United Nations A/C.6/74/SR.23

General Assembly

Seventy-fourth session

Official Records

Distr.: General
13 November 2019

Original: English

Sixth Committee

Summary record of the 23rd meeting

Held at Headquarters, New York, on Monday, 28 October 2019, at 10 a.m.

Chair: Mr. Mlynár . . . . (Slovakia)

Contents

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Management Section (dms@un.org), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

19-18586 (E)

Please recycle

The meeting was called to order at 10.05 a.m.

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session (A/74/10)

1. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its seventy-first session (A/74/10). He said that the Committee would consider the Commission's report in three parts, beginning with the first part, which would cover chapters I to III (the introductory chapters), chapter XI (Other decisions and conclusions of the Commission), chapter IV (Crimes against humanity) and chapter V (Peremptory norms of general international law (*jus cogens*)).

2. **Mr. Šturma** (Chair of the International Law Commission) said that, since the late 1980s, the Chair of the Commission had made a separate introductory statement to the Committee for each part of its consideration of the Commission's report. However, although the Committee would still be considering the report in three parts, he intended to revert to the former practice of introducing the whole report in one statement.

3. Introducing the first cluster of chapters of the Commission's report, he said that, as shown in chapter II, the Commission had made significant progress during the session: it had concluded the second reading on the topic "Crimes against humanity" and had adopted a full set of draft articles and commentaries thereto. It had also concluded the first reading on the topics "Peremptory norms of general international law (*jus cogens*)" and "Protection of the environment in relation to armed conflicts" and had adopted a full set of draft conclusions and a full set of draft principles, respectively, on the two topics, together with commentaries. It had continued its consideration of two other topics, namely "Succession of States in respect of State responsibility" and "Immunity of State officials from foreign criminal jurisdiction" and had begun work on the topic "Sea-level rise in relation to international law", which had been added to the current programme of work. The Commission had also decided to include two new topics in its long-term programme of work: "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea". The syllabuses of the two topics were contained in annexes B and C to the report.

4. Introducing the topic "Crimes against humanity", addressed in chapter IV of the report, he said that the draft articles adopted by the Commission on second reading comprised a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto. In accordance with article 23 of its statute, the Commission had decided to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly for the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. The adoption of the draft articles and the commentaries thereto represented the culmination of five years of work. The Commission had had before it the fourth report of the Special Rapporteur (A/CN.4/725 and A/CN.4/725/Add.1), and also comments and observations received from Governments, international organizations and others (A/CN.4/726, A/CN.4/726/Add.1 and A/CN.4/726/Add.2) on the text adopted on first reading two years previously. The fourth report addressed the comments and observations received from Governments, international organizations and others on the draft articles and commentaries adopted on first reading and made recommendations with regard to each draft article.

5. The draft articles followed the pattern of existing criminal law enforcement instruments affecting the "horizontal" relationships between States. While some aspects of the draft articles reflected customary international law, the central objective had been to draft provisions that would be both effective and likely to be acceptable to States and that were based on provisions often used in widely adhered-to treaties addressing crimes, as a basis for a possible future convention. The basic structure of the text consisted of general provisions (the draft preamble and draft articles 1 to 3) and provisions on prevention (draft articles 4 and 5), on measures to be taken at the national level (draft articles 6 to 12) and on international cooperation, including extradition (draft article 13), mutual legal assistance (draft article 14 and the draft annex) and settlement of disputes (draft article 15). The draft articles provided a definition of crimes against humanity, based closely on the definition contained in the Rome Statute of the International Criminal Court and taking into account developments in the law. They also contained general obligations, including the obligation of prevention and the principle of non-refoulement, and requirements concerning the criminalization of crimes against humanity under domestic law, the imposition of penalties commensurate with the gravity of the offences and the non-application of any statute of limitations. They provided for the establishment of jurisdiction on a variety of mandatory and discretionary bases. Moreover, as was common in instruments dealing with the interdiction of crimes, international cooperation played

a crucial role. In addition to extradition, which was grounded in the obligation to extradite or prosecute (*aut dedere aut judicare*), emphasis was placed on mutual assistance, the importance of investigations, the centrality of victims, witnesses and others, and fair treatment of the alleged offender.

6. The draft articles were intended to fill in lacunae in international law. Unlike the crime of genocide and war crimes, there was no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard. Should the General Assembly take up the Commission's recommendation, the international community would have taken a significant step towards filling that gap. As stated in the draft preamble, the prohibition of crimes against humanity was a peremptory norm of general international law (*jus cogens*). Crimes against humanity were among the most serious crimes of concern to the international community as a whole. The international community had an obligation to ensure that they were prevented and punished in conformity with international law. An end to impunity was realizable if the international community acted together.

7. With respect to the topic "Peremptory norms of general international law (*jus cogens*)", which was addressed in chapter V of the report, the Committee had before it a set of 23 draft conclusions and a draft annex, adopted on first reading, together with commentaries thereto. The Commission had decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020. The Commission had been elaborating the draft conclusions since 2015; the Committee was seeing them in their entirety for the first time at the current session. The approach taken in the draft conclusions was similar to that followed for the conclusions on identification of customary international law. The Commission had had before it the fourth report of the Special Rapporteur (A/CN.4/727), in which the Special Rapporteur discussed the question of the existence of regional *jus cogens* and the inclusion of an illustrative list of norms previously recognized by the Commission as having a peremptory character.

8. The basic structure of the draft conclusions consisted of introductory provisions (draft conclusions 1 to 3); provisions on the identification of peremptory norms of general international law (*jus cogens*) (draft conclusions 4 to 9) and on the legal consequences of such norms (draft conclusions 10 to 21); other provisions of a general nature (draft conclusions 22 and 23); and a draft annex. The draft conclusions contained a definition of *jus cogens* norms and an annex of examples; the criteria for the identification of *jus cogens* norms; the bases of such norms, of which customary international law was the most common, but which also included treaty provisions and general principles of law; the various forms of evidence for the acceptance and recognition of such norms; and subsidiary means for their determination. With regard to the legal consequences, a number of aspects were addressed. First, matters concerning treaties conflicting with *jus cogens* norms, questions of separability of treaty provisions, the consequences of the invalidity and termination of treaties, and the effect of reservations to treaties were addressed. Second, situations in which rules of customary international law conflicted with *jus cogens* norms were addressed. Third, conflicts that might arise between obligations created by unilateral acts of States or by resolutions, decisions or other acts of international organizations and a peremptory norm of general international law were considered. Fourth, the relationship between *jus cogens* norms and obligations *erga omnes* was considered. Any State was entitled to invoke the responsibility of another State for a breach of a *jus cogens* norm, in accordance with the rules on the responsibility of States for internationally wrongful acts. No circumstance precluding wrongfulness under the rules on State responsibility could be invoked with regard to any act of a State that was not in conformity with an obligation arising under a *jus cogens* norm. Moreover, States must cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a *jus cogens* norm. Fifth, questions of interpretation and application of rules of international law to ensure consistency with *jus cogens* norms were addressed. Procedural requirements for the invocation of, and the reliance on, the invalidity of rules of international law, including treaties, by reason of being in conflict with peremptory norms of general international law (*jus cogens*) were also covered. The annex to the draft conclusions contained a list of norms that the Commission had previously referred to as being peremptory norms of general international law (*jus cogens*).

9. *Jus cogens* norms were accorded importance in the conduct of international relations and potentially had far-reaching implications. The draft conclusions were aimed at providing guidance to all those who might be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences.

