic "Provisional application of treaties", he said that the European Union appreciated the work of the Special Rapporteur, which had enabled the Commission to adopt on first reading the whole set of draft guidelines, and the commentaries thereto, as a draft Guide to Provisional Application of Treaties. His delegation found the format of the proposed outcome to be appropriate, as it corresponded to the inherent need for flexibility. It noted that the Guide was expected to include draft model clauses reflecting best practice with regard to the provisional application of both bilateral and multilateral treaties. While *prima facie* such clauses would appear to be of limited interest, the European Union was open to considering them once the Commission had finalized its work on their possible content.

110. The European Union had consistently advocated studying the practice of States and international organizations on provisional application, as it could help to provide guidance on the many questions unanswered by article 25 of the Vienna Convention. It therefore noted with appreciation that the Commission had embarked on an extensive study of such practice and that the Guide was intended to provide guidance not only on the law but also on practice regarding provisional application of treaties, something that greatly increased its authoritative value and practical usefulness.

111. The European Union welcomed the fact that the scope *ratione personae* of the draft guidelines was not limited to States but also included international organizations. In that regard, the European Union was actively contributing to shaping practice in the field of provisional application of treaties, as had been recognized in the Special Rapporteur's reports and in the commentaries to the draft guidelines, where various references were made to the treaty practice of the European Union.

112. With respect to draft guideline 3, he said that, while the European Union fully concurred that a treaty or a part of a treaty could be provisionally applied if the treaty itself so provided, what still remained unclear was what would be the source of the obligation to provisionally apply such a treaty, or part of it, if consent to be bound by the clause providing for provisional application was not given upon signature. The Commission should clarify whether it considered that, if there was a provisional application clause, agreement to

provisional application was always given upon signature, and if so, what the basis in international treaty or customary law for such a rule was. For example, under European Union law, the European Union could agree to provisional application in accordance with the procedure provided for in article 218, paragraph 5, of the Treaty on the Functioning of the European Union, although the consent to be bound by the treaty was only given after the procedure of article 218, paragraph 6, had been completed. Clarifying the matter would contribute to legal certainty and assist parties when deciding whether to provisionally apply a treaty and what the appropriate form of their agreement should be. Such clarification would also be helpful regarding the matter of the commencement of provisional application, to which the Commission had referred, in draft guideline 5, using the term "takes effect".

113. A closely linked matter was that of unilateral declarations as a source of an obligation to provisionally apply a treaty. The Commission recognized that it was possible, although according to it the practice was "quite exceptional", that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of it when the treaty was silent or when it had not been otherwise agreed. However, it was the Commission's view that the declaration must be verifiably accepted by the other States or international organizations concerned, as opposed to mere non-objection, and that, while there was a degree of flexibility as to the form of acceptance, that acceptance must always be expressed. In that regard, the European Union wished to draw attention to a judgment of the European Court of Justice, in which the Court had held that a declaration from the European Union providing that it would issue fishing authorizations in its exclusive economic zone to a limited number of fishing vessels flying the flag of the Bolivarian Republic of Venezuela, subject to certain conditions, must be regarded as an offer made by the European Union, which the Bolivarian Republic of Venezuela had accepted by adopting a certain course of action. The Court had held that such concurrence of wills constituted an agreement between the two parties which set out reciprocal rights and obligations. It had thus recognized that express acceptance was not a requirement for rights and obligations to be created for the parties, but that acceptance could take different forms, such as that of relevant conduct. Furthermore, there was at least one example, cited in footnote 1021 of the Commission's report, of when a unilateral declaration had been used but there had been no express acceptance by the other parties. For those reasons, the European Union invited the Commission to elaborate in the commentaries as to why the regime of unilateral acts of States could not be applied with respect to the provisional application of treaties, and why acceptance, and even express acceptance, was always required. That clarification would help to enhance the integrity and coherence of the international legal order.

114. The European Union encouraged the Commission to further study the question of reservations in relation to provisional application. It would benefit all those using the Guide if the commentary to draft guideline 7 clarified the effects of such reservations, including whether the legal effects of a reservation aimed at excluding or modifying the legal effects of certain provisions, which were provisionally applied, ended with the termination of the provisional application or could continue even after the treaty entered into force. In the view of the European Union, their effect would end with the termination of the provisional application.

115. Finally, the European Union noted with appreciation that draft guideline 9, paragraph 3, referred to the application, mutatis mutandis, of the relevant rules set forth in part V, section 3, of the Vienna Convention concerning termination and suspension of treaties. Exclusive reliance on the regime for termination of provisional application provided for in article 25, paragraph 2, of the Vienna Convention, could lead to disproportionate outcomes. The European Union was therefore pleased that the Commission had recognized that there might be a number of scenarios not covered by article 25, paragraph 2, and had thus confirmed that provisions pertaining to termination and suspension in the Vienna Convention could be applicable to a provisionally applied treaty.

