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Chair: Mr. Gafoor . . . . . (Singapore)
later: Ms. McDougall (Vice-Chair) . . . . . (Australia)

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17-19220 (E)

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

Agenda item 82: Expulsion of aliens (*continued*) (A/C.6/72/L.13)

Draft resolution A/C.6/72/L.13: Expulsion of aliens

1. **Ms. Rolón Candia** (Paraguay), introducing the draft resolution on behalf of the Bureau, said that the text largely reflected that of General Assembly resolution 69/119, with some technical updates. In paragraph 2, the Assembly took note of the articles on the expulsion of aliens presented by the International Law Commission, and acknowledged the comments expressed by Governments in the Sixth Committee at the seventy-second session of the General Assembly on the subject. In paragraph 3, it decided to include the item in the provisional agenda of its seventy-fifth session with a view to examining, inter alia, the question of the form that might be given to the articles or any other appropriate action.

Agenda item 83: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/72/L.12)

2. **Ms. Maitsi** (Lesotho), introducing the draft resolution on behalf of the Bureau, said that it was based on the language of General Assembly resolution 71/146. It sought to reflect the views expressed by Member States and to include the proposals set forth in the report of the Special Committee (A/72/33). In paragraph 3 (b), the General Assembly requested the Special Committee to consider, in an appropriate, substantive manner and framework, the question of the implementation of the provisions of the Charter of the United Nations relating to assistance to third States affected by the application of sanctions (Article 50 of the Charter) based on all the related reports of the Secretary-General and the proposals submitted on the question. Paragraphs 4 and 5 reflected the wording of paragraphs 2 and 3 of the annex to General Assembly resolution 71/146. Paragraph 6, subparagraphs (a), (b) and (c), reflected the wording of paragraph 60 of the report of the Special Committee.

Agenda item 81: Report of the International Law Commission on the work of its sixty-ninth session (*continued*) (A/72/10)

3. **The Chair** invited the Committee to continue its consideration of chapters VI and VII of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

4. **Mr. Celarie Landaverde** (El Salvador) said that the preamble to the draft guidelines on the protection of the atmosphere provisionally adopted so far by the Commission acknowledged that the atmosphere was essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. That provision was welcome, in that it defined the atmosphere as a legal asset of general interest to humanity. The Commission had also rightly identified fundamental principles of international environmental law, such as the principle of intergenerational equity, which ensured that resources such as the atmosphere would be preserved in a sustainable manner for future generations. However, the effect of that important consideration might be reduced owing to the reference in the preamble that the draft guidelines were not to interfere with relevant political negotiations. Such a provision was not appropriate, as the Commission's task was to ensure the codification and progressive development of international law in areas of great importance and intergenerational interest. At the very least, the provision should be moved to the commentaries.

5. In draft guideline 1, the English term "by humans" ought to be rendered in Spanish as "*por los seres humanos*" rather than "*por el hombre*". Draft guideline 8 [5] ("International cooperation") was somewhat limited in scope: it referred only to international organizations, whereas other entities had also made an active and significant contribution in that area. The forms of cooperation provided for in the draft guideline were also very limited. In addition to studies and information exchange, such cooperation should include further measures to prevent, reduce and contain the contamination and degradation of the atmosphere.

6. In accordance with draft guideline 9, paragraph 2, it was essential to ensure that new rules relating to the protection of the atmosphere were interrelated and congruent with existing legal provisions. In that regard, customary norms on environmental protection had already emerged from the principles set forth in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). Environmental protection was also connected with human rights: the right to a healthy environment had been recognized by regional human rights protection systems, notably the inter-American system through article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("San Salvador Protocol").

7. Work on the topic "Immunity of State officials from foreign criminal jurisdiction" had now progressed to the examination of limitations and exceptions to immunity. Analysis of that vital aspect of the draft articles on the topic should be consistent with

contemporary international law and, in particular, the principles and values of the international community. From the outset, his delegation had been convinced of the need for a balanced approach to the topic, especially with regard to defining cases in which immunity *ratione materiae* would not apply. His delegation therefore supported efforts to identify, among such cases, the most serious crimes of concern to the international community as a whole. By identifying those exceptions to immunity, the Commission would respect such fundamental principles as the sovereign equality of States and the principle of individual criminal responsibility, which derived from the case law of the Nuremberg trials and currently constituted a category of international criminal law.

8. Draft article 7, paragraph 1, set out a list of crimes for which immunity *ratione materiae* would not apply. Some members of the Commission had argued that the existence of a customary norm should be demonstrated in respect of each item. His delegation found it difficult to agree, as the function of the Commission related not only to the codification of international law, but also to its progressive development. It was important to spell out the limitations and exceptions to immunity in order to avoid leaving gaps that would make it possible for serious crimes to go unpunished. His delegation supported the inclusion of crimes against humanity and genocide, enforced disappearance, apartheid and torture, which were set out in the Rome Statute, as independent categories. Existing international instruments highlighted the particularly grave nature of those crimes and the obligation to bring their perpetrators before a court.

9. It was not, however, necessary to take a decision regarding the inclusion of the crime of aggression. The Assembly of States Parties to the Rome Statute had yet to decide whether the International Criminal Court had competence to prosecute such crimes, and the necessary consensus therefore did not exist. Similarly, his delegation agreed with the Commission's decision not to include the crime of corruption. Although serious, that crime encompassed a variety of forms of conduct, and it would be difficult to determine in which instances immunity *ratione materiae* should be limited or should not apply.

10. When referring to officials who enjoyed immunity, the Spanish version of the draft articles used the verb "*se benefician*". That term had negative connotations that would make it difficult to interpret the scope of the officials' immunity. It would be preferable to use the term "*gozan*", which appeared in other relevant legal instruments, including the Convention on the Privileges and Immunities of the United Nations.

11. **Ms. Muraki Gottlieb** (Observer for the International Chamber of Commerce) said that the International Chamber of Commerce welcomed the statement, in paragraph 22 of the fourth report of the Special Rapporteur on protection of the atmosphere (A/CN.4/705), that free trade and foreign investment were prerequisites for the welfare of humankind in the contemporary world. However, in the same paragraph, the Special Rapporteur also noted that free trade and foreign investment could come into conflict with the protection of the environment and the atmosphere. The business community took the challenges of climate change and its impact on the ecosystem and humankind very seriously, and the International Chamber of Commerce would continue to champion the United Nations Framework Convention on Climate Change. Trade and investment could be complementary to sustainability. Indeed, the Chamber was promoting the concept of sustainable trade, in which the structure of trade took into account environmental, social and economic factors.

12. Draft guideline 10, as proposed by the Special Rapporteur in his fourth report, stated that States should take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere from atmospheric pollution and atmospheric degradation, provided that the measures did not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment, respectively. While reserving judgment as to whether such measures were indeed necessary under international trade law or international investment law, the Chamber welcomed that provision: businesses could prosper in stable operating environments that prohibited arbitrary, restrictive or discriminatory State action against them.