10. Turning to the second topic on which the Commission had completed a first reading, "Protection

of the environment in relation to armed conflicts", he said that the Commission had adopted a set of 28 draft principles, together with commentaries thereto, which were considered in chapter VI of the report. In accordance with articles 16 to 21 of its statute, the Commission had decided to transmit the draft principles, through the Secretary-General, to Governments, international organizations, including the United Nations and the United Nations Environment Programme (UNEP), and others, including the International Committee of the Red Cross (ICRC) and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020. The Commission's work on the topic had begun in 2013. The Commission had had before it the second report of the Special Rapporteur (A/CN.4/728), in which she addressed questions relating to the protection of the environment in non-international armed conflicts and responsibility and liability for environmental damage.

11. In 2009, in a report in which it offered an inventory and analysis of international law on the protection of the environment during armed conflict, UNEP had recommended that the Commission examine the existing international law for protecting the environment during armed conflict and recommend how it could be clarified, codified and expanded. That had been in part a reflection of a growing concern on the part of the international community about the protection of the environment in relation to armed conflict, including the widespread, long-term and severe damage that armed conflict could cause through the use of nuclear weapons and weapons of mass destruction, as well as conventional means and methods of warfare. There had also been a recognition that environmental effects that occurred both during and after an armed conflict had the potential to pose a serious threat to the livelihoods and even the existence of individuals and communities. Needless to say, prior provisions in that area included certain provisions of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and of the Rome Statute of the International Criminal Court, as well as certain principles set out in the Rio Declaration on Environment and Development and the ICRC guidelines for military manuals and instructions on the protection of the environment in times of armed conflict.

12. The structure of the draft principles reflected three temporal phases – before, during and after armed conflicts – even though there was no strict dividing line between the different phases. The draft principles were divided into five parts. Part One (Introduction) contained provisions on the scope and purpose of the draft principles. The Commission sought to clarify the rules and principles that were particularly relevant or applicable in relation to the environment and armed conflicts. The purpose was not to modify the law of armed conflict but rather to enhance the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

13. Part Two [One] (Principles of general application) concerned guidance on the protection of the environment before an armed conflict but also contained draft principles of a more general nature that were of relevance for more than one temporal phase. Draft principle 5 [6] (Protection of the environment of indigenous peoples) reflected the concern that armed conflict could have the effect of increasing existing vulnerabilities or creating new types of environmental harm on the territories inhabited by indigenous peoples, thereby affecting the survival and well-being of the peoples connected to it. Draft principle 8 (Human displacement) related to the inadvertent environmental effects of conflict-related human displacement and the interconnectedness of providing relief for those displaced by armed conflict and reducing the impact of displacement on the environment. Draft principle 9 concerned the crucial issue of State responsibility for damage caused to the environment in relation to armed conflicts and was modelled on the relevant provisions of the articles on responsibility of States for internationally wrongful acts. Draft principle 10 (Corporate due diligence) provided for measures that were essentially preventive: States should take appropriate legislative and other measures to ensure that corporations operating in or from their territories exercised due diligence with respect to the protection of the environment. Draft principle 11 (Corporate liability) covered closely related issues concerning the possibility of holding corporations and other business enterprises operating in or from the territories of States liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed-conflict situation.

14. Part Three [Two] concerned the protection of the environment during armed conflict. Draft principle 12 was inspired by the Martens Clause, which had originally appeared in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and which contained a reference to "the laws of humanity, and the requirements of the public conscience". It provided that, even in cases not covered

by international agreements, the environment remained under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. Draft principle 18 contained a restatement of the prohibition of the pillage of natural resources, while draft principle 19 (Environmental modification techniques) was modelled on the relevant provisions of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

15. Part Four related to the protection of the environment in situations of occupation. That category of draft principles was not intended as a deviation from the temporal approach but as a practical solution reflecting the great variety of circumstances that might be peculiar to situations of occupation. Draft principle 20 [19] provided for the general obligation of an Occupying Power to respect and protect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory. It was based on article 43 of the 1907 Hague Regulations, which concerned military authority and public order and safety. Draft principle 21 [20] (Sustainable use of natural resources) was based on article 55 of the 1907 Hague Regulations, which provided that an occupying State was to be regarded "only as administrator and usufructuary" of certain properties. Draft principle 22 [21] (Due diligence) reflected the international law obligation not to cause significant harm to the environment of other States and how it might apply in the context of occupation.

16. Part Five [Three] related to the protection of the environment after an armed conflict. Draft principle 26 (Relief and assistance) concerned measures to repair and compensate for environmental damage caused during armed conflict in situations where the source of environmental damage was unidentified or reparation was not available, for instance where multiple States and non-State actors were involved.

17. The topic "Succession of States in respect of State responsibility", addressed in chapter VII of the report, had been included in the Commission's programme of work since 2017. The aim of the Commission's work was to clarify the interaction between the law of succession of States and the law of responsibility for internationally wrongful acts and to fill in possible gaps, while bearing in mind the importance of maintaining consistency with the Commission's previous work on various aspects of the two areas, including the 1978 Vienna Convention on Succession of States in respect of Treaties; the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts; the 1999 articles on nationality of natural persons in relation to the succession of States; and the 2001 articles on responsibility of States for internationally wrongful acts.

18. The Commission had had before it the third report of the Special Rapporteur (A/CN.4/731), in which he addressed certain general considerations and questions of reparation for injury resulting from internationally wrongful acts committed against a predecessor State or its nationals, and made technical proposals relating to the structure of the draft articles. The report complemented prior reports, which had covered general rules, obligations arising from the commission of an internationally wrongful act by a predecessor State, and rights or claims of an injured State. The Commission had also had before it a memorandum by the Secretariat providing information on treaties that might be of relevance to the future work of the Commission on the topic (A/CN.4/730).

19. The debate on the third report of the Special Rapporteur was reflected in paragraphs 75 to 116 of the Commission's report. After the debate in plenary, the Commission had decided to refer draft articles 2 (f), X, Y, 12, 13, 14 and 15 and the titles of Parts II and III, as contained in the third report of the Special Rapporteur, to the Drafting Committee. Moreover, the Commission had provisionally adopted draft articles 1, 2 and 5, with commentaries thereto, which appeared in paragraphs 117 and 118 of the report. The draft articles were intended to apply in the absence of any different solution agreed upon by the States concerned. Priority was given to agreements between States, considering in particular that State practice on the subject was diverse, context-specific and sensitive. The Commission had also taken note of the interim report of the Chair of the Drafting Committee on draft articles 7, 8 and 9 provisionally adopted by the Committee, which had been presented to the Commission for information only and was available on the Commission's website.

20. It was anticipated that, in his future work, the Special Rapporteur would address forms of reparation, such as restitution, compensation and guarantees of non-repetition, in the context of succession of States and procedural issues, including problems arising in situations where there were several successor States and the issue of shared responsibility.

21. State practice was crucial to the consideration of the topic. It would be recalled that, the previous year, the Commission had sought information from States on practice relevant to the succession of States in respect of State responsibility, in particular examples of treaties,

including relevant multilateral and bilateral agreements; domestic law relevant to the topic, including laws implementing multilateral or bilateral agreements; and decisions of domestic, regional and subregional courts and tribunals addressing issues involving the succession of States in respect of State responsibility. Such information was still relevant and would be welcomed by the Commission; it should preferably be provided by 31 December 2019.

