United Nations A/C.6/72/SR.23

General Assembly
Seventy-second session

Official Records

Distr.: General
17 November 2017

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Friday, 27 October 2017, at 10.15 a.m.

Chair: Mr. Gafoor . . . . . (Singapore)

Contents

17-19025 (E)

The meeting was called to order at 10.15 a.m.

Statement by the President of the International Court of Justice

1. **Mr. Abraham** (President of the International Court of Justice) said that he had chosen to speak to the Committee about the position of third parties in the judicial practice and jurisprudence of the International Court of Justice. Article 59 of the Statute of the Court provided that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". The Court nonetheless recognized that the interests of third States, and particularly their legal interests, might be affected in contentious proceedings, and it took those interests into consideration in two ways: in certain circumstances, third States could play an active role in a contentious case between two other States; protection could be afforded to third States in contentious cases to which they were not parties but whose resolution might concern or affect them.

2. The Statute of the Court had two articles on intervention, which presented two distinct scenarios. Article 62, paragraph 1, provided that "[s]hould a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene." Article 63, for its part, addressed the situation when "the construction of a convention to which States other than those concerned in the case are parties is in question." All such States were notified by the Registrar, and "every State so notified has the right to intervene in the proceedings."

3. The conditions for intervention on the basis of Article 63 were clearly defined. If a State did not fulfil them but nonetheless considered that it had an interest of a legal nature that might be affected by the decision in a dispute submitted to the Court by other States, it could submit to the Court an application for permission to intervene under Article 62 of the Statute; the Court could then decide whether to admit or reject the application. In both situations of intervention, it was the third State that instigated the procedure leading to intervention: the Court could not direct that a third State should be made a party to its proceedings. Since its inception, the Court had been seized of only four applications for permission to intervene under Article 63 of the Statute.

4. By contrast, the conditions for intervention under Article 62 were not very clear and merited closer examination. The Court had had occasion to clarify in its jurisprudence the conditions under which a third party could intervene on the basis of Article 62.

5. First, it had made it clear that the consent of the parties to a case was not required for a third State's application for permission to intervene under Article 62 to be accepted. Indeed, a State wishing to intervene as a non-party could do so without any basis of jurisdiction between itself and the parties to the proceedings. By contrast, the Court had emphasized that if a State applying to intervene intended to become a party to the proceedings itself, such a basis of jurisdiction was essential. That distinction between the option to intervene as a party and the option to intervene as a non-party was not made explicit in Article 62 or in the relevant articles of the Rules of Court, but it had been elucidated by the Court in its judgments of 4 May 2011, by which it had ruled on the applications presented by Honduras and Costa Rica for permission to intervene in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The distinction between intervention as a party and intervention as a non-party was not only critical in terms of the conditions that must be met for an application for permission to intervene to be accepted, it also had implications for the scope of the intervening State's procedural rights.

6. Moreover, the Court had observed that the purpose of intervention under Article 62 was preventive; therefore, it could not be used by a State to submit new issues for decision by the Court, at least when the intervening State did not become a party to the case. The State must confine itself to protecting its interests of a legal nature that were already at stake in the decision in the dispute before the Court. As stated by the Chamber constituted to entertain the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, in its judgment of 13 September 1990 on the application by Nicaragua for permission to intervene, intervention was not intended "to enable a third State to tack on a new case," but was aimed at "protecting a State's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other States."

7. Finally, when deciding on an application for permission to intervene, the Court did not ask itself whether the participation of the third State seeking to intervene might be useful or even necessary, since an affirmative answer to that question was not sufficient for its application to be accepted. Instead, the Court asked itself whether, in the dispute forming the subject matter of the main proceedings, the legal interest of the third State was at issue ("*en cause*" in the French version of Article 62 of the Statute). As the English version of Article 62 put it, the question was whether the third State had "an interest of a legal nature which may be affected by the decision in the case."

8. In the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Italy, seeking to intervene under Article 62 of the Statute, had invoked "the impossibility, or at least the greatly increased difficulty, of the Court's performing the task entrusted to it … in the absence of participation in the proceedings by Italy as intervener". In that case, the Court had decided that the application by Italy for permission to intervene could not be allowed.

9. The French text of Article 62 of the Statute talked about an "*intérêt juridique en cause*" in a dispute — a "legal interest at issue" — while the English text referred to an "interest of a legal nature which *may be affected* by the decision in the case." The Court had noted that difference in the wording and, considering the English version to be "more explicit", it had systematically sought to ascertain, when dealing with an application for permission to intervene, whether the legal interest claimed by the State "may be affected", in its content and scope, by a decision of the Court in the principal proceedings.

10. The "interest of a legal nature" which the intervening State must be able to claim was indeed an interest and not a right. The Court had consistently held that "the State seeking to intervene as a non-party ... does not have to establish that one of its rights may be affected"; it only had to demonstrate that one of its interests might be affected. However, the interest invoked must be "of a legal nature," in other words, as stated in the judgments relating to the applications for permission to intervene in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the interest "has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature."

11. Lastly, for an intervention to be permitted, it was not necessary to establish that the legal interest of the third State would be affected by a decision in the principal proceedings; it was sufficient that that interest might be affected by the decision. The Court had recalled that well-established principle in its 4 July 2011 ruling on the application by the Hellenic Republic for permission to intervene in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy)*, which was the most recent application submitted to it on the basis of Article 62. The Court had also consistently held, since its judgment of 23 October 2001 on the application by the Philippines for permission to intervene in the case concerning *Sovereignty over Pulau Ligitam and Pulau Sipadan (Indonesia/Malaysia)*, that the interest of a legal nature that needed to be shown "is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*." In other words, a State seeking to intervene in proceedings could base its application on the fact that part of a judgment's reasoning, and not necessarily the operative part itself, could affect one of its interests of a legal nature.

12. One question which Article 62 of the Statute did not expressly resolve was whether the very fact that a legal interest might be affected by a decision obliged the Court to allow the intervention, or whether the decision on that point was left to its discretion. In that regard, as the Court had observed for the first time in its judgment of 14 April 1981 on the application by Malta for permission to intervene in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* and had regularly held since, although Article 62, paragraph 2, provided that it was for the Court to decide on any application for permission to intervene on that basis, the Court did not consider that provision "to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy." Thus, whenever the Court had concluded that the conditions set out in Article 62 of the Statute were met and judged that the object of the request was consistent with the function of intervention, it had systematically allowed the intervention sought by the third State concerned.

