Statement by Mr Borut Mahnič, Director-General,
Ministry of Foreign Affairs of the Republic of Slovenia

Agenda Item 78: Report of the International Law Commission on the work of its Sixty-sixth session

Chapter V: Protection of persons in the event of disasters, Chapter X: Identification of customary international law, Chapter XII: Provisional application of treaties

69th Session of the General Assembly
Sixth Committee

Mr Chairman,

Allow me first to congratulate you on your election as Chairman of this year's Sixth Committee session. On behalf of my delegation and on my own behalf, I would like to thank the Chairman of the Sixty-sixth session of the International Law Commission, Mr Kirill Gevorgian, and other Commission members, particularly the Special Rapporteurs, for investing their efforts, which is evident from the report under discussion.

My delegation is in full agreement with the statements of the EU; nevertheless, we would like to share with you some additional remarks in our national capacity.

Mr Chairman,

Slovenia commends the impressive progress made by the Commission and the Special Rapporteur, Mr Valencia Ospina, on Chapter V: Protection of persons in the event of disasters. As a result of the increased frequency of large-scale catastrophes and the need to provide rapid and coordinated humanitarian assistance, as well as taking into account those unfortunate cases when international assistance was not accepted, the international community has repeatedly recognized the urgent need to regulate this area in a comprehensive and contemporary manner.

This goal is also at the core of the work and efforts of the Commission, which adopted a set of 21 draft articles at its Sixty-sixth session. Upon the conclusion of the first reading of the draft articles, Slovenia would like to express its full support for their wording and

comments. The Commission succeeded in striking the proper balance between the protection of disaster victims and their human rights on the one hand, and the principles of state sovereignty and non-intervention on the other. This innovative and balanced approach needs to be preserved, since it is the only guarantee for the successful recognition of rules on disaster response by States, international organizations and non-governmental actors.

We believe that the draft articles when adopted should serve as a set of rules and principles on disaster response and gain global acceptance. Although the top-down approach to the development of a universal framework in this area has failed so far, we are aware that the Commission's work has a significant impact.

Firstly, the fundamental principles, rights and duties of the affected States and donors in the protection of disaster victims have so far not been included in any widely accepted binding or non-binding document. Secondly, through the involvement of States in commenting on the drafting procedure in the UN GA Sixth Committee, the Commission's work gains global credibility and acceptability. Lastly, the Commission has a clear mandate under its Statute to engage in the progressive development of international law, which is vital to establishing the rules and principles on the protection of persons in the event of disasters. We must not forget that the notion of humanity and the protection of human rights have recently gained prominence and value both in international law and the response of the international community and States.

The legal framework for disaster relief is one of the few areas of State and human activity which, although practiced for centuries, has not been comprehensively codified. In this vein, Slovenia continues to support the Commission's work on the "Protection of persons in the event of disasters".

Mr Chairman,

As to Chapter X: Identification of customary international law, we would like to commend the Special Rapporteur, Mr Michael Wood, for thoroughly analysing the topic in his second report. We would also like to thank the Drafting Committee for their work on the eight draft conclusions on this topic and to the members of the Commission for their

constructive deliberations. Although the draft conclusions were presented for information only, I would like to make some brief remarks.

The present report, focusing on the core of the topic, namely the two-element approach to identifying the rules of customary international law, highlighted the inherent complexity of the topic, ranging from the challenge of distinguishing manifestations of "a general practice" and "*opinio iuris*" to the intertwined nature of this topic with other areas of international law, such as the responsibility of States. Despite these challenges, the Special Rapporteur's work successfully continued with an approach to ensuring the practicality of the conclusions.

In this context, my delegation considers that, while the Special Rapporteur addressed the notions of "a general practice" and "*opinio iuris*" in a rather detailed manner, additional examination of the interplay of the two elements is necessary, including any relevance of the temporal order. Let me also recall our proposal that work on this topic should also include practical examples of the identification of rules of customary international law. Since the conclusions are intended for practitioners, including the domestic judiciary, it would be helpful to include examples of identification of already existing customary international rules in which various aspects of the topic could be demonstrated, including the dichotomy between the two elements, their manifestations and evaluation. In the same manner, we welcome the idea to compile information on digests and other publications containing relevant State practice.