22. The topic "Immunity of State officials from foreign criminal jurisdiction", addressed in chapter VIII of the report, had been on the Commission's programme of work since 2008. The Commission had had before it the sixth and seventh reports (A/CN.4/722 and A/CN.4/729) of the Special Rapporteur, in which she addressed procedural aspects of immunity from foreign criminal jurisdiction. That was the concluding component under the workplan proposed for the topic; the Commission had already addressed matters of scope, as well as immunity *ratione personae* and immunity *ratione materiae*. To date, the Commission had provisionally adopted seven draft articles, structured in three parts.

23. It was worth recalling that the debate on the sixth report had not been completed at the Commission's seventieth session; in that report, the Special Rapporteur offered an analysis of three procedural aspects of immunity relating to the concept of jurisdiction, namely timing, the kinds of acts affected and the determination of immunity. In the seventh report, she completed her examination of those issues and delved further into questions concerning invocation of immunity and waiver of immunity. She also examined aspects of procedural safeguards relating to the forum State and the State of the official and the procedural rights and safeguards pertaining to the official. The report contained nine proposed draft articles – 8 to 16 – and the debate on them was reflected in paragraphs 122 to 201 of the Commission's report. Following the debate in plenary, the Commission had decided to refer those draft articles to the Drafting Committee, taking into account the debate and proposals made in plenary. The Drafting Committee had been unable to complete its work and would continue at the next session. The Commission had nonetheless received and taken note of the interim report of the Chair of the Drafting Committee on draft article 8 ante, which had been presented to the Commission for information only and was available on the Commission's website. The purpose of draft article 8 ante was to make certain that the procedural provisions and safeguards in Part Four of the draft articles would be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerned any of the draft articles contained in Part Two and Part Three of the draft articles, including to the determination of whether immunity applied or did not apply under any of the draft articles.

24. The Commission's work on the topic had reached a critical stage requiring information on what States actually did when confronted with a criminal matter concerning a foreign State official. Accordingly, the Commission would welcome any information from States, preferably by 31 December 2019, on manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that were competent to take any decision that might affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State.

25. The Commission had commenced the substantive consideration of the topic "General principles of law", which was reflected in chapter IX of the report. The Commission had had before it the first report of the Special Rapporteur (A/CN.4/732), in which he addressed the scope of the topic, the main issues to be addressed in the course of the Commission's work, and the Commission's previous work relating to general principles of law, thereby providing an overview of the development of general principles of law over time and an initial assessment of certain basic aspects of the topic and future work on the topic. The Commission's debate was reflected in paragraphs 203 to 262 of the report.

26. Following the debate in plenary, the Commission had decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft conclusion 1 provisionally adopted by the Committee, which had been presented to the Commission for information only and was available on the Commission's website.

27. To assist in the further consideration of the topic, the Commission requested States to provide information on their practice relating to general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including as set out in decisions of national courts, legislation and any other relevant practice at the domestic level; pleadings before international courts and tribunals; statements made in international organizations, international conferences and other forums; and treaty practice. Such information should be made available preferably by 31 December 2019.

28. The topic "Sea-level rise in relation to international law", covered in chapter X of the report, was the newest on the Commission's programme of work. It was therefore not surprising that the focus had

been on procedural issues and the way forward. The Commission had established a Study Group, which had agreed on its membership, methods and programme of work, based on the three subtopics identified in the syllabus, namely law of the sea, statehood and human rights. In order to further advance its work, the Commission would welcome any information that States, international organizations and the International Red Cross and Red Crescent Movement could provide on their practice and other relevant information concerning sea-level rise in relation to international law.

29. In 2020, the Study Group was expected to focus on the subject of sea-level rise in relation to the law of the sea. In that connection, the Commission would appreciate receiving, by 31 December 2019, examples from States of their practice that might be relevant, even if indirectly, to sea-level rise or other changes in circumstances of a similar nature. Such practice could, for example, relate to baselines and where applicable archipelagic baselines, closing lines, low-tide elevations, islands, artificial islands, land reclamation and other coastal fortification measures, limits of maritime zones, delimitation of maritime boundaries, and any other issues relevant to the subject. Relevant materials could include bilateral or multilateral treaties, in particular maritime boundary delimitation treaties; national legislation or regulations, in particular any provisions related to the effects of sea-level rise on baselines or more generally on maritime zones; declarations, statements or other communications in relation to treaties or State practice; jurisprudence of national or international courts or tribunals and outcomes of other relevant processes for the settlement of disputes related to the law of the sea; any observations in relation to sea-level rise in the context of the obligation of States parties under the United Nations Convention on the Law of the Sea to deposit charts or lists of geographical coordinates of points; and any other relevant information, for example, statements made at international forums, as well as legal opinions, and studies.

30. In 2021, the Study Group would address questions concerning statehood and the protection of persons affected by sea-level rise, as outlined in the syllabus of the topic. Accordingly, it would further welcome in due course any information relating to those issues.

31. It would be recalled that, at its seventieth session, the Commission had completed the first reading on the topic "Provisional application of treaties" and had taken note of the Drafting Committee's recommendation that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, based on a revised proposal to be made by the Special Rapporteur, taking into account the comments and suggestions made both during the plenary debate and in the Drafting Committee. To that end, the Special Rapporteur for the topic had convened informal consultations to consider the draft model clauses, the summary of which was reflected in paragraphs 274 to 284 of the report. The proposed draft model clauses were contained in annex A to the report. Comments from Governments and international organizations in advance of the second reading of the draft Guide to Provisional Application of Treaties at the seventy-second session would greatly facilitate the Commission's work. Written comments on the text adopted on first reading were to be submitted to the Secretary-General by 15 December 2019.

32. The Commission had also completed the first reading on the topic "Protection of the atmosphere" at its seventieth session. Comments from Governments and international organizations on that topic were to be submitted to the Secretary-General by 15 December 2019.

33. In its report, the Commission had once more commented on its current role in promoting the rule of law and had reiterated its commitment to the rule of law in all its activities in accordance with the request set out in General Assembly resolution 73/207. Moreover, the Commission continued to benefit from the visit of the President of the International Court of Justice and from cooperation with other bodies engaged in endeavours similar to those of the Commission. The holding of the International Law Seminar remained of the utmost importance to Commission members. The fifty-fifth session of the Seminar had been held at the Palais des Nations to coincide with the beginning of the second part of the Commission's session. As an alumnus of the Seminar, he had been particularly pleased to note the holding of the first Conference of the International Law Seminar Alumni Network.

34. The Commission had decided that its seventy-second session would be held in Geneva from 27 April to 5 June and from 6 July to 7 August 2020.

35. In conclusion, he acknowledged the invaluable assistance of the Codification Division of the Office of Legal Affairs in the substantive servicing of the Commission. The Commission was particularly appreciative of the Secretariat's memorandum on information on treaties that might be of relevance to the Commission's future work on the topic "Succession of States in respect of State responsibility". The Secretariat had been further requested to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be

particularly relevant for the Commission's future work on the topic "General principles of law".

36. **Mr. Kabba** (Sierra Leone), speaking on behalf of the African Group, said that the process of progressive development and codification of international law must be all-embracing by including the consideration of texts of laws, State practice, precedents and doctrine, as required by the Commission's statute. The Commission should also draw inspiration from the principal legal systems of the world, including African customary law. The Group was committed to multilateralism and the rules-based international legal system and valued the Commission's contribution in that regard, taking into account the views of all Member States.