13. Turning to what might compel a third State to seek to intervene in a case on the basis of Article 62, namely the consequences of such an intervention, he said that an intervening State did not necessarily become a party to a case on account of its intervention. It could become a party only if it requested to do so and asserted an applicable basis of jurisdiction between it and the parties to the main proceedings. Whether it intervened as a party or not, pursuant to Article 85, paragraph 3, of the Rules of Court, a third State was entitled, in the course of the oral proceedings, to submit its observations with respect to the subject matter of the intervention — subject matter which must be identified by the State in its application for permission to intervene and which was defined by the Court. However, the "capacity" in which a third State intervened had implications for both the procedural rights it acquired and its obligations. The Court had summarized those differences in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, in which Honduras had primarily sought to be permitted to intervene as a party and, in the alternative, as a non-party. If it was permitted to become a party to the proceedings, the intervening State could ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention had been

granted. On the other hand, a State permitted to intervene in the proceedings as a non-party did not acquire the rights, or become subject to the obligations, which attached to the status of a party under the Statute and Rules of Court or the general principles of procedural law.

14. One of the ways in which the Court protected the interests of third States even when they were taking no action in contentious cases was to declare that it was unable to rule on a question which might affect those interests. It had been in the well-known case concerning the *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* that the Court had first observed that it could not rule on the rights and obligations of a third State in proceedings without the consent of that State, when those rights and obligations formed "the very subject matter" of the decision to be taken. In that case, the Court had been asked to decide whether a certain quantity of monetary gold removed from Rome by Germany in 1943, gold which had been recognized as belonging to Albania but to which both the United Kingdom and Italy had claims, should be delivered to the United Kingdom or to Italy. In its application, Italy had requested that the gold should be delivered to it in partial satisfaction for damage which it alleged had been caused to it by Albania. The Court had taken the view that to go into the merits of such questions would be to decide a dispute between Italy and Albania, which it could not do without the consent of Albania.

15. The Court had had a further opportunity to apply the so-called *Monetary Gold* principle in the case of *East Timor (Portugal v. Australia)*, in which Portugal had accused Australia of concluding a treaty with Indonesia that created a zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia. Portugal had argued that by concluding that treaty, Australia had infringed the rights of Portugal as the administering Power of East Timor and the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources.

16. The Court had observed that in order to rule on the claim by Portugal, it was required to determine the lawfulness of the conduct of Indonesia, and in particular, whether Indonesia had the power to enter into treaties, on behalf of East Timor, relating to the natural resources of its continental shelf. The Court had concluded that it could not exercise its jurisdiction to resolve the dispute, because the very subject matter of its decision would indicate whether Indonesia could or could not have acquired that power, and such a decision could not be taken without the consent of Indonesia. Thus, a third State had a guarantee that the Court would not rule on a claim that required it to make a determination about that State's international responsibility.

17. Nevertheless, as the Court had made clear in its judgment of 26 June 1992 in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court would not be deprived of its jurisdiction to entertain a case by the simple fact that the legal interest of a third State might be affected or that its findings might have implications for the legal situation of the third State. The *Monetary Gold* principle only applied when the legal interest of the third State that might be affected formed the very subject matter of the decision being sought and when there was a logical link between the findings that would have to be made concerning the third State and the decision requested.

18. Another way in which the Court protected the rights and interests of third States in contentious proceedings was by ensuring that its decisions did not affect their interests. Using the example of maritime delimitation disputes, he said that when identifying the area it was being asked to delimit, the Court did not consider that it was precluded from including spaces in which the rights of third States might be affected, but it did observe that such inclusion was without prejudice to any rights which third States might claim to hold in that area. Thus, in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the Court had noted that where areas were included solely for the purpose of approximate identification of overlapping entitlements of the parties to the case, third party entitlements could not be affected. Furthermore, a practice had developed whereby, when necessary, the Court would end any line drawn by it to delimit the maritime spaces of States parties to the principal proceedings before that line reached an area where the legal interests of third States might be affected.

19. A number of other aspects of the Court's practice could have been mentioned with regard to third parties in contentious proceedings. The Statute made provision for any public international organization to submit observations whenever the construction of its constituent instrument or that of an international convention was in question in a case submitted to the Court. On the other hand, it made no provision for a non-governmental organization to intervene as *amicus curiae* in contentious proceedings. In advisory proceedings under Article 66 of the Statute, any State entitled to appear before the Court or any international organization which the Court or its President considered likely to be able to furnish information on the question

must be informed that the Court was prepared to receive written statements or to hear oral statements at a public sitting. Furthermore, a State that had not received such an invitation could express a desire to submit a written statement or to be heard. The Practice Directions adopted by the Court stipulated that the written statements or documents presented by non-governmental organizations in advisory proceedings were not to be considered as part of the case file, but were to be made accessible for consultation by the States and organizations that were presenting written or oral statements in the case concerned.

20. **Mr. Simonoff** (United States of America) said that he had found the statement by the President of the International Court to be enlightening but would welcome hearing his views on the disparity between Article 63, paragraph 2, of the Court's Statute, which provided that judgments were binding upon States that intervened as well as upon the parties to a dispute, and Article 62, which said nothing about the binding nature of a judgment with respect to States that intervened under that article.

21. **Mr. Abrahams** (President of the International Court of Justice) said that in drafting Article 62, the lawmakers had probably had in mind the intervention of a State as a non-party to a dispute. In such a case, it was logical that a judgment should not be binding. It was the Court that, in its jurisprudence, had stipulated that when a third State intervened as a party to the proceedings, the Court's ruling would be binding upon it in respect of the issues that had prompted its intervention, since on those issues the intervening State had gained the status of a party to the dispute. There was nothing ambiguous in the wording of Articles 62 and 63; the jurisprudence of the Court had introduced a certain degree of complexity, but it had also been quite well founded and consistent: intervention as a party was more difficult to obtain because more conditions had to be met, but once it had been gained, it had consequences for the intervening State, one of which was that it would be bound by the judgment on the points that had been the subject of its intervention.