13. With regard to the future work proposed by the Special Rapporteur on the topic, the Chamber would welcome the opportunity to enter into dialogue with the Commission regarding business practices relevant to the protection of the atmosphere. Such dialogue could add value to the Commission's work and ensure that any resulting guidelines helped to meet the Sustainable Development Goals.

14. **Mr. Pulkowski** (Observer for the Permanent Court of Arbitration) said that several recent arbitrations considered by the Permanent Court of Arbitration had implications for the provisional application of treaties. For instance, the Court had provided administrative support in several proceedings under the Energy Charter Treaty, which many investors had assumed would be applied provisionally by the host State. Much of the extensive legal analysis conducted in those arbitrations

was now in the public domain and could be found in the Court's online case repository. That analysis included summaries of dozens of legal opinions submitted by the claimants and the respondent State. In addition to the specific points at issue, the discussion had focused on the purpose of provisional application; the nature of a State's consent to provisionally apply a treaty; distinctions between a treaty's application, its legal force and its effectiveness; the rationale for some exceptions to provisional application that were typically found in treaties; and the stances of various domestic legal systems.

15. In his fourth report (A/CN.4/705 and A/CN.4/705/Corr.1), the Special Rapporteur for the topic "Protection of the atmosphere" had explored the legal principles governing the relationship between rules of international environmental law and other rules of international law. The Court's experience appeared to support his findings in that area. The Special Rapporteur had referred to the case *Bilcon of Delaware et al. v. Government of Canada*, in which the claimants alleged that Canada had breached its obligations under the North American Free Trade Agreement (NAFTA) in the course of an environmental impact assessment. In its award, the tribunal had pointed out that the preamble to NAFTA contained evidence that economic development and environmental integrity could be reconciled and, indeed, were mutually reinforcing.

16. In the case *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, the claimant had challenged a ban on the agro-chemical known as lindane. The tribunal had consulted relevant international treaties on organic pollutants and found that it had an obligation to interpret treaties in the light of the customary international law for the protection of the environment. In the case *Peter A. Allard (Canada) v. Government of Barbados*, the tribunal had accepted the principle that an investor's legitimate expectation that a State would observe environmental standards could form the basis of a claim under an investment treaty.

17. In the *Iron Rhine* arbitration, the tribunal had applied concepts of contemporary customary international environmental law to treaties dating back to the mid-nineteenth century. In the *Indus Waters Kishenganga* arbitration, it had referred to the *neminem laedere* principle of customary international law, according to which no State had the right to use its territory in such a manner as to cause damage to the territory of another. Recent Court case law thus lent further support to the principle of mutual supportiveness that was enshrined in proposed draft guideline 10.

18. If the Commission were to take up the potential topic "General principles of law" within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice in judicial and arbitral practice, it might wish to review relevant awards and decisions in the case repository of the Permanent Court of Arbitration. Tribunals administered by the latter Court had applied general principles of international law to a wide range of circumstances in which treaties or customary international law did not provide a rule or decision.

19. Turning to the potential topic "Evidence before international courts and tribunals", he said that the various dispute settlement bodies were increasingly interested in learning from one another's best practices. The Court would be willing to support efforts to systematize those efforts. Inter-State and investor-State proceedings overseen by the Court routinely involved significant documentary evidence, witness and expert testimony, and other forms of evidence-taking, including from tribunal-appointed experts.

20. In the paper in which he proposed the inclusion of the topic in the Commission's programme of work, the Special Rapporteur stated that a multiplicity of practices with regard to evidence could result in a fractured system whose inconsistent and incoherent decisions would erode confidence in the dispute resolution process. However, while it was true that frameworks for evidence-taking were often described in a highly abstract manner, tribunals generally adopted detailed procedural orders in consultation with the disputing parties.

21. It would be useful for the Commission to examine procedural orders and the resulting practice of courts and tribunals, for instance with regard to requests for the production of evidence and access to government archives. In the *Guyana v. Suriname* arbitration, such questions had been resolved through the appointment of a so-called document master, an independent expert designated by the tribunal who could inspect confidential materials on its instructions. Other forms of written and oral evidence-taking had been adopted in the *Duzgit Integrity*, *Abyei* and *Arctic Sunrise* arbitrations. In yet other cases, a Permanent Court of Arbitration tribunal had appointed experts or conducted site visits. The Court was prepared to give a presentation on the subject to any future session of the Commission in Geneva.

22. More detailed comments on those issues could be found in his written statement, available on the PaperSmart portal.

23. **Ms. Escobar Hernández** (Special Rapporteur on the topic "Immunity of State officials from criminal jurisdiction") thanked the members of the Committee for their comments, which she would take into consideration when drafting her sixth report. In particular, she would address the issue of ensuring that State officials were not prosecuted abusively for political ends.

24. **The Chair** invited the Committee to consider chapters VII to X of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

25. **Mr. Nolte** (Chairman of the International Law Commission), introducing chapters VII to X of the report, said that the Commission had considered the second report of the Special Rapporteur on the topic "Peremptory norms of general international law (*jus cogens*)" (A/CN.4/706), previously entitled "*Jus cogens*". The report sought to set out the criteria for the identification of peremptory norms; in that regard, the Special Rapporteur had proposed six draft conclusions and had also proposed the change in the title of the topic, which the Commission had subsequently accepted.

26. In considering the report, the members of the Commission had taken article 53 of the 1969 Vienna Convention on the Law of Treaties as the starting point for identifying the criteria of *jus cogens*. While agreeing that customary international law was the most common basis for *jus cogens*, members had diverged with regard to the role of treaty rules. Several members had supported the Special Rapporteur's proposal regarding criteria for identification; others had argued that the character of *jus cogens* as protecting fundamental values should be given a place among those criteria. Many members had highlighted the significance of the concept of fundamental values. Others, however, had expressed the view that the meaning of the term needed to be clarified. Most had supported the Special Rapporteur's approach in relation to general international law as the first criterion. However, while many members accepted that general principles could form the basis for *jus cogens*, others had recalled the lack of common understanding of the general principles of law.

27. Some members had endorsed the two-step approach relied upon by the Special Rapporteur to prove the existence of a norm of general international law, i.e., a process by which a "normal" rule of customary international law would be elevated to a *jus cogens* norm under general international law; others had expressed reservations. Several members expressed disagreement with the Special Rapporteur's view that non-derogability was not a criterion of identification of *jus cogens* but a consequence of its existence. Several had expressed concern in relation to the consideration of regional *jus cogens* and its universal applicability. Recalling the Commission's previous attempts to develop an illustrative list of *jus cogens* norms, the Special Rapporteur had said that he was still uncertain regarding the advantages of formulating such a list. Many members had expressed support for a list, although others had suggested that the Commission should instead agree on the methodology for the identification of *jus cogens* and the consequences.

28. At its sixty-ninth session, the Commission had decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur. It had subsequently considered his first report (A/CN.4/708), which sought to set out his approach to the scope and outcome of the topic and to provide an overview of general provisions relating to the topic. In the report, the Special Rapporteur had proposed four draft articles. The latter were currently being considered by the Drafting Committee, whose interim report was available on the website of the Commission.