37. The Group congratulated the Commission on the adoption on second reading of the draft articles on prevention and punishment of crimes against humanity and the adoption on first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*) and the draft principles on protection of the environment in relation to armed conflicts. The Group also expressed gratitude to the Special Rapporteurs for those topics for briefing legal advisers from the countries of the Group on the Commission's work.

38. The Group also appreciated the progress made by the Commission on the other topics on its programme of work. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the Group looked forward to strong procedural safeguards to help ensure that the exercise of any type of foreign jurisdiction in relation to officials who enjoyed immunity was not abused for political purposes.

39. The Group welcomed the establishment of a Study Group on the topic of sea-level rise in relation to international law, which was of great importance to Member States. In the light of the clear threats posed by sea-level rise to islands and other coastal areas in States of the African Group and the livelihoods of their people, and given that the international community had not addressed the legal implications of sea-level rise in a comprehensive manner, the Group greatly appreciated the accelerated consideration of the topic. It took note of the Commission's request for information from States on the topic and looked forward to seeing States' comments.

40. The Group attached great importance to the two topics that had been placed on the Commission's long-term programme of work, "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea". The Group had consistently spoken out in various forums on the problem of piracy and the need to strengthen maritime security, including at the twenty-ninth Meeting of States Parties to the United Nations Convention on the Law of the Sea, held in June 2019.

41. The Group noted the pending conclusion of a number of topics on the Commission's current programme of work. It also noted that only one African member of the Commission was currently serving as a Special Rapporteur. The Group called on the Commission, when making decisions about the addition of new topics, to consider a balanced approach in terms of interest as well as in the selection of Special Rapporteurs so as to enhance the legitimacy of its work.

42. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro and North Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia and the Republic of Moldova and referring to the topic "Crimes against humanity", said that the European Union and its member States had a long-standing commitment to fighting impunity for the most serious crimes of concern to the international community as a whole. As the Commission had pointed out at the start of its work, there was no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard. The elaboration of such a convention would be a major step towards strengthening the international criminal justice system, putting an end to impunity for the perpetrators of crimes against humanity and contributing to the prevention of such crimes. The European Union therefore strongly supported the elaboration of a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading, preferably by an international conference of plenipotentiaries.

43. **Mr. Seland** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that those countries welcomed the Commission's decision to include the topic "Sea-level rise in relation to international law" in its programme of work. The global mean sea level was rising at an increasing rate, a trend that was projected to continue beyond 2100. Sea-level rise had serious implications, particularly for small islands and low-lying coastal areas. Consideration of its relation to international law raised broad and complex questions; the Commission was well suited to take that work forward.

44. The Nordic countries would make every effort to provide the Commission with relevant information, including on State practice, in accordance with the requests in chapter III of the report, and encouraged

other States to do the same. They welcomed the draft model clauses on provisional application of treaties and would provide written comments on them in due course. They also wished to emphasize the importance of the Commission's interaction with stakeholders and welcomed the tradition of exchanges of information between the Commission and relevant bodies throughout the year.

45. With regard to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, it had been pointed out on previous occasions that the definition of the term "gender" found in article 7 (3) of the Rome Statute of the International Criminal Court did not reflect current realities or the current status of international law, under which the social construction of gender and the accompanying roles, behaviours, activities and attributes assigned to women and men, boys and girls, were acknowledged. While the Nordic countries would have preferred the inclusion of a definition that took those elements into account, they were pleased to see that the Commission had decided not to include the definition of "gender" found in article 7 (3) of the Rome Statute. That allowed the term to be applied for the purposes of the draft articles on the basis of an evolving understanding of its meaning.

46. The Nordic countries attached great importance to due process considerations, which were particularly pertinent in the context of criminal law. In relation to the obligation to ensure that crimes against humanity were punishable by appropriate penalties that took into account their grave nature, it was regrettable that the use of the death penalty was not ruled out in draft article 6, paragraph 7, in contrast to article 77 of the Rome Statute, in which it was clear that the death penalty should not be applied.

47. The draft articles and the commentaries thereto could be of great practical relevance to the international community. The Nordic countries therefore welcomed the Commission's recommendation that a convention be elaborated on the basis of the draft articles, either by the General Assembly or by an international conference of plenipotentiaries. Among the core international crimes, only crimes against humanity lacked a convention. International norms could contribute to national laws, the establishment of national jurisdiction, and cooperation among States in the fight against impunity.

48. The topic "Peremptory norms of general international law (*jus cogens*)" had potentially significant effects on the understanding of international law and also possible practical effects, including on litigation. However, it did not easily lend itself to codification, considering the relatively limited and varying practice; thus caution was called for. The Nordic countries continued to hold the view that the topic was best dealt with by the Commission through a conceptual and analytical approach, rather than with a view to elaborating a new normative framework for States.

49. The Nordic countries remained unconvinced about the possibility of reconciling regional *jus cogens* with the notion of *jus cogens* as peremptory norms of general international law. They were therefore pleased that regional norms had been excluded from the scope of the topic. With regard to the draft conclusions on the topic adopted on first reading, they reiterated their reservations with regard to the non-exhaustive list of *jus cogens* norms contained in the annex, but noted that, under draft conclusion 23, the list was without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*).

50. The Nordic countries looked forward to continued work on the topic and encouraged the Commission to strive for consensus on its most difficult elements, including by seeking guidance from Member States.

51. **Mr. Jia** Guide (China), referring to the topic "Crimes against humanity", said that the elaboration of a convention relating to such crimes would involve debates on complicated issues, such as the definition and scope of crimes against humanity, and must therefore be based on the actual will of and consensus among States. At present, States were far from reaching consensus on the need for a convention. Moreover, the discussions thus far in the Committee showed that many Member States still saw major shortcomings in key provisions of the draft articles on the topic. For instance, many provisions were derived from analogous text found in existing international conventions, were not grounded in empirical analysis of widespread international practice, and relied primarily on the practice of international criminal tribunals that were not universal in nature. In his delegation's view, the time was not yet ripe for the conclusion of a convention.

52. With regard to the topic "Peremptory norms of general international law (*jus cogens*)", the draft conclusions adopted on first reading might serve as useful references for States and international institutions. His delegation noted that, owing to time constraints, the Commission had been unable to engage in in-depth discussions on many issues. Given the particular importance of *jus cogens* vis-à-vis other norms of international law, his delegation hoped that the Commission would further refine the draft conclusions and the commentaries thereto on the basis of statements

delivered in the Committee and other relevant comments, in order to fully reflect various concerns.

53. The criteria for the identification of *jus cogens* must be strictly implemented. The two criteria adopted by the Commission on first reading, namely that the norm in question should be a norm of general international law and that it should be accepted and recognized by the international community as a whole as a norm from which no derogation was permitted, were largely in line with the consensus of the international community. The Commission should strictly abide by those criteria in its codification activities. His delegation also hoped that detailed elaboration of the criteria would be included in future versions of the commentaries to the draft conclusions, so as to help States and international institutions strictly implement the criteria when identifying peremptory norms and to heighten the authority and serious nature of *jus cogens* rules.