22. **Mr. Tito** (Kiribati) said that the Pacific Island States were being buffeted by damaging storms, wind and waves that were breaking their sea walls and bridges, spoiling their drinking water and destroying their homes. It had now been established as a scientific fact that such damage was caused by people not behaving responsively on the planet. He wished to know whether such behaviour could not be declared to constitute *injuria*, an actionable wrong, and whether something could not be done to ensure that the wrong thus caused was paid for.

23. **Mr. García Reyes** (Guatemala) said that the International Court of Justice played an important role in safeguarding the rule of law worldwide. The Court's rulings helped to ensure the peaceful settlement of disputes between States, and the Court's jurisprudence greatly enriched the Sixth Committee's work as the legal advisory body of the United Nations.

24. **The Chair**, speaking in his personal capacity, said it would be interesting to hear from the President of the Court, as he looked back on the time he had served in that capacity, what his vision was for the Court in the next 20 years, and what the delegates in the Sixth Committee, who were among the brightest legal minds in the international community, could do to help realize that vision.

25. **Mr. Abrahams** (President of the International Court of Justice), responding first to the comments by Guatemala, said the Court would continue to strive to be worthy of the confidence placed in it. Concerning the comments by the representative of Kiribati on climate change that caused major damage to the environment, he said that he was obviously moved by those concerns, as was the entire Court. That said, the Court was only one of the many cogs in the wheel of the United Nations system, and its work must be based on its Statute, which defined its competencies as either to resolve a contentious issue with the consent of the parties or to provide an advisory opinion when so requested. Even though international environmental law was a fairly new field, the Court had already been requested to resolve some cases, and in the future, it might be called upon to contribute still further to clarifying and developing the law in that domain. But unlike a political body, the Court could not decide of its own accord what issues it must tackle. An issue had to be brought before it, and it had to verify that, within the limits of its competence, it could deal with that issue.

26. Regarding the future of the International Court of Justice, he said that the Court's authority flowed entirely from the confidence that States placed in its capacity to fulfil its mission. In an ideal world, all disputes between States would be susceptible to submission to adjudication. In reality, States, which were sovereign entities, had the freedom to consent or not to the Court's jurisdiction. The Court strictly respected the limits of its competence and never overstepped those boundaries. However, by the quality of its judgments and by the conditions it respected in rendering them, such as rapid handling of urgent cases involving requests to indicate provisional measures, the Court hoped to merit the confidence of States and even to develop that confidence still further so that in future, more and more of them would consent to its jurisdiction. That was

basically what would define the contours of international justice in the next 20 years. What could be done in the meantime was to work towards strengthening the confidence of States in international justice and the rule of law in international relations.

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

27. **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).

28. **Mr. Špaček** (Slovakia) said that the way the Commission dealt with the topic "Protection of the atmosphere" continued to raise concerns, and at its latest session, it had once again proven that the topic was not developing in the right direction.

29. Slovakia recognized the serious risks and challenges that climate change and global warming posed to humankind, as well as the fact that atmospheric pollution and degradation were the prime contributors to climate change. However, it was not up to the Commission to address such policy issues involving a broad range of socioeconomic, development and scientific questions which fell outside its primary mandate. Legal considerations must take priority when it came to the definition and development of rules pertaining to the protection of the atmosphere.

30. The current text of the draft guidelines provisionally adopted by the Commission still lacked a clear purpose. As stated in the draft preamble, the draft guidelines were not to interfere with relevant political negotiations, including those on climate change, ozone depletion and long-range transboundary air pollution, neither were they to seek to fill gaps in treaty regimes or to impose on current treaty regimes legal rules or legal principles not already contained therein. However, it was not clear at all what the Commission intended to achieve by drafting a set of guidelines that was merely a repetition of procedural obligations under international law not pertaining solely to the protection of the atmosphere.

31. With regard to the interrelationship between international law on the protection of the atmosphere and other fields of international law, it was obvious that the Commission had struggled with the content of the fourth report of the Special Rapporteur (A/CN.4/705 and A/CN.4/705/Corr.1), and the Drafting Committee should be commended for making improvements to the draft guidelines proposed by the Special Rapporteur. The proposed concept of laws on the protection of the atmosphere had not received much support because it was not based on realistic assumptions. Indeed, neither doctrine nor State practice supported the notion that there was a separate branch of international law relating to the protection of the atmosphere. There was therefore no need to tackle the question of interrelationship without running the risk of engaging in a purely academic debate that could not lead to realistic practical solutions. Moreover, the question of interrelationship had been covered sufficiently by the Commission in its work on the topic "Fragmentation of international law".

32. The approach taken in paragraph 1 of draft guideline 9 (Interrelationship among relevant rules), namely that conflicts under international law could be avoided through politically oriented changes or variations in the identification, interpretation or application of the relevant rules, was highly unrealistic. Paragraph 1 also contained some contradictions that might be misleading. Paragraph 2, as currently drafted, stated the obvious. It epitomized a basic problem in the draft guidelines: they represented an artificial endeavour to collect generally applicable norms and restate them without identifying specifics directly applicable to the protection of the atmosphere.

33. In paragraph 3, the Commission tried to identify particularly vulnerable persons and groups. However, the persons and groups that were particularly vulnerable to climate change were not necessarily identical to those that were vulnerable to atmospheric pollution or atmospheric degradation. For example, people living in cities or in highly industrialized areas were much more vulnerable to the effects of atmospheric pollution than groups or people living in remote areas. The concept underlying the paragraph should therefore be revisited.

34. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said his delegation had some concerns about the procedure used by the Commission to resolve the deadlock on the limitations and exceptions to immunity *ratione materiae*. Although voting was a legitimate procedural tool, it must be used only as a last resort and only with extreme caution, especially on highly politically charged questions. Forcing the adoption of draft article 7 through a roll call vote had not been the appropriate way to proceed. The Commission should have continued its discussions and explored consensual solutions. No one could realistically expect the division in the Commission on that particular draft article to go unnoticed in the General Assembly; under the circumstances, consensual action on the draft articles was almost impossible.