29. The Commission's discussion had centred on the current status of the general rule on State succession in respect of State responsibility. Several members had questioned whether the "traditional" rule of non-succession that the Special Rapporteur had posited had indeed evolved. Several members had also highlighted that the examples of State practice and jurisprudence, both national and international, cited by the Special Rapporteur to support his position for evolution in the traditional rule did not in fact support that finding. It had been suggested that the Special Rapporteur should examine the matter more closely before proceeding to potential exceptions, and that particular attention should be given to State practice from all regions.

30. Referring to the draft articles proposed by the Special Rapporteur in his first report, he said that members had generally welcomed the proposed text of draft article 1 ("Scope"). Several had suggested that the scope should be amended to ensure greater clarity and focus on the scope of the topic, as opposed to a general focus on State responsibility. Members had generally supported the use in draft article 2 ("Use of terms") of terminology from the previous work of the Commission. The definition of the term "international responsibility", however, had elicited contrasting views. With regard to draft article 3 ("Relevance of the agreements to succession of States in respect of responsibility") and draft article 4 ("Unilateral declaration by a successor State"), it had been suggested that the general rule on

succession of States in respect of responsibility should first be discussed further. Following the debate, the Special Rapporteur had indicated that in his subsequent reports he would propose a set of rules for different categories of succession and would address the general rules on succession.

31. The Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts", Marie Jacobsson, had not sought re-election. The Commission had established a working group, which in turn had recommended the appointment of a new Special Rapporteur. The Commission had appointed Marja Lehto for that role.

32. The Commission had suspended its consideration of the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", to enable States to carefully review the outcome and give in-depth comments for the second reading. Member States were encouraged to submit any written comments by 1 January 2018.

33. **Ms. Aching** (Trinidad and Tobago), speaking on behalf of the Caribbean Community (CARICOM), said that CARICOM welcomed the decision that the Commission would hold part of its seventieth session in New York, something that would strengthen the relationship between the Commission and the Sixth Committee.

34. Although progress had been made on the topic "Protection of the environment in armed conflicts", there still existed a legal vacuum in that area. Most of the existing legal provisions protecting the environment in international armed conflict did not necessarily apply to internal conflicts, a category that accounted for most of the conflicts currently under way. CARICOM therefore welcomed the progress made by the working group on the topic and urged it to maintain its momentum.

35. The Community welcomed draft article 6 [5] of the draft articles on crimes against humanity, which called on each State to take the necessary measures to ensure that certain acts were offences under its criminal law. In order to combat impunity, it was important for States to establish jurisdiction under national law. States should also be obligated to ensure that the official position of alleged perpetrators did not exempt them from liability for crimes against humanity. Draft article 12 ("Victims, witnesses and others") was also essential in order for justice to prevail. The Commission should examine all three major international crimes, namely crimes against humanity, war crimes and genocide. While recognizing that crimes against humanity had not become the subject of an international treaty, CARICOM believed that international cooperation in respect of the other two major crimes could be strengthened. Consideration of the three crimes should not detract from, but rather complement, the provisions of the Rome Statute of the International Criminal Court.

36. CARICOM supported the programme of work of the Special Rapporteur for the topic "Succession of States in respect of State responsibility". It encouraged the Commission to further explore the legal complexities of the topic, including the question of whether obligations arising from wrongful acts constituted debts subject to the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts.

37. The Community welcomed the change of the name of the topic "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)" to make it consistent with article 53 of the 1969 Vienna Convention on the Law of Treaties. That article was a good starting point for the identification of criteria for *jus cogens*. CARICOM encouraged the Commission to continue examining other aspects of the topic, should the need arise to supplement or look beyond the Vienna Convention. The Commission might also wish to further analyse the meaning of the term "fundamental values", particularly with a view to identifying a universal understanding of such values. While caution was needed when determining whether certain treaties were part of general international law, CARICOM welcomed further consideration of that question.

38. **Mr. Jensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries fully supported the process that had been adopted for the consideration of the topic "Peremptory norms of general international law (*jus cogens*)". The topic was best approached from a conceptual and analytical standpoint rather than with a view to elaborating a new normative framework for States.

39. The topic "Succession of States in respect of State responsibility" had thus far been neglected; it had usually been assumed that there was no succession to State responsibility. The Special Rapporteur had analysed the most recent State practice and suggested that the traditional rule had been challenged. That finding opened the way to analysis of the transmissibility of rights and obligations related to State responsibility. The proposition was an interesting one, and the Nordic countries would welcome additional instances and analysis of State practice to substantiate it. The Commission had also examined a number of

related areas, and there was substantial academic work to build on. The topic was thus not completely new. The challenge was rather to fill the gap between the regimes of State succession and State responsibility. The topic did not, however, allow for large categorizations; it would be more realistic for the draft articles to be subsidiary in nature, as the Special Rapporteur had proposed.

40. The Nordic countries strongly supported the topic "Protection of the environment in relation to armed conflicts", as a safe natural environment and living conditions for human beings were closely connected with international peace and security. They commended the Commission for continuing work on the topic following the end of the Special Rapporteur's mandate and thanked the outgoing Special Rapporteur for having prepared commentaries to draft principles despite no longer serving on the Commission. The Nordic countries agreed with the Working Group that the Commission's substantial work on the topic needed to be finalized without delay. In that regard, they noted with satisfaction the plan of work for the remainder of the quinquennium. While acknowledging that certain matters, such as protection of the environment in situations of occupation, should be addressed in a future report, they believed that it would be preferable at the current stage to make a more general reference to existing rules and principles on liability and responsibility.

41. **Ms. Kalb** (Austria), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that her delegation was pleased that most members of the Commission were in favour of the development of an illustrative list of *jus cogens* norms. She reiterated that such a list would be a major benefit of the Commission's work on the topic and well worth the time it would take to produce. Referring to the draft conclusions provisionally adopted by the Drafting Committee at the sixty-eighth and sixty-ninth sessions of the Commission (available on the website of the Commission), she said that draft conclusion 2 [3 (2)] (General nature of peremptory norms of general international law (*jus cogens*)) adequately reflected her delegation's view that the hierarchical superiority of *jus cogens* norms was a consequence of their peremptory nature, not a characteristic of such norms or a precondition for their identification as *jus cogens*.

42. The Commission should consider the relationship between universal applicability and the persistent objector doctrine, given that *jus cogens* norms were described in draft conclusion 2 [3 (2)] as being universally applicable. Draft conclusions 3 [3 (l)] (Definition of a peremptory norm of general international law (*jus cogens*)) and 4 (Criteria for identification of a peremptory norm of general international law (*jus cogens*)) should be streamlined or merged to avoid repetition.