54. Under draft conclusion 16, a resolution, decision or other act of an international organization that would otherwise have binding effect did not create obligations if and to the extent that it conflicted with *jus cogens*. It was further argued in the accompanying commentary that such binding resolutions of international organizations included the resolutions of the Security Council, effectively negating, albeit in an implicit manner, the effect of Security Council resolutions that contradicted *jus cogens*. Admittedly, it was also suggested in the commentary that resolutions of the Security Council required additional consideration since, pursuant to Article 103 of the Charter of the United Nations, obligations under the Charter prevailed over other rules of international law. Nonetheless, it was inappropriate to make an explicit reference to the relationship between Security Council resolutions and *jus cogens* in the commentaries. The Council was the core of the collective security mechanism of the United Nations. Its resolutions, whose authority flowed from the Charter, must meet stringent procedural requirements and be in compliance with the purposes and principles of the United Nations, as set out in the Charter. It was simply inconceivable that such resolutions would conflict with *jus cogens*. In addition, given that the content and scope of *jus cogens* was far from being settled, any attempt to judge the validity of Council resolutions against *jus cogens* would likely lead to the use of *jus cogens* as a pretext to evade the obligation to implement those resolutions or to challenge their authority. His delegation therefore suggested that references to Security Council resolutions be removed from the commentaries to the draft conclusions.

55. The draft conclusions should not include an illustrative list of peremptory norms. The current list of eight norms in the annex to the draft conclusions was highly problematic, as the Commission had failed to provide convincing arguments for the inclusion of those norms in accordance with its own criteria for the identification of *jus cogens*, as set out in the draft conclusions. In fact, the substance of some norms remained extremely vague. For instance, the Commission did not offer, either in the draft conclusions or in the commentaries thereto, any illumination as to what rules constituted “the basic rules of international humanitarian law”. There was also no explanation of the rationale for highlighting the eight norms in the list while leaving out other norms governing international relations, such as the principle of sovereign equality. Furthermore, the inclusion of such a list would change the nature of the work on the topic, deviating from the codification of secondary rules regarding the criteria for the identification of peremptory norms and their legal consequences and moving toward the development of primary rules under which it was determined which norms constituted *jus cogens*. Such an approach would provoke even greater divergences of views and was at variance with the original purpose of the topic, which was to elaborate on the criteria for the identification of *jus cogens*. His delegation suggested that the list be deleted from the draft conclusions.

56. His delegation appreciated the inclusion of the topic “Prevention and repression of piracy and armed robbery at sea” in the Commission’s long-term programme of work. China carried out escort operations at sea off the coast of Somalia in accordance with relevant Security Council resolutions and actively participated in international cooperation to combat piracy in the Gulf of Guinea. It fully appreciated the need to promote the implementation of existing treaties in that area, coordinate operations by various States and increase the anti-piracy capacity of relevant countries.

57. Prevention and repression of piracy was a long-established topic in the realm of international law of the sea, with abundant international treaties and State practice. The legal framework and rules in that area were based on international instruments such as the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and also regional treaties such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. In addition, the Security Council had adopted a series of resolutions under Chapter VII of the Charter to address piracy off the coast of Somalia and in the Gulf of Guinea. His delegation hoped that the

Commission would take fully into consideration the development of law and practice in that area, avoid altering the existing international framework and rules, base its work on respect for national legal systems and seek practical and feasible measures to promote international cooperation and coordination in the criminalization of relevant offences and in piracy-related extradition and mutual legal assistance.

58. With regard to the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", the international community was yet to reach agreement on the types of acts that qualified as gross violations of international human rights law and serious violations of international humanitarian law. The inclusion of the topic in the Commission's long-term programme of work therefore seemed premature; the topic was also not sufficiently supported by international and State practice. Moreover, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2005, had already provided States with the necessary guidance on how to deal with the issue. The focus of the international community at present should be on ensuring the implementation of the Basic Principles and Guidelines, rather than formulating new rules in that regard.

59. **Mr. Tichy** (Austria), referring to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, said that his Government welcomed the effort to base the draft articles as much as possible on the Rome Statute of the International Criminal Court and also welcomed the explicit reference to the Rome Statute in the preamble. That approach precluded the risk of divergences.

60. His delegation noted that, as stated in the commentaries to the draft articles, the term "jurisdiction" was to be understood in a broad sense to encompass situations of de facto jurisdiction or control. However, it would have preferred the expression "jurisdiction or control" to be used within the draft articles themselves, as in other texts prepared by the Commission, such as the draft principles on protection of the environment in relation to armed conflicts. The Commission should make more efforts to use consistent wording in its texts.

61. His delegation supported the strengthening of international cooperation, as envisaged in draft article 14 (Mutual legal assistance), in particular paragraph 9 concerning cooperation with international mechanisms. It welcomed the reference in draft article 15 (Settlement of disputes) to the main judicial organ of the United Nations – the International Court of Justice – and advocated acceptance of the Court's compulsory jurisdiction.

62. His delegation strongly supported the Commission's recommendation to elaborate a convention on prevention and punishment of crimes against humanity on the basis of the draft articles. Such a convention would close the existing gap concerning the criminalization of crimes against humanity and would constitute an important supplement to the Rome Statute. The jurisdiction of the International Criminal Court was, in practice, confined to high-ranking perpetrators, whereas the new convention would oblige States to establish jurisdiction over crimes against humanity and either institute proceedings against any suspected perpetrator or extradite such person, irrespective of status or rank. A diplomatic codification conference would be the most suitable forum for the elaboration of such a convention. His Government was currently considering the possibility of hosting such a conference in Vienna.

63. Other initiatives to elaborate international instruments concerning mutual legal assistance with regard to the prosecution of atrocity crimes were complementary to the Commission's work on the current topic and did not preclude the elaboration of a convention on prevention and punishment of crimes against humanity. It would, however, be necessary to avoid duplication between the different instruments.

64. With regard to the topic "Peremptory norms of general international law (*jus cogens*)", his delegation concurred in general with the non-exhaustive list of *jus cogens* norms contained in the annex to the draft conclusions adopted on first reading. However, it was unclear whether the prohibition of aggression comprised all aspects of the general prohibition of the use of force pursuant to Article 2 (4) of the Charter of the United Nations. As indicated in the commentary to draft conclusion 23, the Commission had taken the broader view when it had stated in the commentary to article 50 of the draft articles on the law of treaties that the law of the Charter concerning the prohibition of the use of force had the character of *jus cogens*. The phrase "prohibition of aggression" did not rule out an interpretation that would restrict the *jus cogens* norm to the narrower scope of General Assembly resolution 3314 (XXIX) on the definition of aggression. In the commentary, however, the Commission seemed to suggest that the broader scope was envisaged. It would thus seem logical to replace "prohibition of aggression" with "prohibition of the use of force".

65. The reference to “the basic rules of international humanitarian law” as a *jus cogens* norm was not sufficiently precise. The references, in the commentary to draft conclusion 23, to the articles on State responsibility and the report of the Study Group on fragmentation of international law (A/CN.4/L.682), in which “the prohibition of hostilities directed at civilian population” was mentioned as one such rule, did not provide sufficient clarity. The question of whether the basic rules of international humanitarian law also included other important norms, such as the Martens Clause and the principles and rules on distinction, proportionality, military necessity and precautions in attack, as well as the protection of persons *hors de combat*, merited further study.

66. Although his delegation understood that the list in the draft annex was not meant to be exhaustive, it wondered why the Commission had not attempted to include all the norms that it had identified as *jus cogens* in its previous work and why “other norms having the same character” referred to in the commentary had been excluded. His delegation requested that the Special Rapporteur and the Commission continue their analysis of which norms were to be included in the list and provide more thorough reasoning in the commentary as to why those norms were considered to be peremptory.