35. Slovakia acknowledged the concept of immunity *ratione materiae* for State officials as well as the existence of limitations and exceptions to that immunity, and supported the inclusion of draft article 7, which dealt with such limitations and exceptions. However, those limitations and exceptions should only be applicable to core crimes under international law. Although that idea might be deduced from the title of the draft article (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), it would be more helpful if the original purpose of the draft article, namely to define the limitations and exceptions to immunity *ratione materiae*, was more explicitly reflected in the title.

36. His delegation welcomed the Commission's approach to list international crimes for which immunity *ratione materiae* did not apply. Doing so would help to achieve legal certainty, although the question naturally arose whether such a list would reflect customary international law or constitute an attempt to develop the law. In the view of his delegation, that list should not go beyond *de lege lata* crimes, nor should it include crimes that were not part of general international law or that fell into a broader category of particular international crimes, such as crimes against humanity. The Commission should therefore deliberate further on whether the crimes of apartheid, torture or enforced disappearance should be included in the list of crimes for which immunity *ratione materiae* should not apply. The Commission should also decide whether or not its ambition with regard to draft article 7 was to redefine the concept of crimes under international law.

37. The question of procedural provisions and safeguards, which the Special Rapporteur intended to deal with in her sixth report, might be crucial to having a workable set of draft articles adopted and accepted by States. While his delegation noted the Commission's intention to complete the draft articles on first reading in 2018, it cautioned against proceeding towards premature completion at any cost.

38. **Mr. Alabrune** (France) said that the Commission should be aware that its work on the topic of protection of the atmosphere might overlap with the treatment of certain matters under the draft Global Pact for the Environment, proposed by the President of France on 19 September 2017. Respecting the understanding reached in 2013 when the topic was first included in the Commission's programme of work took on even greater importance in that regard.

39. Referring to the draft guidelines provisionally adopted by the Commission, he said that the draft preamble consisted largely of a recitation of scientific notions and facts and failed to elucidate the intentions behind the text; the question arose as to whether it was useful or not. Since the draft guidelines would not be binding in nature, his delegation also questioned the utility of draft guideline 9, one of the principal purposes of which was "avoiding conflicts" to the extent possible between the rules relating to the protection of the atmosphere and other relevant rules of international law.

40. In addition, the link between some of the fields of law mentioned in draft guideline 9 and the protection of the atmosphere was not self-evident. It was not clear whether existing bilateral investment treaties really covered the question of the atmosphere. As for the rules of international trade law, while it was true that they should not be interpreted in isolation, the commentary to draft guideline 9 did little to clarify the links between bilateral investment treaties and protection of the atmosphere. The international treaties cited in the commentary contained no provisions on atmospheric protection per se: they dealt with environmental protection in general.

41. Lastly, the analysis of how the principle of non-discrimination applied to protection of the atmosphere did not seem to reflect the state of positive international law: for example, there was no reference to the practice of States and international organizations. In its commentary, the Commission's stated that "the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution", based on one learned article alone, without querying whether it was well founded or not. Given the conditions set when the topic was first included in 2013, and the ongoing diplomatic negotiations, the Commission must show greater restraint in its work on the protection of the atmosphere.

42. Chapter VII of the Commission's report, on immunity of State officials from foreign criminal jurisdiction, raised a number of problems, especially in the light of the fundamental importance of the rules relating to immunity on international relations. The discussion of the topic, particularly draft article 7, had sparked vigorous debate within the Commission, resulting in the adoption of the draft article by majority vote. The question of exceptions to immunity from foreign criminal jurisdiction was of crucial importance, and the Commission should have taken the time to forge a consensus on it. One could hardly expect the text to be accepted by all States if the Commission itself had not arrived at a consensus; the absence of a consensus militated against the consistent interpretation of the rules of international law and exacerbated the risk of fragmentation.

43. In its work on such an important subject, it was important for the Commission to clearly announce whether it was engaging in the codification of international law or its progressive development; it was noteworthy that the Commission had indicated that its thinking had been based on the existence of a "trend." In view of the insufficiency of State practice and *opinio juris*, the exceptions to immunity *ratione materiae* listed in draft article 7 did not constitute rules of customary international law, in the view of France. His delegation regretted the fact that the Commission had not set up a working group to look into the relevant State practice in greater depth, since even its members who had voted in favour of adopting draft article 7 had diverged on the interpretation of State practice.

44. The Commission had indicated in its report that it hoped to complete the consideration of the draft article on first reading in 2018. Since the applicable procedural provisions and safeguards, to be considered at the next session, were directly related to the question of exceptions to immunity, and in view of the intensive debates and divisions on the issue, it would be preferable for the Commission to give itself all the time needed to develop a coherent view of the relevant practice in order to achieve greater consensus on the text.

45. **Mr. Perera** (Sri Lanka) said that with regard to the topic of immunity of State officials from foreign criminal jurisdiction, it was necessary to proceed with circumspection, given both the legal complexity and the political sensitivity of the issues involved and their critical importance to Member States. In her fifth report on the topic (A/CN.4/701), the Special Rapporteur had concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations and exceptions in respect of immunity *ratione personae* or to identify a trend in favour of such a rule. However, she had also stated that although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction. It had been that conclusion and the approach adopted in draft article 7 that had generated a sharply divisive debate within the Commission and had led, unfortunately, to a decision through recourse to a vote on an issue which needed to be the subject of further critical analysis and a decision taken by consensus.

46. Questions had been raised in the course of the debate as to whether the report contained sufficiently cogent evidence to support the conclusion reached on the existence of limitations and exceptions in respect of immunity *ratione materiae*. While the discussion of practice in the report had been seen as extensive, it had been pointed out that the examples cited related to State immunity or immunity in civil proceedings rather than criminal prosecutions, that they were taken from different contexts and that the report selectively discussed cases that supported the establishment of limitations and exceptions while disregarding evidence indicating the opposite.

47. The treaty practice that had been cited with regard to limitations and exceptions to immunity was problematic. Treaties dealing with international crimes of a serious nature, such as those providing for an extradite-or-prosecute regime, did not expressly provide for limitations and exceptions in respect of the crimes covered. Such treaties could not be considered to form part of the evidence of a customary rule. To establish the existence of such a rule, much more cogent, clear and unequivocal evidence of treaty practice was required.