116. **Ms. Suvanto** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and referring to the topic "Protection of the atmosphere", said that those delegations welcomed the complete set of draft guidelines adopted by the Commission on first reading. They commended the Special Rapporteur and acknowledged the challenges he faced in maintaining the delicate balance of his work.

117. The Nordic countries welcomed the inclusion of draft guideline 7, which was closely interrelated with draft guidelines 3 to 6, and appreciated the emphasis on prudence and caution before undertaking any activities aimed at intentional large-scale modification of the atmosphere. The precautionary principle also contained the obligation to refrain from an activity if the consequences and effects on the environment were unclear or could not be assessed.

118. International environmental law was an area of law that was constantly evolving and of growing importance. The draft guidelines built on and did not

duplicate existing international law. In that connection, the Nordic countries encouraged the Commission, in finalizing its work, to take account of the experiences gained since the entry into force of the Paris Agreement under the United Nations Framework Convention on Climate Change on 4 November 2016.

119. In its report, the Commission had explained why it had not used the concept of the common concern of humankind and had opted instead for the expression "a pressing concern of the international community as a whole." Although the Commission had understandably wanted to use a factual descriptor rather than a term with legal implications, the Paris Agreement clearly referred to climate change as a "common concern of humankind", and other international instruments also used the concept. The Nordic countries therefore encouraged the Commission to elaborate on the implications of the legal concept of the "common concern of humankind" in the context of environmental law on the protection of the atmosphere.

120. Turning to the topic of provisional application of treaties, she said that the Nordic countries were pleased about the progress made at the Commission's recent session, with the adoption on first reading of the draft Guide to Provisional Application of Treaties. They welcomed the Special Rapporteur's proposal regarding draft model clauses on provisional application, which they believed would be of practical assistance when formulating final provisions of treaties. A closer review of the relationship between the draft model clauses and the draft guidelines might be called for, however, taking into account their partly overlapping nature.

121. The revised wording of draft guideline 6 (Legal effect of provisional application) took into account the distinction made in the Vienna Convention between provisional application and entry into force. The Nordic countries agreed with that wording and with the fact that it allowed for the termination and suspension of provisional application in line with part V, section 3, of the Convention, mutatis mutandis. The Nordic countries also welcomed the Commission's work on the use of reservations in relation to provisional application. Any such reservation should be made in accordance with the relevant rules of the Vienna Convention. The possibility of making a reservation to exclude or modify the legal effect produced by the provisional application of a treaty might increase the willingness to apply the treaty provisionally among States that would make a reservation to the treaty when expressing consent to be bound. A review of the practical impact of draft guideline 7 might, however, be useful in the further work on the subject.

122. Although practice on termination and suspension of provisional application was scarce, the Nordic countries noted with interest draft guideline 9, paragraph 3, on termination and suspension, not only in the case of a material breach, but with a reference to the application, mutatis mutandis, of part V, section 3 of the Vienna Convention. That reference would guide future practice in the area and clarified the relationship between article 25 and part V, section 3, of the Convention. The specific reference to part V, section 3, also conformed to the principle of legal certainty.

123. Lastly, with regard to peremptory norms of general international law (*jus cogens*), a topic with a potentially significant impact on the understanding of international law as a legal system, the Nordic countries were concerned about the organization of work on the topic within the Commission, whereby the draft conclusions were to remain in the Drafting Committee until a full set of draft conclusions and commentaries had been completed. While that had already been done in relation to other topics, the method might hamper the exchange of views between the Commission and Member States. It would result in a very significant body of work being presented to the Commission and the Sixth Committee at the time of the first reading, which would make thorough analysis difficult. Especially with a topic of such significance and weight, the Nordic countries would like to have meaningful interaction with the Commission during the whole span of the work.

124. On substance, the Nordic countries continued to hold the view that the topic was best dealt with through a conceptual and analytical approach rather than with a view to elaborating a new normative framework for States. They appreciated the comments made by Commission members during the Commission's session and agreed with the focus on keeping the conclusions closely aligned with established and well-founded interpretations of the consequences and effects of *jus cogens* norms. There was relatively little practice on *jus cogens*, and they supported a cautious approach.

125. The Nordic countries welcomed the clear statement in draft conclusion 15, paragraph 3, that the persistent objector rule did not apply to *jus cogens* norms. The inclusion of draft conclusion 17 on binding resolutions of international organizations appeared well founded.

126. As to the Special Rapporteur's plans for future work on the topic, the Nordic countries reiterated their reservations regarding a list of *jus cogens* norms and remained unconvinced about the possibility of reconciling regional *jus cogens* with the notion of *jus cogens* as peremptory norms of general international law.

The meeting rose at 6 p.m.