67. The issue of prevention and repression of piracy and armed robbery at sea had not yet been addressed by a specific, comprehensive international instrument that was in accordance with modern international criminal law. However, it remained to be seen to what extent the Commission’s work could go beyond the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol thereto.

68. His delegation noted with regret that the topics “Universal criminal jurisdiction” and “The settlement of international disputes to which international organizations are parties” had not been taken up at the seventy-first session. In his delegation’s view, both topics not only met the Commission’s criteria for the selection of topics but were also of high practical relevance for States. His delegation would therefore support their inclusion in the Commission’s current programme of work.

69. With regard to the draft model clauses on provisional application of treaties, it was regrettable that there was no model clause allowing negotiating States as well as non-negotiating States to opt in to the provisional application of a treaty. That was important, since some States were able to apply a treaty provisionally only after the relevant steps under domestic law, including parliamentary approval, had been taken. Moreover, the model clauses should also provide for the possibility of terminating or suspending provisional application, even if a State did not intend to become a party in the future. With those improvements, the draft model clauses would certainly be of practical value for States in drafting relevant treaty provisions.

70. The fiftieth anniversary in 2019 of the Vienna Convention on the Law of Treaties had been commemorated by many events around the globe. To round up the celebrations, the Ministry of Foreign Affairs of Austria would be hosting a seminar for practitioners and treaty experts on 19 November 2019. It might also be possible on that occasion to identify future topics for the Commission.

71. **Mr. Hermida Castillo** (Nicaragua), referring to the topic “Peremptory norms of general international law (*jus cogens*)”, said that, in general terms, the draft conclusions on the topic adopted on first reading could serve as a practical guide for various persons involved in the application of international law. His delegation agreed with the statement in the commentary to draft conclusion 1 that the draft conclusions were concerned primarily with the method for establishing whether a norm of general international law had a peremptory character and that they were thus not concerned with the determination of the content of the peremptory norms themselves. In that regard, the inclusion of an illustrative list of norms might be at odds with the stated objective of not attempting to define the concept and content of peremptory norms themselves. His delegation agreed that the norms included in the list were peremptory norms of international law; however, in its current form, the list had no positive practical impact on the recognition or strengthening of peremptory norms. On the contrary, the Commission’s decision to include the list might send an unfortunate secondary message concerning the current status of other norms that had been excluded from the list and also raise a question about the precise content of the norms that had been included. His delegation appreciated that, at least in the commentary to draft conclusion 23, it was made clear that the Commission had previously referred to other peremptory norms, such as those contained in the Charter of the United Nations, especially those provisions that set out the purposes and principles of the Organization, and norms concerning the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas. However, that statement merely raised further questions as to why those norms had not been included in the list.

72. The topic was of great importance in that *jus cogens* norms reflected fundamental values of the international community that served as the basis for the rule of law at the international level. Hence no objections to their application were permitted, as reflected in draft conclusion 14, and their application was universal.

73. The particular consequences of serious breaches of peremptory norms of general international law, set out in draft conclusion 19, had recently been confirmed by the International Court of Justice in its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, in which the Court stated that all States must cooperate with the United Nations to complete the decolonization of Mauritius and thus bring to an end the breaches of the right to self-determination. His delegation therefore welcomed the draft conclusion, without prejudice to the interpretation of the term "serious", which should be determined by the United Nations. It attached importance to paragraph 2 of the draft conclusion, under which States must not recognize as lawful a situation created by a breach of a peremptory norm or render any assistance to the perpetrator. In addition, the invalidity of treaties that conflicted with a *jus cogens* norm at the time of their conclusion was recognized in draft conclusion 10.

74. **Ms. Orosan** (Romania), referring to the topic "Crimes against humanity", said that her delegation strongly favoured developing the draft articles on prevention and punishment of crimes against humanity adopted on second reading into a global convention, which would provide a solid legal basis for inter-State cooperation on the prevention, investigation and prosecution of such crimes. There was also a need for a coherent approach in relation to all crimes of grave concern to humankind to ensure that no fragmentation occurred, especially with regard to inter-State cooperation and mutual legal assistance.

75. On the topic "Peremptory norms of general international law (*jus cogens*)", her delegation was confident that the draft conclusions adopted on first reading would serve their intended purpose, namely to provide guidance to all those who might be called upon to determine the existence of such norms and their legal consequences. Her delegation had supported the inclusion of the topic in the Commission's programme of work but had been critical of the methodology used to address it, which had prevented the close involvement of States. Her delegation had also argued for a coherent approach in line with existing international law, specifically the 1969 Vienna Convention on the Law of Treaties. She was therefore pleased to note that the draft conclusions and the commentaries thereto were drafted in a well-balanced and careful manner and followed the Vienna Convention closely. She was also pleased to note that the draft conclusions did not deal with regional *jus cogens* norms, which, in her delegation's view, did not exist. The draft text, in particular draft conclusion 23, reflected the Commission's cautious approach to the topic.

76. Under draft conclusion 13, paragraph 1, a reservation to a treaty provision that reflected a *jus cogens* norm did not affect the binding nature of that norm. Her delegation wondered whether such a reservation was permissible at all, given that a treaty could not be contrary to a *jus cogens* norm and that a reservation could not be made if it was contrary to the object and purpose of a treaty. Presumably a reservation to a treaty provision that reflected a *jus cogens* norm would be contrary to the object and purpose of the treaty. Further reflection was therefore needed on whether the paragraph was necessary as formulated.

77. Draft conclusion 21 (Procedural requirements) mirrored the procedure provided for in articles 65 to 67 of the Vienna Convention. Her delegation's understanding, both from the text of the conclusion and from the commentary thereto, was that the intention was not to alter the procedural requirements in place for activating the jurisdiction of the International Court of Justice but simply to encourage the submission to the Court of a dispute between an invoking State and an objecting State. However, paragraph 4 of the draft conclusion and the commentary thereto reflected only the situation in which a dispute actually came before the Court and were drafted in such a manner as to suggest that the Court would have jurisdiction to deal with such a dispute irrespective of the consent of the two States involved, which was not in line with the Commission's intention when it was drafting the text or with international law as it currently stood. It would therefore be useful to address, in the draft conclusion, what happened in a situation in which the Court's jurisdiction could not be activated owing to the lack of consent of the two States involved. She wondered whether there was any relevant State practice in that regard, particularly given that the Vienna Convention was also silent on the matter.

78. Under article 64 of the Vienna Convention, if a new peremptory norm of general international law emerged, any existing treaty which was in conflict with that norm became void and terminated. She wondered whether the opposition of a majority of States to the invoking by one or a few States of a conflict with a *jus cogens* norm as a ground for the invalidity or termination of a rule of international law would invalidate a determination that such a norm was indeed

a *jus cogens* norm. It was questionable whether the procedure set out in articles 65 to 67 of the Vienna Convention really applied in situations covered by article 64.

79. With regard to draft conclusion 23, her delegation was mindful of the objections raised by some members of the Commission and some delegations to the elaboration of a non-exhaustive list of *jus cogens* norms, but nonetheless considered it useful to include such a list in an annex to the draft conclusions. However, it was not clear why the list was limited to those norms that the Commission had previously referred to as having the status of *jus cogens* and why not even all those norms were included. In her delegation's view, the list should include all norms identified by the Commission as *jus cogens* norms, as well as other norms having a *jus cogens* character, on the basis of the criteria identified by the Commission, as reflected in State practice or the case law of international courts and tribunals. It was not clear, for instance, why only two of the fundamental principles of international law were considered *jus cogens* norms and the others were not. In further analysing the topic, the Commission should consider adapting draft conclusion 23 and the list in the annex to reflect other norms of international law with *jus cogens* status in order to avoid implying that certain norms were not peremptory norms.