48. The considerable reliance on treaties expressly providing for individual criminal responsibility for international crimes was of concern. Such treaties, by definition, should not have a bearing on the question of immunity of State officials before the domestic courts of a foreign State. The blurring of the distinction between the application of limitations and exceptions in proceedings before an international court and in proceedings before the domestic courts of a foreign State made the basic approach in draft article 7 somewhat problematic. The draft article was largely grounded in the Rome Statute and, consequently, could not be considered to reflect a customary law principle establishing limitations and exceptions to the immunity of State officials in foreign criminal jurisdictions. States that had subscribed to the Rome Statute had voluntarily renounced the right to claim immunity in respect of the core crimes under the Statute. The Statute therefore should not have a bearing on the question of the immunity of State officials from prosecution before national courts.

49. That fundamental distinction between prosecution of a foreign official before a domestic court as opposed to one before an international court or tribunal had a critical bearing on the overall approach with regard to draft article 7. Aligning that text with the approach used in instruments relating to international courts and tribunals would run the risk of affecting peace and stability in relations among States if, for example, one State opted to exercise criminal jurisdiction over the officials of another State before its own national courts. That approach militated against the sanctity of the principle of sovereign equality of States enshrined in the Charter of the United Nations and could jeopardize the

broad acceptability of the draft articles as a whole, a scenario that should be carefully avoided. On the contrary, as the starting point, it was necessary to focus on existing law (*lex lata*) and build up a solid foundation of existing State practice; progressive development (*de lege ferenda*) could be addressed at a subsequent stage.

50. Finally, his delegation wholeheartedly agreed with the views expressed in the Commission on the need to recognize the crucial relationship between possible exceptions to immunity *ratione materiae* and the procedural safeguards that would ensure that such exceptions were not abused for partisan political purposes. Draft article 7 should have been adopted only in conjunction with such safeguards. It was encouraging, however, that the Special Rapporteur had reiterated her conviction that the Commission should deal thoroughly with procedural issues, including the necessary procedural guarantees and safeguards, to prevent politicization and possible abuse in the exercise of criminal jurisdiction. His delegation emphasized the importance of the right of waiver, in appropriate circumstances, as a key element in that regard.

51. Turning to the topic of protection of the atmosphere, he said that his delegation welcomed the Special Rapporteur's approach to dealing with the interrelationship between protection of the atmosphere and other relevant rules of international law and wished to underline the inextricable linkage between protection of the atmosphere and the oceans. In 1982, the United Nations Convention on the Law of the Sea had established the basic framework for dealing with the ocean environment and the duty of States to cooperate to protect and preserve it. Since then, new and serious threats to the oceans had emerged in the form of sea-level rise, increasing acidity, floating plastics and many others.

52. Sri Lanka also welcomed the recognition of the fact that special consideration should be given to persons and groups that were particularly vulnerable to atmospheric pollution and atmospheric degradation. The invocation of the fundamental principle of intergenerational equity which had been recognized in the jurisprudence of the International Court of Justice, namely that the global commons were held in trust for the benefit of future generations, was most pertinent.

53. **Ms. Pengsuwan** (Thailand) said that Thailand recognized the value of the Commission's work on the topic of protection of the atmosphere, as it raised the visibility of the issue itself and of the complex legal issues surrounding it, including fragmentation. Of particular interest to her delegation was paragraph 1 of draft guideline 9 provisionally adopted by the Commission: Thailand could support, in principle, the suggestion that all relevant rules of international law should be identified, interpreted and applied in a way that led to a single set of compatible obligations.

54. On the topic of immunity of State officials from foreign criminal jurisdiction, Thailand took note of draft article 7 as provisionally adopted by the Commission, which listed the crimes for which immunity *ratione materiae* did not apply, based on the Special Rapporteur's finding that no customary international law existed in relation to limitations or exceptions to any such type of immunity. Her delegation was of the view that the work on that complicated and highly sensitive topic should be based on *lex lata* and State practice; proposals *de lege ferenda* should be made only where they were supported by the international community as a whole.

55. **Mr. Xu** Hong (China) said that under the topic of protection of the atmosphere, the Commission had adopted draft guideline 9, the purpose of which was to ensure the harmonization and systemic integration of the rules of international law relating to the protection of the atmosphere with other relevant rules of international law. In order for the draft guideline to apply, however, there would need to be pre-existing rules of international law on the protection of the atmosphere, but since there was no generally applicable international treaty in that field at present, the draft guideline lacked the backing of international practice. While it might have some utility for theoretical purposes, it did not offer much practical value, and the Commission might wish to reconsider the need to retain it.

56. With respect to immunity of State officials from foreign criminal jurisdiction, he noted that the Commission had adopted by vote draft article 7, which identified six crimes under international law as exceptions to the immunity *ratione materiae* of State officials. In his delegation's opinion, the draft article was very problematic. Its hasty adoption without thorough discussion seemed inappropriate. Before the deliberations on the issue could run their course, the Commission had rushed to a vote and adopted the draft article with almost one third of the members voting against it. The Commission should proceed with caution and prudence and continue with an in-depth exchange of views on the issue of exceptions to seek the broadest possible consensus. It should avoid proposing a draft article on which there was extensive controversy, since that might undermine the authority of any potential outcome in that regard.

57. The six exceptions to immunity provided for in the draft article were not grounded in general international

practice. When arguing for the exceptions to immunity, the Special Rapporteur, in her fifth report, and the Commission, in the relevant commentaries, cited very few domestic cases, and those cited were mostly from European and American jurisdictions; the practice of Asian States had not been fully taken into consideration. The methodology used in the study had been marred by tendentious selectiveness. Many of the examples cited in the fifth report and the commentaries were related to legislation on State immunity or decisions in civil proceedings and were irrelevant to the immunity of State officials from foreign criminal jurisdiction. Furthermore, there was a strong tendency toward selective invocation of international practice and court decisions, giving lopsided weight to a handful of cases in which immunity had been denied while ignoring much more numerous instances of State practice and court decisions where immunity had been upheld. In addition, the references to certain court decisions selectively highlighted minority opinions against immunity, whereas the majority opinions in favour of immunity were not given due attention.