43. Her delegation agreed with the statement in paragraph 1 of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) that customary international law was the most common basis for *jus cogens* norms. However, it was not convinced that treaty provisions, some of which were not universally applied or even contained in multilateral instruments, could serve as bases for *jus cogens* norms, as indicated in draft conclusion 5, paragraph 2. Her delegation preferred the version contained in draft conclusion 5, paragraph 4 of the draft conclusions as proposed by the Special Rapporteur in his second report (A/CN.4/706), which read: "A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law." Furthermore, the Special Rapporteur should identify examples of *jus cogens* norms deriving from general principles of law and treaty rules, as his analysis thus far had covered only customary international law.

44. Recalling that there had been disagreement among delegations at the sixty-ninth session of the Commission regarding the meaning of "international community of States as a whole", she said that, while the term might not encompass all States, it must mean at least virtually all of them. Her delegation therefore welcomed the inclusion of the reference to "a very large majority" in draft conclusion 7 (International community of States as a whole).

45. Her delegation reiterated that "Succession of States in respect of State responsibility" was a highly controversial topic that had wisely been excluded from the previous work of the Commission. Recent discussions on the topic by the International Law Association and the *Institut de Droit International* had highlighted the extreme scarcity of State practice, and it was questionable whether even some of the small number of cases discussed by the Special Rapporteur in his first report (A/CN.4/708) could really be considered exceptions to the rule of non-succession. Moreover, the Special Rapporteur had indicated that it was unclear whether there were any general rules providing for succession to responsibility. It was therefore unfortunate that the Commission had chosen a title for the topic that suggested that there might be situations in which a successor State automatically succeeded to the responsibility incurred by a predecessor State for an internationally wrongful act. A better title would have been "State responsibility problems in cases of succession of States".

46. The examples in the Special Rapporteur's report primarily concerned situations in which a successor State had incurred responsibility for the wrongful act of a predecessor State by endorsing and continuing the situation or by voluntarily assuming secondary obligations arising from the act. Austria considered that the view referred to in the report as the "traditional thesis" of non-succession in fact reflected the current state of international law. Her delegation hoped that the Commission's work on the topic would clarify the concept of State responsibility and the effects of the succession of States.

47. Turning to the topic "Protection of the environment in relation to armed conflicts", she said that it was more important to improve compliance with the existing rules and standards of international humanitarian law than to create new ones. Her delegation supported the examination of the topic by the Commission, as it would promote compliance by enhancing understanding of existing norms. Austria also supported the efforts of Switzerland and the International Committee of the Red Cross to reform and increase the efficiency of international humanitarian law compliance mechanisms.

48. More detailed comments reflecting her delegation's position on the topics "Peremptory norms of general international law (*jus cogens*)" and "Protection of the environment in relation to armed conflicts" could be found in her written statement, available on the PaperSmart portal.

49. **Ms. Telalian** (Greece) said that the two reports by the Special Rapporteur on *jus cogens* and the draft conclusions provisionally adopted by the Drafting Committee and available on the Commission's website had paved the way for a pragmatic approach to the topic based on article 53 of the Vienna Convention on the Law of Treaties, which was widely held to provide an adequate definition of *jus cogens* that was applicable to areas beyond treaty law. Greece was pleased that the Special Rapporteur and the Commission recognized the pivotal importance of the acceptance and recognition by States of the peremptory character of a norm as a prerequisite for its qualification as *jus cogens*. Like all other norms within the international legal system, *jus cogens* norms had to be accepted as such by the international community of States; their *jus cogens* character could not derive solely from a principle or doctrine of natural law.

50. According to article 53 of the Vienna Convention, and also draft conclusions 3 [3 (l)] (Definition of a peremptory norm of general international law (*jus cogens*)) and 4 (Criteria for identification of a peremptory norm of general international law (*jus cogens*)), peremptory norms formed part of general international law. The draft conclusions should therefore include a definition of general international law, as the exact meaning and scope of the term were far from settled. In particular, the relationship of general international law to customary international law and normative multilateral treaties should be further elaborated.

51. While paragraph 1 of draft conclusion 6 (Acceptance and recognition) seemed to bring general international law close to, or even assimilated it with, customary international law, paragraph 2 of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)), which indicated that treaty provisions might serve as bases for *jus cogens* norms, seemed to imply that treaty provisions might also form part of general international law. It should also be made clear that the term "general" in that context did not refer to the subject matter of the norm in question but rather to the level of its acceptance by the international community of States. The definition of general international law could be based on the one in paragraph 1 of draft conclusion 5 as proposed by the Special Rapporteur in his second report, which read: "A norm of general international law is one which has a general scope of application". That provision had not been retained by the Drafting Committee.

52. Referring again to the draft conclusions provisionally adopted by the Drafting Committee, she said that the Commission should consider stipulating, in draft conclusion 4, that for a norm to qualify as *jus cogens* it must be accepted and recognized by the international community of States as reflecting and protecting the fundamental values of the international community of States. That characteristic of *jus cogens* norms, which was already referred to in draft conclusion 2 [3 (2)], was the reason that States recognized *jus cogens* norms as non-derogable. States and courts tended to put forward that same view when arguing that a particular norm was *jus cogens.*

53. With regard to draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)), she said that while the question of whether treaties could serve as direct sources of *jus cogens* rules or only as evidence of such rules had not been settled at the theoretical level, there was no doubt that universal multilateral treaties could be vehicles for the establishment of norms of international law as *jus cogens.* In that context, the future commentary to the draft article should include a reference to treaties with universal participation that contained provisions prohibiting reservations. Some such provisions might,

when supported by other conclusive evidence, provide evidence of the acceptance and recognition of the substantive norms of the relevant treaty as peremptory norms of general international law.

54. Turning to draft conclusion 7, she said that Greece agreed with the Special Rapporteur and the Drafting Committee that acceptance and recognition by all States was not required for a norm to qualify as a peremptory norm of international law; no State had veto rights in that regard. Furthermore, no State was permitted to opt out of the application of a norm that was recognized as peremptory, since *jus cogens* norms operated uniformly, even in relation to States that had objected to their acceptance and recognition.

55. Turning to the topic "Succession of States in respect of State responsibility", she said that the Commission might encounter difficulties in identifying applicable rules, as State practice in that area was not abundant; the Commission would therefore have to focus on progressive development. Her delegation was confident that the Commission's work would provide useful normative guidance on the complex issue. Detailed comments reflecting her delegation's position on the draft articles contained in the Special Rapporteur's first report could be found in her written statement, available on the PaperSmart portal.

56. *Ms. McDougall (Australia), Vice-Chair, took the Chair.*

57. **Mr. Martín y Pérez de Nanclares** (Spain), on the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation continued to believe that it was essential to preserve the open and flexible nature of the process of creating *jus cogens* norms; producing a list of such norms might call that objective into question.