80. With regard to the draft model clauses on provisional application of treaties, her delegation acknowledged the Special Rapporteur's efforts to cover a wide variety of State practice and to draw on existing provisions of various international treaties. While draft model clauses 1, 2 and 5 reflected widespread practice relating to treaty provisions on provisional application, her delegation was not sure of the applicability of draft model clause 3 (the "opt-in" clause): it was not clear when a non-negotiating State or international organization could make a declaration that it would provisionally apply a treaty and whether such a declaration could be made upon signature of the treaty by such a State or international organization. It was also not clear whether non-objection by the negotiating States would imply acceptance of the declaration or whether only express acceptance was envisaged. In her delegation's view, draft model clause 3 reflected a certain formalism that was not necessarily found in article 25 of the Vienna Convention.

81. With regard to draft model clause 4, read together with article 25 (1) (b) of the Vienna Convention, her delegation was not sure of the need for a State to declare that it would not provisionally apply a treaty in a situation in which a decision on provisional application had been taken pursuant to a resolution to which that State did not agree. Under the aforementioned provision of the Vienna Convention, the provisional application of a treaty occurred when States had agreed to it in some form. Therefore, if a State did not agree to a resolution that included a decision on provisional application of a treaty, it was clear that such provisional application did not occur.

82. On the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", her delegation had doubts regarding the need for the Commission to embark on an exercise of codification and progressive development, especially with the aim of producing draft guidelines or draft principles. The Commission's previous work on diplomatic protection and State responsibility, as well as the studies undertaken by various treaty bodies, already contained an analysis of existing best practices and could offer good guidance in respect of the norms, principles and procedures relating to reparation owed to individuals for violations of international law. Another useful text in that regard was the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2005.

83. Her delegation noted with interest the addition of the topic "Prevention and repression of piracy and armed robbery at sea" to the long-term programme of work. Piracy continued to be a matter of concern for the international community; while existing international law, in particular the United Nations Convention on the Law of the Sea, provided a solid legal framework for addressing the threat, there remained issues that deserved closer attention. In particular, the effective prosecution of pirates was essential in order to fight piracy and armed robbery at sea; it would be worthwhile to analyse whether there were any gaps in that respect in the applicable legal regime.

84. **Mr. Špaček** (Slovakia), referring to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, said that his delegation endorsed the Commission's recommendation that a convention be elaborated on the basis of the draft articles by the General Assembly or by an international conference of plenipotentiaries. His delegation had a preference for the second option. It also appreciated the consistency of the Special Rapporteur's approach to the topic, with due regard for the comments made by States, which had produced an outstanding and balanced outcome. In his fourth report (A/CN.4/725), the Special Rapporteur noted a significant amount of overlap between the draft articles and the initiative for a new

multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes. His delegation took note with concern of that analysis and of the Special Rapporteur's view that pursuit of both initiatives might be inefficient and confusing, and risked the possibility that neither initiative succeeded. Nonetheless, it was still inclined to believe that the two initiatives were complementary and was determined to engage in procedural steps leading to the adoption of a new convention on prevention and punishment of crimes against humanity on the basis of the draft articles. Slovakia strongly encouraged other States not to misuse the analysis as a bar to the elaboration of a convention.

85. On the topic "Peremptory norms of general international law (*jus cogens*)", his delegation recalled its previously stated position that the topic required a cautious approach and in-depth analysis. Despite the warning signs from many delegations at previous sessions, the Commission and the Special Rapporteur had boldly proceeded to the adoption of the whole set of draft conclusions on first reading. A rushed outcome, with scant regard for the divergent views of States, was unlikely to lead to success.

86. His delegation supported the inclusion of draft conclusion 23 and the idea of an illustrative list of peremptory norms. However, such a list should result from a careful, inductive analysis of the practice and legal opinions of States and should reflect those norms that had been referred to by the Commission over the years. The exact criteria for the inclusion of norms in the list remained unclear, and the Commission provided no further guidance on that score in the commentaries. Only some of the norms previously referred to by the Commission as *jus cogens* appeared in the list. Moreover, some of the terms used, such as "basic rules of international humanitarian law" were ambiguous, while the prohibition of the threat or use of force was omitted. Lastly, it might be insufficient to merely reproduce the Commission's previous references without giving explanations, instead of conducting a thorough search for the *opinio juris cogentis* expressed by States. Even though the text took the form of draft conclusions, it should reflect a cautious approach to the progressive development of the law. Despite its concerns regarding methodology and phrasing, his delegation believed that the draft conclusions could serve as meaningful guidance for resolving potential normative conflicts in international law.

87. The draft model clauses on provisional application of treaties could be a useful complement to the draft Guide to Provisional Application of Treaties and could help States to develop their practice in that regard, without limiting the flexible and voluntary nature of provisional application of treaties. With regard to paragraph 2 of draft model clause 1, he recalled his delegation's previous observation that the intention of a State to terminate the provisional application of a treaty did not always have to coincide with notification by that State of its intention not to become a party to the treaty, as presupposed in draft guideline 9, paragraph 2, which was the basis for the draft model clause.

88. With regard to the Commission's decision to add two new topics to its long-term programme of work, his delegation wished to emphasize that, in deciding to include a particular topic either in the long-term programme of work or in the current programme of work, the Commission should observe the criteria for the selection of new topics agreed upon at its fiftieth session, in 1998. Although the Commission could also consider proposals for topics that reflected new developments in international law and pressing concerns of the international community as a whole, the criteria must be respected. His delegation urged the Commission to consider carefully the addition of any new topic and to provide detailed reasoning when deciding to include a topic in the current programme of work.

89. Bearing in mind the Commission's current workload and the haste with which certain topics had been addressed, his delegation would prefer the Commission to refrain from adding any new topics to its programme of work at the next session. That would enable it to focus on completing several topics and making further progress in the consideration of other topics.

90. **Mr. Alabrune** (France) said that the Commission's work was particularly important in the context of the current challenges to the authority of international law, on which the multilateral system was based. Its working methods had proved their worth over the years, although there was always room for improvement. As indicated by the General Assembly in resolution 73/265, the dialogue between the Commission and the Committee should be enhanced, and his delegation therefore welcomed the Commission's efforts to take greater account of the views of States.

91. Multilingualism and consideration of the specific characteristics of different national legal systems were inextricably linked and were vital to the universal acceptance of the Commission's work. International law should not reflect only one line of legal thinking transmitted through only one language. It was therefore important for the documentary sources used by the Commission to be linguistically diverse, since such

diversity imparted a richness, and hence authority, to the Commission's work. On questions of terminology, it was regrettable that, in the context of the topic "Immunity of State officials from foreign criminal jurisdiction", the French term "représentants de l'État" had been used instead of "agents de l'État" for the English term "State officials". Moreover, there were errors in the French version of the Commission's report: for example, in chapter V, there were multiple instances of the phrase "la communauté internationale dans sans ensemble", which was meaningless. His delegation was aware that the translation of the report was subject to time constraints, but called on the Secretariat to ensure that more care and resources were devoted to translation in future, particularly within the Drafting Committee. Universal dissemination of the Commission's work depended on its being available in several languages, in translations that were of high quality.