Moving to the question of establishing the existence of "a general practice", we note the differences in views on whether the practice of international organisations should be taken into account when identifying the rules of customary international law. Given the increasing importance of international organisations, including in international law, Slovenia fully supports the view that their role regarding this topic should be fully addressed, without prejudice to the primacy of the practice of States in the formation of customary international law. This could also be relevant in the context of examining regional customary international law.

Furthermore, we note the discussion on draft conclusion 6 as submitted by the Special Rapporteur on the attribution of conduct; in this regard, we share the view expressed by several Commission members that the particular context of identifying customary

international law calls for a nuanced approach as regards the application of articles on the responsibility of States for internationally wrongful acts. We would encourage additional analysis on this important point. Namely, while we agree with the Special Rapporteur that "every act of State is potentially a legislative act", for the purposes of identifying customary international law, the hierarchy of state bodies as well as their mandates should be taken into account when evaluating the weight of State practice.

My delegation looks forward to the third report of the Special Rapporteur and would like to contribute to the discussion on this topic in the future.

Let me now address Chapter XII: Provisional application of treaties. We would like to commend Special Rapporteur Gómez-Robledo for his second report on the provisional application of treaties, in which he analysed the legal effects of this mechanism and identified some further issues to be addressed.

With regard to issues to be discussed further, we note that in his report, the Special Rapporteur did not consider, nor did he propose to consider, the provisional application as regulated by the Vienna Convention on Succession of States in Respect of Treaties. As stated in our speech to this Committee last year, we believe that it would be useful to additionally examine the *travaux préparatoires* of the Convention, including the related practice and doctrine, which would improve understanding of Article 25 of the Vienna Convention on the Law of Treaties and its implications in particular, and the comprehensive analysis of provisional application in general. Such an approach would also correspond with the method of proceeding in relation to, for example, reservations to treaties, which were also analysed in the context of the succession of States in relation to treaties. We are aware that there might be reasons for excluding this aspect of provisional application from consideration of this topic by the Commission; however, if so, these reasons should be explained.

More specifically, we would like to address the main issue under consideration this year, which is the legal effects of provisional application. The conclusion made by the Special Rapporteur on the basis of discussion in the Commission, which also appears to reflect his own opinion, was that "there had been general agreement that the basic premise […] was that […] the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State."

While we see no reason to withhold support for the above conclusion in principle, we (and some of the Commission members) understand it to be substantially the same as the conclusion of the Commission of 1966 in its comment on the draft article on provisional application, to which the Special Rapporteur also refers in his second report. However, the conclusion of the Commission of 1966 was made with regard to the "provisional entry into force," while the present conclusion refers to "provisional application," which the Special Rapporteur defined in his first report as a legal concept which is different from the provisional entry into force.

When commenting on the Special Rapporteur's first report during last year's session of this Committee, we advocated the view that these two concepts do not differ in terms of their legal effects, which now seems to be accepted. As an additional aspect in considering the legal effects of provisional application, we would like to propose an analysis of the reasons why provisional application has the same legal effects as provisional entry into force, how this is supported by the *travaux préparatoires* of the Vienna Convention on the Law of Treaties, practice and doctrine, and what – if any – is the difference between the two concepts.

An interesting example of international practice which illustrates the relevance of the above questions is taken from the framework of international commodity agreements, in which both terms are still used simultaneously. Since the Special Rapporteur is planning to consider the practice of international organisations (including as regards commodities), this would be a good opportunity to address the issue.

Mr Chairman,

To conclude, allow me to commend once again the hard work accomplished by both the Commission and its Special Rapporteurs. Slovenia will continue to support the Commission's work by contributing to the discussions and by providing comments and observations as requested.

Thank you, Mr Chairman, for your attention.