58. Referring to the draft conclusions provisionally adopted by the Drafting Committee, he said that the possible existence of regional *jus cogens* should be mentioned in the future commentary to draft conclusion 1 (Scope), since the draft conclusion itself referred only to general international law. The fact that article 53 of the Vienna Convention on the Law of Treaties referred to general international law and the acceptance and recognition of the international community of States as a whole did not rule out the existence of regional *jus cogens*. The question of whether regional *jus cogens* norms could invalidate treaties was a separate issue, and one that would concern only treaties concluded between States subject to the relevant regional *jus cogens*. The commentary to draft conclusion 1 should also make it clear that the reference to general international law did not rule out the existence of *jus cogens* norms in specific fields of law.

59. His delegation continued to doubt the relevance of the reference in draft conclusion 2 [3 (2)] (General nature of peremptory norms of general international law (*jus cogens*)) to the hierarchical superiority of norms of *jus cogens*, given that that position was simply a consequence of their peremptory nature. With regard to the universal application of *jus cogens* norms, the commentary to the draft conclusion should include a reference to the difference between the *jus cogens* nature of a norm and its *erga omnes* scope, especially since the jurisprudence of the International Court of Justice habitually alluded to the *erga omnes* nature, but not the *jus cogens* nature, of norms and principles that were universally agreed to be *jus cogens.* Spain was pleased that the Drafting Committee had removed the word "abrogation" from draft conclusion 3 [3 (l)] (Definition of a peremptory norm of general international law (*jus cogens*)).

60. The commentary to paragraph 2 of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) should include an explanation of the relationship between treaties and custom, taking into account the differences in the creation, crystallization and consolidation of the different types of norms. It should not be stated in paragraph 2 of the draft conclusion that treaty provisions might serve as bases for peremptory norms of general international law. In reality, treaty provisions could do no more than reflect such norms. However, the affirmation in the same paragraph that general principles of law could serve as bases for peremptory norms of general international law was correct.

61. The title of draft conclusion 6 (Acceptance and recognition) was disconcertingly short and was not in keeping with the titles of the other draft articles. His delegation therefore suggested expanding it to read: "Acceptance and recognition as a criterion for identifying a peremptory norm of general international law (*jus cogens*)". Spain was pleased that draft conclusion 7 (International community of States as a whole) had been amended so that the phrase "international community of States as a whole" now meant a very large majority of States, as compared with the version proposed by the Special Rapporteur in his second report, which referred to a large majority of States.

62. Given that the definition of *jus cogens* norms in draft conclusion 3 [3 (1)] and the description of the criteria for their identification in draft conclusion 4 referred to acceptance and recognition by the

international community of States, it was logical that draft conclusion 7, paragraph 3, indicated that the positions of actors other than States could serve to determine the position of States but could not, in and of themselves, form a part of the acceptance and recognition required for the identification of a norm as *jus cogens*. Nevertheless, it was difficult to accept that the actions of international organizations could not reflect their acceptance of the peremptory nature of certain norms of international law and that such acceptance was not relevant to the identification of *jus cogens* norms. His delegation's comments on the future translation into Spanish of draft conclusion 7, paragraph 3, could be found in his written statement, available on the PaperSmart portal.

63. With regard to draft conclusion 9 (Evidence of acceptance and recognition), as proposed by the Special Rapporteur in his second report (A/CN.4/706), it should be made clear that the forms of evidence mentioned in the second and third paragraphs were simply examples and did not constitute an exhaustive list. Domestic laws and norms (including constitutions), decisions of national courts and statements made in the context of international organizations and conferences could also serve as evidence.

64. His delegation was doubtful that there could be a successful outcome to the work on the topic "Succession of States in respect of State responsibility", since, in the almost total absence of existing international legal provisions on the topic, the Commission's proposals would have to be *de lege ferenda*. The two draft articles provisionally adopted by the Drafting Committee presented no significant problems. However, if the final text did not contain a separate provision stipulating that the draft articles applied only when a succession occurred in conformity with international law, along the lines of article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties and article 3 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, that principle should be reflected in draft article 1 (Scope).

65. Referring to the draft articles proposed by the Special Rapporteur in his first report, he said that paragraphs 1 and 2 of draft article 3 (Relevance of the agreements to succession of States in respect of responsibility) could be recast and simplified. The purpose of the paragraphs was to establish the unenforceability of an agreement between a predecessor State and a successor State on the transfer of responsibility for an internationally wrongful act to the successor State in cases where the successor State was the victim of the act. In paragraph 3, it was not clear what was meant by "an agreement other than a devolution agreement". It was also unclear whether the parties referred to were the predecessor State and the successor State or, alternatively, one of those States and a third State that was the victim of an internationally wrongful act. The statement in draft article 3, paragraph 3, that any agreement was binding upon the parties to it and must be performed by them in good faith was not controversial. It simply expressed the *pacta sunt servanda* principle, in almost identical terms to those in article 26 of the Vienna Convention on the Law of Treaties, and therefore did not need to be included in the text of the draft articles.

66. The content of paragraph 1 of draft article 4 (Unilateral declaration by a successor State) was self-evident. Unilateral acts could not give rise to rights for the State undertaking the act; therefore a unilateral declaration by a successor State could not result in its becoming the holder of rights to which the predecessor State was entitled in accordance with international law on State responsibility. With regard to draft article 4, paragraph 2, Spain had no conceptual objection to accepting that a successor State could assume the obligations of a predecessor State in respect of an internationally wrongful act through a unilateral declaration. However, the relationship between paragraph 2, which set out that concept and stipulated only that the unilateral declaration must be stated in clear and specific terms, and paragraph 3, which cited in a general manner the norms of international law applicable to unilateral acts of States, was not obvious.

67. His delegation welcomed the Commission's decision to continue its work on the topic "Protection of the environment in relation to armed conflicts". It was unfortunate that the Commission had made barely any progress on the topic during its sixty-ninth session.

68. **Mr. Arrocha Olabuenaga** (Mexico), referring to the draft conclusions on peremptory norms of international law (*jus cogens*) as proposed by the Special Rapporteur in his second report, said that the draft conclusions should be further amended to simplify their content and avoid repetition. It was also important to ensure that they did not deviate from standards set out in article 53 of the Vienna Convention on the Law of Treaties. While his delegation agreed with the substance of draft conclusion 6 (Acceptance and recognition as a criterion for the identification of *jus cogens*), it considered that the draft conclusion should be removed or incorporated into other provisions, as its content was covered in draft conclusion 4 (Criteria for *jus cogens*).

69. With regard to evidence of acceptance and recognition of a norm as *jus cogens*, which was covered in draft conclusion 9, the draft conclusions should

reflect the difference between materials that could provide evidence of the creation or existence of a rule of customary international law and those that reflected the existence of a *jus cogens* norm. Norms of *jus cogens* were those shown by *opinio juris cogentis* and State practice to be peremptory norms of general international law. For example, his Government had expressed its opinion that the norms applicable to armed conflicts and to the maintenance of international peace and security were norms of *jus cogens* in its 1995 written statement to the International Court of Justice concerning the request for an advisory opinion on the question of the *Legality of the Threat or Use of Nuclear Weapons*. Materials such as that should be taken into consideration in efforts to determine the *opinio juris* of States.