58. In that light, China did not believe that the provisions of draft article 7 qualified as codification or progressive development of customary international law. The unfair denial of immunity to State officials would seriously undermine the principle of sovereign equality and very likely become a tool for politically motivated litigation, causing grave damage to the stability of international relations. The Commission must fully recognize the seriousness of the issue and the potential harm involved, focus on thoroughly analysing existing international practice and proceed in a cautious and prudent manner.

59. With respect to peremptory norms of general international law (*jus cogens*), the Chinese delegation was of the view that the topic should be based on article 53 of the Vienna Convention on the Law of Treaties and on State practice, and excessive reliance on theoretical deduction should be avoided. It had pointed out in 2016 that the three basic elements of *jus cogens* norms as proposed by the Special Rapporteur in his first report, namely universal applicability, hierarchical superiority to other norms of international law and protection of the fundamental values of the international community, were at considerable variance with the elements set out in article 53 of the Vienna Convention and also lacked the backing of State practice. In response to the concern expressed by China, the Special Rapporteur explained in paragraph 18 of his second report (A/CN.4/706) that such elements should be seen as descriptive and characteristic elements, as opposed to the constituent elements (or criteria) of norms of *jus cogens* contained in article 53 of the Vienna Convention, and he argued that a distinction should be made between the two sets of elements. However, that explanation was still less than convincing, since the purported difference was an ambiguous one, distinguishable only in theoretical abstraction and not supported by positive law. More importantly, the three proposed elements were subject to controversy themselves. For instance, the specific meaning of so-called fundamental values could be very difficult to define in an international community with diverse civilizations and multiple value systems. Another example was the conclusion about the hierarchical superiority of *jus cogens*, which lacked the support of sufficient and coherent State and international judicial practice. With regard to such issues as whether *jus cogens* norms had priority over procedural rules such as immunity of State officials from foreign criminal jurisdiction or over the obligations of Members States under the Charter of the United Nations, there was no consensus yet in the international community.

60. With regard to the draft conclusions proposed by the Special Rapporteur in his second report, it was proposed in draft conclusion 5 (*Jus cogens* norms as norms of general international law) that general principles of law could serve as the basis for *jus cogens* norms. However, given the lack of consensus in the international community as to which norms fell within the category of general principles of law and the paucity of State practice relating to the elevation of a general principle of law to a *jus cogens* norm, further studies seemed warranted in order to determine whether general principles of law could indeed form the basis of *jus cogens*. China sought clarification from the Special Rapporteur in that regard.

61. Regarding the phrase “the international community of States as a whole”, contained in the criteria for the identification of *jus cogens*, he said that irrespective of whether it was interpreted as “a large majority of States” or “a very large majority of States”, such a definition would be very difficult to implement in practice. The same vague quantitative criterion could also be employed to identify customary international law, and it would be difficult to ascertain the difference, if any, in the manner in which the criterion was used to identify *jus cogens* norms. Since an accurate definition of “the international community of States as a whole” was crucial for the determination as to whether a norm of international law constituted a norm of *jus cogens*, more in-depth studies appeared to be required on that issue.

62. With respect to the topic “Succession of States in respect of State responsibility”, the Chinese delegation

was of the view that given the limited international practice relating to the matter, as well as the complex political and historical contexts in which such limited practice had occurred, it was foreseeable that the codification of rules of international law in that field would be very difficult. In addition, it was also worth further discussion as to whether there was any real urgency for the Commission to embark on the codification of the topic at the current stage.

63. With regard to draft article 1 (*Scope*) of the draft articles proposed by the Special Rapporteur in his first report (A/CN.4/708), China endorsed limiting the scope to State responsibility and succession of States, excluding the responsibility of international organizations and succession of Governments. It proposed that the rules on international liability should be kept out of the scope of the topic and that the focus should be entirely on secondary rules of State responsibility.

64. **Mr. Valek** (Czechia), recalling his delegation's well known reservations on the inclusion of the topic of protection of the atmosphere in the Commission's agenda, said that while the problem of climate change represented one of the most serious challenges now facing mankind, the resolute action that was urgently needed required the full engagement of international bodies other than the International Law Commission. The real issue at stake was how to develop an integrated approach to the problems underlying climate change, including understanding and acceptance of the scientifically proven relationship between various natural phenomena, such as the oceans and the atmosphere, and the impact of various human activities on the environment. Obviously, the Commission had no competence to deal with the scientific, socioeconomic and policy issues related to climate change, which were at the centre of any strategy to address the related challenges.

65. The relationship between the law on protection of the atmosphere and other branches of international law was a different issue. The first question that arose in that connection was whether there was indeed a branch of international law that could be called the law on the protection of the atmosphere, and his delegation was not convinced that that was the case. Moreover, the problem of inter-disciplinary relationship was not confined to the protection of the atmosphere; it was a broader legal issue. The relationship between the various fields of international law was governed by principles, and routinely resolved by techniques that were not dependent on the subject matter of the legal field in question. There was therefore no reason for the issue to be addressed specifically in connection with the protection of the atmosphere.

66. Of the draft guidelines on the topic provisionally adopted by the Commission, draft guideline 9 (Interrelationship among relevant rules) therefore raised several concerns. It was of course important that conflicts and tensions between rules relating to the protection of the atmosphere and rules relating to other fields of international law should to the extent possible be avoided, but the approach suggested in the first sentence of paragraph 1 was not the solution. Rather, the problem seemed primarily one of harmonization of the substantive obligations under various international legal instruments dealing with different subjects in the interest of a clearly defined and generally agreed policy. Such harmonization must be preceded by the identification of appropriate material and technical solutions for interconnected problems, which might require the adoption of legal obligations or the modification of existing ones. If the legal instruments were substantively contradictory, the problem could not be resolved by means of their idealistic reinterpretation.

67. Draft guideline 9 suggested an unworkable solution, which disregarded precisely those rules on the interpretation of treaties to which the second sentence of paragraph 1 explicitly referred. The rules of the Vienna Convention on the Law of Treaties applied to treaties individually. They did not aim at reconciling, by means of interpretation, an indefinite number of substantively incompatible instruments which might be binding on different groups of parties to treaties. Paragraph 2 addressed the problem of harmonization of legal instruments in a much more realistic manner and represented the only workable element of draft guideline 9.

68. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction," he said that the Commission's most recent discussions had clearly demonstrated that it was sometimes an uneasy task to identify established rules of customary international law, since relevant State practice might be varied and the legal issues complex and sensitive. The exceptions to immunity *ratione materiae* set out in draft article 7 of the articles provisionally adopted by the Commission seemed to be a case in point. Nevertheless, Czechia welcomed the draft article's adoption, since it properly reflected a trend in State practice which supported the existence of an exception to immunity *ratione materiae* when crimes under international law, as well as other so-called official crimes defined in the relevant treaties, were committed. Czechia also appreciated the commentary's elucidation of several aspects of a contentious issue.

69. His delegation welcomed the decision not to include the crime of aggression and the crime of corruption in the draft article. The crime of aggression was subject to a special jurisdictional regime, as reflected, inter alia, in the 1996 draft Code of Crimes against the Peace and Security of Mankind. As to the crime of corruption, Czechia shared the view, expressed in the commentary to draft article 7, that corruption should not be regarded as an act performed in an official capacity and therefore did not need to be included among the crimes for which immunity did not apply.

70. Lastly, Czechia wished to highlight the Commission's conclusion that the exceptions to immunity *ratione materiae* did not apply to or limit in any way the immunity of State officials *ratione personae*. In its commentary, the Commission expressly mentioned that principle with regard to Heads of States, Heads of Government and Ministers for Foreign Affairs, but in his delegation's view, the same immunity also applied to persons connected with special missions, diplomatic missions, consular posts, international organizations and the military forces of a State. Such immunity was guaranteed by draft article 1, paragraph 2, but it would be useful to reaffirm that fact in the commentary to draft article 7.

71. **Ms. Telalian** (Greece), referring to the topic of protection of the atmosphere, said that draft guideline 9 as provisionally adopted by the Commission drew on the conclusions reached in 2006 by the Commission's Study Group on the fragmentation of international law and aimed to ensure compatibility and complementarity among rules on the protection of the atmosphere and rules stemming from other branches of international law so that States could abide by both without fear of conflicting obligations, notwithstanding any difference in respect of their provenance and regulatory subject matter.

72. As indicated in the Special Rapporteur's fourth report (A/CN.4/705), environmental considerations had progressively made their way into branches of international law, either through the proclamation of new principles or through an evolutionary interpretation of existing rules by judicial and quasi-judicial bodies, thus facilitating the trend towards harmonization and mutual supportiveness. It was to be expected that such growing interaction would speed up in the future, and draft guideline 9, through its framework nature and open-ended wording, provided enough normative guidance for that process to flourish.

73. Draft guidelines 10 to 12 proposed by the Special Rapporteur, which had not been retained by the Commission, employed a sectoral approach which in any case should be avoided. Taking draft guideline 11, paragraph 2, as an example, she said that law of the sea issues had no place in a set of guidelines on the protection of the atmosphere. That was even truer with regard to the core matters relating to the law of the sea, such as the delimitation of maritime zones. All such matters were adequately regulated by the United Nations Convention on the Law of the Sea, whose universal and unified character was stressed, as was the need to maintain its integrity, in the resolutions adopted annually by the General Assembly on the oceans and the law of the sea, the latest being General Assembly resolution 71/257.

74. When the Commission had decided to include the topic in its programme of work, it had reached an understanding, reflected in footnote 677 to its current report to the General Assembly (A/72/10), to the effect that "[t]he outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein." That should provide clear guidance to the Commission regarding the future treatment of the topic of protection of the atmosphere. Moreover, the Commission should be very cautious about including in its future programme of work topics that were related to the law of the sea.

75. With regard to the immunity of State officials from foreign criminal jurisdiction, and, in particular, the highly sensitive issue of exceptions to immunity *ratione materiae*, she said that the Commission must not miss the opportunity to remove the lingering uncertainty which caused tensions between States and to provide them with appropriate guidance. Unfortunately, an apparently irreconcilable divergence of views on the issue had not permitted the Commission to come up with a consensus proposal on draft article 7, making the rather unusual recourse to a recorded vote inevitable.

76. Despite the heated debate within the Commission, the majority of its members had endorsed the systemic approach to the institution of immunity proposed by the Special Rapporteur in her fifth report (A/CN.4/701) and had recognized the need for the rules on immunity not to overlook other existing standards or principles enshrined in other important sectors of contemporary international law. It had been in that spirit that the Commission had ultimately decided to bolster the discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of certain types of behaviour by including in draft article 7 certain crimes under international law in relation to which immunity *ratione materiae* did not apply.

77. Her delegation firmly believed that in contemporary international law, the rules on immunity should strike a balance between respect for the sovereign equality of States and the stability of international relations, and the need to preserve the essential interests of the international community as a whole, one of which was undoubtedly to combat impunity for the most serious crimes under international law. From that point of view, the Commission's decision was a step in the right direction.

78. However, the concerns expressed by some members of the Commission regarding the potential abuse of exceptions to immunity *ratione materiae* and the danger of politically motivated trials were understandable. Her delegation accordingly welcomed the fact that, in the footnote to the text of the draft articles and in the commentary to draft article 7, the Commission had highlighted the importance of procedural provisions and safeguards in order to prevent possible abuse in the exercise of foreign criminal jurisdiction over State officials.

79. She welcomed the deletion of corruption-related crimes from the list of crimes included in draft article 7. Despite their gravity, such crimes could not be considered as "acts performed in an official capacity"; accordingly, one of the essential normative elements of immunity *ratione materiae* was not met in respect of those crimes. She could also accept the reasoning on which the Commission had based its decision not to include in draft article 7 the so-called 'territorial tort exception, a concept which had been mainly invoked to date in the context of civil proceedings.

80. As to the list of crimes under international law contained in draft article 7, paragraph l, it was understandable that, given the circumstances, the Commission had opted for a pragmatic approach based on what could ultimately be acceptable to States. It was also understandable that the inclusion of the crime of apartheid had been deemed appropriate mainly for historical reasons.