70. The future work of the Special Rapporteur could include drawing up an indicative list of *jus cogens* norms. Such a list could prove to be a very useful tool for identifying *jus cogens*, provided that the list was understood to be non-exhaustive. His delegation welcomed the Special Rapporteur's intention to begin consideration of the effects or consequences of *jus cogens* in treaty law and other areas of international law. He reiterated his delegation's suggestion that a study should be carried out on the emergence of new norms of *jus cogens* that derogated from earlier ones and their invalidating effects, including the question of who determined the existence of conflicting norms.

71. Addressing the topic "Succession of States in respect of State responsibility", he said that the historical analysis provided in the Special Rapporteur's first report (A/CN.4/708) would be very useful for the consideration of the topic. Mexico agreed with the Special Rapporteur that the elaboration of draft articles on the topic would be appropriate, since it would be in line with the approach taken to the closely related topic of the responsibility of States for internationally wrongful acts.

72. Referring to the draft articles proposed by the Special Rapporteur in his first report, he said his delegation found draft article 1 (Scope) and draft article 2 (Use of terms) to be appropriate. However, draft article 3 (Relevance of the agreements to succession of States in respect of responsibility) and draft article 4 (Unilateral declaration by a successor State), concerning inapplicable agreements and declarations on the transfer of responsibility and rights, were partly based on two conventions that had been ratified by only a small number of States, meaning that the draft articles represented progressive development rather than codification of international law. Those matters should therefore be addressed with caution. The meaning of the phrase "an agreement other than a devolution agreement" in draft article 3, paragraph 3 should be clarified in order to define the scope of the paragraph. Draft article 4 should also be amended to take into account all the requirements that must be met in order for a unilateral declaration to be considered binding, to avoid contradictions with the Commission's earlier work on the matter.

73. In his second report, the Special Rapporteur should provide in-depth analysis of the continuity of primary rules of obligation and their effects in respect of succession of States. He should also consider the transfer of rights and obligations arising from the commission of an internationally wrongful act in cases of succession. It was important for the Commission to take into account State practice, the practice of international, regional and national courts and legal doctrine. His delegation therefore requested the Special Rapporteur to expand the focus of the work to regions beyond Europe and to further examine the development and current status of the rule of non-succession.

74. **Ms. Gasri** (France) said that her delegation wished to reiterate its doubts about the appropriateness of the selection of "Peremptory norms of general international law (*jus cogens*)" as a topic for consideration by the Commission, given that there were significant uncertainties about the concept. The debate on the Special Rapporteur's second report during the sixty-ninth session of the Commission had revealed divisions within the Commission and diverging views on matters such as the appropriateness of the topic, the role of State practice, and whether a natural law or positivist approach should be taken to the consideration of the topic.

75. The draft conclusions provisionally adopted by the Drafting Committee had been similarly contentious, and a number of them seemed to have been adopted only because it had been impossible to reach an agreement on an alternative. Draft conclusion 2 [3 (2)] of the draft conclusions provisionally adopted by the Drafting Committee during the sixty-ninth session of the Commission reproduced, in nearly identical form, paragraph 2 of draft conclusion 3 (General nature of *jus cogens* norms) as contained in the first report by the Special Rapporteur, which had been strongly criticized by the Commission during its sixty-eighth session, and subsequently by the Sixth Committee. Furthermore, the notion of fundamental values referred to in draft conclusion 2 [3 (2)] raised several questions, such as whether a value was fundamental by nature or because it was considered to be fundamental. It should also be recalled that norms could be considered to reflect fundamental values, of a particular region, for example, or possess an *erga omnes* character without being *jus*

cogens norms. Draft conclusion 2 [3 (2)] therefore seemed to presuppose the outcome of the debates on the effects of *jus cogens*.

76. The Commission's current approach to the topic also raised questions about the role of State practice. At the linguistic level, the terms "international community" and "international community of States as a whole" seemed to be used interchangeably in the draft conclusions provisionally adopted by the Drafting Committee. The Commission should use only the term "international community of States as a whole". At the substantive level, her delegation was not convinced by the Special Rapporteur's view that *opinio juris* did not necessarily need to be supported by State practice. Following that logic, the criteria for identifying peremptory norms of international law would be less stringent than those for identifying customary international law, and *jus cogens* norms would not have to be customary rules. In order to be considered *jus cogens*, a rule of international law must at least be a customary rule.

77. As stated in draft conclusion 4 (Requirement of practice) of the draft conclusions on identification of customary international law adopted by the Commission on first reading at its sixty-eighth session, it was primarily the practice of States that contributed to the formation, or expression, of rules of customary international law. Therefore, the Special Rapporteur's view that the determination of the practice of the international community of States as a whole should be based on the views of States, taken together, was incorrect. That practice should instead be identified through the examination of the individual attitudes of States.

78. Paragraph 3 of draft conclusion 5 as proposed by the Special Rapporteur in his second report, in which it was stated that general principles of law could also serve as the basis for *jus cogens* norms of international law, should not have been carried over into the text provisionally adopted by the Drafting Committee. General principles of law came from national legal systems, not international practice, which meant that the identification of general principles of law was not subject to the same constraints as the identification of customary international law. Making general principles of law a source of peremptory norms of international law would therefore introduce an element of legal uncertainty.

79. Both versions of draft conclusion 6 accorded little importance to international practice, requiring only acceptance and recognition for the identification of *jus cogens* norms. Moreover, no justification was given for the affirmation in draft conclusion 8, as proposed by the Special Rapporteur in his second report, that the requirement for acceptance and recognition as a criterion for *jus cogens* was distinct from acceptance as law for the purposes of identification of customary international law. The Special Rapporteur had instead focused on the examination of the means by which acceptance and recognition could be expressed, which were discussed in draft conclusion 9 (Evidence of acceptance and recognition).

80. The use of the phrase "very large majority of States" in the context of acceptance and recognition in draft conclusion 7 (International community of States as a whole), as provisionally adopted by the Drafting Committee, was a source of confusion, in particular because some members of the Commission considered it to mean the same as "substantial majority of States". Taking into account the significance of *jus cogens* norms in the international legal order, and their characteristics and effects, it would be appropriate to require acceptance and recognition by "substantially all States".

81. Given the diverging opinions on the appropriateness of drawing up an indicative list of *jus cogens* norms, the Commission would be well advised to simply include a few examples of *jus cogens* norms in the commentaries to the draft conclusions and focus its efforts on developing operational criteria for the identification of *jus cogens* norms.

82. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan), said that the topic "Succession of States in respect of State responsibility" was timely, given the need created by current circumstances. His delegation was confident that conclusions could be reached that would contribute to the progressive development and codification of international law. It should be noted that different forms of succession entailed different forms of responsibility. For instance, when a State dissolved, a successor State's responsibility for internationally wrongful acts would be different depending on whether the predecessor State had been federal or centralized. The Commission's consideration of the topic should examine such special cases. It would also be useful to consider whether some of the relevant provisions that had already been codified had gained the status of international customary law.

83. The topic involved some highly complex issues, particularly with regard to the succession of nationality, treaties, property, archives, debts, membership of international organizations and special or acquired rights. Some of those complexities arose because of the range of potential scenarios: a State could dissolve, or one or more parts of its territory could secede, or a State could renounce its claim to a territory, or different States

could unite. The variety of practices that had been applied meant that the general norms of international law with regard to succession were unstable. Attempts to codify or develop general rules had been unsuccessful: the 1978 Vienna Convention on Succession of States in respect of Treaties had only entered into force in 1996 and had only a limited number of States parties. The 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts had yet to enter into force. Some of the provisions of those instruments did, however, reflect customary international law, and States referred to them when resolving issues arising from the succession of States.

84. Referring to the draft articles proposed by the Special Rapporteur in his first report, he said that before formulating exceptions and saving clauses of the type set out in draft articles 3 and 4, the Commission should endeavour to identify objective general rules on succession in respect of State responsibility. Draft article 4 should be reconsidered and redrafted accordingly. His delegation agreed with the Special Rapporteur that there was no universal succession of States, but rather several areas of legal relations to which succession of States applied. Therefore, rules on succession of States in one area, such as in respect of treaties, might differ from the rules in another area such as in respect of State property, debts and archives. Each case should be considered separately in order to ascertain whether or not the successor State had certain obligations or rights arising from the responsibility of the predecessor State. The Special Rapporteur had correctly argued that the rules to be codified should be of a subsidiary nature, and that as such they might serve two purposes. First, they could present a useful model that might be used and also modified by the States concerned. Second, in cases of lack of agreement, they could present a default rule to be applied in case of dispute. His delegation believed that the outcome of the Commission's work should take the form of guidelines. It welcomed the Special Rapporteur's proposed future programme of work on the topic.

85. In 2011, a part of the Sudan had seceded. In view of that experience, he wished to comment on a related topic, namely that of nationality in relation to the succession of States. Article 15 of the Universal Declaration of Human Rights provided that every individual had the right to a nationality. Article 24, paragraph 3, of the International Covenant on Civil and Political Rights and article 7 of the International Covenant on the Rights of the Child stated that every child had the right to acquire a nationality. In its Opinion No. 2, the Arbitration Commission of the Conference on Yugoslavia had considered that every individual might choose to belong to whatever ethnic, religious or language community he or she wished. The issue of dual nationality and the preferential treatment of citizens residing in the predecessor State or successor State each involved complexities of a political, economic, security and psychological nature that did not arise with regard to the succession of treaties, debts, property or archives. Those issues should therefore be left to the discretion of the internal law of each State. In its commentary to article 26 ("Granting of the right of option by the predecessor and the successor States") of the articles nationality of natural persons in relation to the succession of States, the Commission had not excluded the possibility of dual or multiple nationality, but had stressed that the choice belonged to each State.

86. **Ms. Fong** (Singapore), referring to the draft conclusions on peremptory norms of general international law (*jus cogens*) provisionally adopted by the Drafting Committee at the sixty-eighth and sixty-ninth sessions of the Commission (available on the Commission's website), said that her delegation was pleased that draft conclusion 4 (Criteria for identification of a peremptory norm of general international law (*jus cogens*)) was based on and consistent with article 53 of the Vienna Convention on the Law of Treaties. Singapore agreed with the affirmation in draft conclusion 7 that the endorsement of the international community of States as a whole was necessary for the identification of the peremptory nature of a norm. In that connection, her delegation welcomed the statement in paragraph 2 of the draft conclusion that acceptance and recognition by a very large majority of States was required for the identification of *jus cogens*. While an objection by a single State could not prevent a norm from being considered *jus cogens*, a norm must not be identified as *jus cogens* unless its peremptory nature was accepted and recognized by virtually all States.

87. Her delegation welcomed the clarification in the Special Rapporteur's second report (A/CN.4/706) that the qualities of *jus cogens* norms set out in paragraph 2 of draft conclusion 3 (General nature of *jus cogens* norms) as proposed in his first report (A/CN.4/693) — namely that they protected the fundamental values of the international community, were hierarchically superior to other norms of international law and were universally applicable — were descriptive elements rather than criteria for the identification of *jus cogens*. However, while it might be possible to distinguish between descriptive elements, criteria and consequences in theory, it was not clear what, if any, the practical effects of that distinction were. It would be worth clarifying that

issue by either revising the draft conclusion or providing an explanation in the commentary.

88. If the Commission drew up an indicative list of *jus cogens* norms, it must seek comments from States in advance and only include norms that were agreed by States to be *jus cogens* and that clearly fulfilled the criteria for *jus cogens* identified by the Commission.

89. **Ms. Pucarinho** (Portugal) said that her delegation supported the consideration of the topic of peremptory norms of general international law (*jus cogens*) by the Commission. The notion of having hierarchically superior norms in a horizontal international legal system was not contradictory; in fact, a hierarchy of norms helped to secure the fundamental principles of the system.

90. Her delegation welcomed the progressive approach taken by the Commission to the topic. *Jus cogens* derived from and represented the fundamental values of the international community that were essential for peaceful coexistence and fruitful cooperation. Those values could be identified through the practice of States and international organizations and the jurisprudence of international courts and tribunals. Portugal considered *jus cogens* norms to be the evidence and shield of the minimum common legal standards recognized by States and international organizations, and it therefore supported the Commission's view that *jus cogens* could be drawn from all sources of international law, not treaty law alone.

91. The development of *jus cogens* would take place primarily through progressive development and would not be impeded by the elaboration of an illustrative list of *jus cogens* norms. A list could be useful if it comprised a small number of norms and principles that embodied the minimum but most fundamental commitments of States and international organizations towards one another. Obligations *erga omnes* were evidence of the existence and recognition of such norms and principles. While the compilation of even a short list of the most widely recognized peremptory norms of international law could raise difficult questions, that was no reason to prevent the Commission from undertaking such an endeavour.

92. Turning to the topic "Succession of States in respect of State responsibility" in the Commission's programme of work, she said that it would not be possible to reach any conclusions on the effects of succession on State responsibility without an in-depth and comprehensive analysis of the case law and State practice. The Commission's work on related topics, in particular succession of States in respect of treaties, succession of States in respect of State property, archives and debts and nationality in relation to the succession of States, would make a useful contribution to the consideration of the topic. Given the extent and diversity of practice, her delegation suggested that the Commission should undertake its analysis without focusing on the predetermined goal of assessing the existence of general rules or principles relating to State responsibility.

93. Until the substantive elements of the topic had been fully explored, it would be premature to take a decision concerning the final form of the project. Therefore, any further work on the draft articles on succession of States in respect of State responsibility should be without prejudice to the final decision on the form that the outcome of the work should take.

94. Portugal was confident that the work on the topic "Protection of the environment in relation to armed conflicts" would have a positive impact on the protection of human beings and the environment.