81. Finally, her delegation welcomed the refinements made by the Drafting Committee to the wording of the draft article, aiming mainly at highlighting the fact that it concerned immunity *ratione materiae*, as well as the removal of the two "without prejudice" clauses initially proposed by the Special Rapporteur.

82. **Ms. Orosan** (Romania), referring to the topic of immunity of State officials from foreign criminal jurisdiction, said that the sensitive nature of the limitations and exceptions to such immunity had resulted in another vivid and wide-ranging discussion within the Commission, following the partial debate on the same topic in 2016. Given that there was limited relevant practice and *opinio juris* on the matter, her delegation welcomed the cautious approach adopted in proceeding towards a decision on draft article 7.

83. Romania was in favour of making a distinction between immunity *ratione personae* and immunity *ratione materiae* for the purpose of the exercise of foreign criminal jurisdiction, on the grounds that immunity, as a procedural mechanism to guarantee respect for sovereign equality of States, should not undermine values and principles recognized by the international community as a whole. Therefore, there was merit in identifying acts which, even if performed in an official capacity, could not fall within the purview of immunity *ratione materiae* and, as a consequence, could be prosecuted under foreign criminal jurisdiction once immunity *ratione personae* had ceased.

84. Taking into account the differing views on the categories of crimes proposed for inclusion in the draft article, her delegation welcomed the Commission's approach of making limitations and exceptions applicable only to a prescriptive list of the most serious crimes under international law, defined on the basis of a broad international consensus and prohibited by customary international law. Romania likewise welcomed the clarifying addition that references to a specific treaty for the definition of each of the crimes were included only for the purposes of convenience and appropriateness and in no way affected other relevant rules of customary or treaty-based international law.

85. While the lingering uncertainty over the scope of immunity required the guiding work of the Commission, careful consideration must be given to the risk of creating inter-State tensions by asserting limitations and exceptions that States would not need to accept by means of a treaty and for which there was no sufficient and coherent State practice. Since clearly defined procedural safeguards could help to prevent abuse in the exercise of jurisdiction by States, her delegation looked forward to the sixth report of the Special Rapporteur and the Commission's consideration of the procedural safeguards applicable to the current draft articles, including draft article 7.

86. **Mr. Troncoso** (Chile), speaking on the topic of protection of the atmosphere, said that one of the lessons of the twenty-first century was that it was not enough to tackle environmental protection in general — protection of the atmosphere was becoming more important day by day. Failure to care for the "envelope of gases surrounding the Earth", as the Special Rapporteur rightly defined it in draft guideline 1 of the draft guidelines on the topic provisionally adopted by the

Commission, was a threat to humankind's very existence. His delegation welcomed the fact that the Special Rapporteur had organized a meeting with scientists, as in previous years, to help the legal experts on the Commission understand certain complex technical aspects of the topic.

87. The new preambular paragraphs, particularly the ones on the close interaction between the atmosphere and the oceans and the special situation of low-lying coastal areas and small island developing States, summed up very well the points made by the Special Rapporteur in his fourth report (A/CN.4/705). It was a scientifically proven fact that atmospheric pollution and atmospheric degradation owing to human activity were the main sources of global warming. The melting of the ice cap caused by higher temperatures raised the sea level, endangering the subsistence of whole societies in littoral areas. The sixth preambular paragraph, concerning the interests of future generations in the long-term conservation of the quality of the atmosphere, was in full accordance with the duty to practise sustainable living to enable future inhabitants of the planet to inherit an environment compatible with human well-being and health.

88. He welcomed the fact that draft guideline 9, on the interrelationship among relevant rules, fit in well with draft guidelines 10, 11 and 12; the commentary gave sufficient explanations about the issues relating to the protection of the atmosphere. Although the relevant regime was autonomous, its rules formed part of general international law, interacting with rules on the law of the sea, international trade law, international investment law, international human rights law and other branches. Hence the particular importance of the provisional adoption of draft guideline 9, which stated, in paragraph 1, that the various sets of rules "should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations." Paragraph 2 encouraged the progressive development of international law in a harmonious manner. Paragraph 3 took account of the views expressed in the Committee the year before on the need to recognize the position of persons and groups whose special vulnerability to atmospheric pollution and atmospheric degradation was frequently demonstrated through the devastating effects of grave natural disasters such as flooding, drought and tornados.

89. Referring to the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction report (A/CN.4/701), he noted her conclusion that it had not been possible to identify a customary rule permitting limitations or exceptions to immunity *ratione personae*; on the other hand, she had concluded that immunity *ratione materiae* did not apply to the commission of crimes against humanity.

90. The issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction was not a simple matter, since it involved such fundamental principles as the sovereign equality of States, together with the need to combat impunity for serious international crimes. His delegation concurred with the Commission that there was a clear trend under general international law towards limitations on the immunity *ratione materiae* enjoyed by State officials when they committed any of the most atrocious crimes against humanity. The Commission's work should cement that trend, in the interests of preventing impunity.

91. His delegation endorsed the provisional adoption of draft article 7, paragraph 1, which reflected the current trends in international law. Even though the crimes of torture, apartheid and forced disappearance were encompassed within crimes against humanity, according to the wording of article 7 of the Rome Statute, singling them out, as proposed in the text, was justified by the fact that the commission of such crimes would not in all cases meet the necessary threshold to be considered crimes against humanity, namely, their commission as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.

92. Turning to the topic of peremptory norms of general international law (*jus cogens*) and in reference to the draft conclusions provisionally adopted by the Commission, he emphasized the importance of draft conclusion 9 (Evidence of acceptance and recognition), which was an excellent contribution to both the codification and the progressive development of international law. Paragraph 1 in particular made an important point: that evidence of acceptance and recognition that a norm of general international law was a norm of *jus cogens* could be reflected in a variety of materials and could take various forms. His delegation endorsed the wording of the entire draft conclusion and looked forward to its adoption in future.

93. Lastly, although his delegation supported the Commission's decision to include in its long-term programme of work the topic of evidence before international courts and tribunals, a flexible approach should be adopted in that regard, since the standard for evidence might vary according to the nature of the international dispute involved. In addition, the plentiful regional and universal practice in that area, including that of the human rights treaty bodies, should be taken into account.

The meeting rose at 1.10 p.m.