95. **Mr. Meza-Cuadra** (Peru) said that his delegation supported the decision to change the title of the topic "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)". His delegation agreed that the core characteristics of *jus cogens* norms were that they protected the fundamental values of the international community, were hierarchically superior to other norms of international law and were universally applicable, as stated in draft conclusion 3 as proposed by the Special Rapporteur in his first report. His delegation welcomed the reference to "the acceptance and recognition of the international community of States as a whole" as the criterion for the identification of norms of *jus cogens* in draft conclusion 7 (International community of States as a whole) as proposed by the Special Rapporteur in his second report. However, it should be made clear that the reference was to acceptance by an overwhelming majority of States, not all States.

96. In its future work, the Commission should focus on determining the methodology to be used to identify *jus cogens* rather than the preparation of an indicative list of such norms. If a list were to be drawn up, it should consist of a small number of examples and avoid giving the impression that it was exhaustive. Peru would follow with interest the Special Rapporteur's consideration of the linkage between universal applicability and regional *jus cogens*, as it did not seem possible that regional *jus cogens* could exist.

97. **Mr. Singh** (India), referring first to the topic "Peremptory norms of general international law (*jus cogens*)", said that article 53 of the Vienna Convention on the Law of Treaties should serve as the starting point

for determining the criteria for the identification of *jus cogens* norms. Such norms should be rules of customary international law with bases in all three sources of law: custom, treaties and general principles of law.

98. Turning to the topic "Succession of States in respect of State responsibility", he recalled that the Commission had decided not to cover the issue of succession in its earlier work on related topics. It had not included the question of succession in respect of responsibility for torts as a subtopic to be examined in relation to its work on the question of succession of States in the 1960s. In his first report (A/CN.4/708), the Special Rapporteur indicated that while in 1998 the Special Rapporteur for the topic "Responsibility of States for internationally wrongful acts" had written that there was a widely held view that a new State did not, in general, succeed to any State responsibility of the predecessor State with respect to its territory, the Commission's commentary to draft article 11 of the 2001 draft articles on responsibility of States for internationally wrongful acts reflected the more nuanced view that, in the context of State succession, it was unclear whether a new State succeeded to any such responsibility.

99. His delegation was in favour of determining whether there were rules of international law governing the transfer of obligations and rights arising from the international responsibility of States for internationally wrongful acts. It would be useful to carry out a further analysis of State practice, which was limited and still evolving. In his second report, the Special Rapporteur should distinguish between cases where the predecessor State no longer existed, for example as a result of dissolution or unification, and cases where the predecessor State continued to exist and successor States were created through territorial transfer, secession or independence.

100. **Mr. Mahnic** (Slovenia), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that the Commission's consideration of approaches to the identification of *jus cogens* should not be entirely focused on article 53 of the Vienna Convention. He reiterated his delegation's view that *jus cogens* norms were of a special and exceptional nature, as they reflected the common and generally accepted fundamental values and foundations of the international order. Consequently, the criteria for their identification should not be based entirely on consent. The Commission should therefore consider how the characteristics of *jus cogens* set out in paragraph 2 of draft conclusion 3 (General nature of *jus cogens* norms) as proposed by the Special Rapporteur in his first report (A/CN.4/693) should play into the identification of *jus cogens*.

101. Turning to the draft conclusions as proposed by the Special Rapporteur in his second report, he said that the meaning of the term "international community of States as a whole" in draft conclusion 7 should be clarified. In that connection, his delegation's view was that while a norm did not have to be accepted and recognized by all States in order to be considered *jus cogens*, the majority should be large enough that the matter was not contentious. The term "attitude" as employed in draft conclusion 7 should also be more clearly defined.

102. With reference to draft conclusion 8, he said that the Special Rapporteur should examine the role of acquiescence as it pertained to the acceptance and recognition of *jus cogens*. Draft conclusion 9 should be further developed to provide greater legal certainty. In particular, it should be emphasized that the list of materials that could provide evidence of acceptance and recognition of *jus cogens* was not exhaustive.

103. With regard to the Commission's future work on the topic, Slovenia wished to reiterate its view that a regional *jus cogens* was not possible. The elaboration of an illustrative list of *jus cogens* norms would fall within the scope of the Commission's mandate and make a useful contribution to the work on the topic.

104. Reaffirming his delegation's support for the consideration of the topic "Succession of States in respect of State responsibility", he said that the Special Rapporteur's first report provided convincing evidence that the traditional theory of non-succession had been challenged by modern practice, or at least that modern international law did not exclude the possibility of a transfer of obligations arising from State responsibility. The examples in the report adequately supported the arguments of the Special Rapporteur. While cases of succession were rare and occurred in diverse political and historical contexts, it was clear that the approaches taken in more recent international judicial decisions and agreements differed substantially from those in early cases. There was a need for further in-depth research into State practice, including in regions outside of Europe.

105. With regard to agreements concerning succession, Slovenia supported the suggestion made by some members of the Commission to examine how the application of the *pacta tertiis* rule to devolution agreements and other agreements between predecessor and successor States had evolved. As noted in the Special Rapporteur's report, agreements concerning succession could confirm that a successor State was ready to accept obligations arising from State responsibility of its predecessor, but they could also

limit or exclude such obligations, so the consent of third States was important and could not be presumed in all cases. It remained unclear whether such agreements could limit or exclude the responsibility of successor States.

106. In that connection, it must be taken into account that, by changing the number and/or structure of the responsible State or States, succession affected the position of the injured State. Up to the date of succession, the injured State was able to invoke the responsibility of the State that had committed the unlawful act. However, the rights of the injured State in that regard once succession had taken place and the responsible State had become a predecessor State were unclear. It was therefore necessary to define rules to govern the extent and form of responsibility succeeded to by successor States for each different category of succession. For example, it must be determined whether an agreement between a number of successor States in which those States did not recognize any joint and several responsibility for an unlawful act affected the right of the injured State to invoke the responsibility of those States in respect of that act. His delegation therefore supported the Special Rapporteur's intention to propose a set of rules for different categories of succession.

107. Slovenia also welcomed the intention of the Special Rapporteur to further consider the matter of plurality of successor States and the matter of shared responsibility. The question of plurality of injured States should be addressed in a similar manner. His delegation proposed that the Special Rapporteur should take into account the provisions of constitutions or constitutional instruments of federal States, such as the Constitutional Charter of the State Union of Serbia and Montenegro, in its consideration of succession agreements. Such texts could be relevant to the analysis of the right of federal units to secede and the consequences of such secession. It would also be useful to consider the interpretation of the succession of States in respect of State responsibility by the European Court of Human Rights in cases such as *Bijelić v. Montenegro and Serbia.* That case concerned the rights of individuals and was therefore not directly relevant to the topic, but it could provide useful insight.

108. Slovenia supported the continuation of the work on the topic "Protection of the environment in relation to armed conflicts" and, in that connection, invited the Special Rapporteur and the Commission to consider the 2017 report of the Global High-level Panel on Water and Peace, which was directly relevant to the topic.

The meeting rose at 6.05 p.m.