92. The draft articles on prevention and punishment of crimes against humanity adopted on second reading should logically form the basis for an international convention; his delegation favoured the organization of a conference of plenipotentiaries for that purpose. The text constituted a model for the Commission in that it was a high-quality piece of work, produced within a reasonable time frame, that could become an international instrument meeting the needs of States.

93. The transmission to States of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading would enable States to engage in a transparent dialogue with the Commission on a complex topic. His delegation welcomed the Commission's decision to exclude the concept of regional *jus cogens* from the scope of its work but had reservations about the inclusion of a list of *jus cogens* norms, even a non-exhaustive list. In order to establish a worthwhile list, the Commission would have to undertake an in-depth study of primary rules of international law, such as the prohibition on the use of force, the right of self-determination and obligations under international humanitarian law, whereas its mandate under the topic related only to secondary rules, namely the way in which a rule would achieve the status of a *jus cogens* norm and the legal consequences of that status. Detailed examination of each norm that was a candidate for *jus cogens* status would require such wide-ranging research as to change the nature of the Commission's mandate and could take an extremely long time. It was difficult to discern the added value of a list that merely reproduced rules that the Commission had previously referred to as having the status of *jus cogens* norms. Moreover, it was strange for the Commission to be embarking on an effort to codify its previous work, which was itself intended to codify international law. A possible compromise would be to include the examples of *jus cogens* norms in the commentaries so as to illustrate how, from a methodological point of view, the Commission had identified *jus cogens* norms in the past.

94. In a number of fundamental respects, the draft conclusions seemed to depart from the terms of the 1969 Vienna Convention on the Law of Treaties; two examples were draft conclusion 2 (Definition of a peremptory norm of general international law (*jus cogens*)) and draft conclusion 21 (Procedural requirements). Clarifications were therefore needed for States, whether or not they were parties to the Vienna Convention.

95. With regard to draft conclusion 5, it was inappropriate to refer to "bases" for *jus cogens*. Paragraph 2 of the draft conclusion raised a serious legal difficulty because it did not reflect the fact that *jus cogens* must originate from customary law; in his delegation's view, a general principle of law could not serve as the basis for a *jus cogens* norm. Another cause for concern was the approach to the issue of forms of evidence of acceptance and recognition of a *jus cogens* norm in draft conclusion 8. Given the significant legal consequences of *jus cogens* norms, the issue of evidence should be addressed more rigorously and the threshold should be significantly raised. In particular, it seemed unreasonable, and inconsistent with practice, to regard a resolution adopted by an international organization as a form of evidence of the peremptory nature of a norm of international law.

96. Lastly, his delegation had doubts about the future of the draft conclusions and the status of the text. It was not clear whether the Commission was engaging in a doctrinal exercise, in which case it was difficult to understand the reason for including a procedural provision such as draft conclusion 21, or whether the draft conclusions were rather intended as recommendations to States. It would be useful to make clear which parts of the text constituted codification and which parts constituted progressive development, so as to ensure that States understood the Commission's intentions.

97. **Mr. Macleod** (United Kingdom) said that the Commission's outputs were frequently cited by international and domestic courts and tribunals and in academic writing. That was, in principle, a good thing, provided that there was clarity about the legal force of those outputs; however, that was not always the case. The Commission's work was sometimes relied on as an articulation of international law without proper consideration of whether the output had been accepted as a treaty or was sufficiently underpinned by State

practice and *opinio juris* to be regarded as customary international law. The confusion on the part of the reader was understandable: international law, and therefore the work of the Commission, featured in the business of all kinds of courts and tribunals in national legal systems, and not all of those courts and tribunals could be expected to be fully conversant with international law principles. The Commission therefore had a responsibility to assist judges and practitioners by making clear when it was codifying existing law and when it was proposing the progressive development of the law or the creation of new law. That point had been made repeatedly in the Committee, both by his delegation and by others, but the situation was becoming critical.

98. In addition, engagement between the Commission and States was essential in order to maintain the authority of the Commission's work. The Commission's working methods must allow States to participate fully in the process of determining the output of its work. Currently, draft provisions were presented to States at various stages. In some cases, the Commission followed its usual practice of drafting and adopting a provision together with the commentary to that provision. In other cases, however, provisions were proposed by Special Rapporteurs and revised by the Drafting Committee before the commentaries thereto had been prepared, or provisions were kept in the Drafting Committee without commentaries until a full set of draft provisions had been adopted. That inevitably reduced the opportunity for States to comment on and inform the Commission's work. As his delegation had previously stated, States would have a fuller understanding of draft provisions, and would be able to engage more productively with the Commission, when draft provisions and commentaries were produced simultaneously.

99. States, for their part, must avail themselves of the opportunity to express their views and contribute fully to the Commission's work, and the Commission must accurately and fully consider the observations of States. At the end of a topic's life cycle in the Commission, the proposed output should in principle be subject to discussion among States in the Committee. That was especially the case where such an output was intended to progressively develop the law or to create new law.

100. His delegation was also concerned about the speed at which important topics were being dealt with by the Commission. Topics with excessively broad syllabuses should be approached with caution, and the Commission should choose new topics carefully and judiciously, taking into consideration the requirements and needs of States. If there were fewer, more focused, topics on the Commission's programme of work, the Commission could adopt a more rigorous and measured approach to them, which would improve the clarity and acceptability of the final product.

101. Those points had been made by his delegation and others in previous statements to the Committee but it did not seem as if much had changed. The United Kingdom was a committed supporter of the Commission, but in the spirit of dialogue it was important that States spoke plainly about their concerns. Otherwise, their confidence in the Commission and its work risked being eroded, which would not be to the benefit of anyone.

102. His delegation welcomed the Commission's decision to include the topic "Sea-level rise in relation to international law" in its current programme of work but took the view that there was currently no need for the Commission to move any further topics to its current programme of work. However, if the Commission was still minded to do so, his delegation could support its taking up the topic "Prevention and repression of piracy and armed robbery at sea". The resurgence of maritime piracy in the twenty-first century was an issue of grave concern to the international community; the Commission could usefully suggest ways in which States could improve arrangements and cooperation for the prosecution of perpetrators.

103. His delegation did not share the view that the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" was ripe for work by the Commission. There were a number of conceptual issues concerning, as a general matter, the degree to which international obligations owed between States could result in an obligation to make reparation to private persons. His Government considered that such examples as there were of State practice existed in the context of specific treaty regimes, such as human rights treaties, and it was not easy to draw general conclusions from such practice. There was not, therefore, sufficient practice for the topic to lend itself to codification efforts by the Commission.

104. With regard to other topics on the Commission's long-term programme of work, he recalled his delegation's previous comments on the topic "Universal criminal jurisdiction". It was clear that there continued to be a diversity of views among States on the definition, nature, scope and limits of the principle of universal criminal jurisdiction. His Government therefore remained of the view that State practice was not yet sufficiently advanced to enable consideration of the topic by the Commission.

105. In the draft articles on prevention and punishment of crimes against humanity adopted on second reading,

the Commission navigated a complex and sensitive issue through a rigorous, practical approach, drawing significant inspiration from precedents in international criminal law. The draft articles were a positive example of the potential for the Commission to promote the codification and progressive development of international law by distilling existing international law in a focused, responsible and practical way.

106. The Commission had made some helpful amendments to the draft articles and commentaries since States had provided their written comments to the Commission. In particular, his delegation supported the removal of the definition of "gender" from the text and the amendment of draft article 4 so that the list of measures through which each State undertook to prevent crimes against humanity was more clearly exhaustive. His delegation also supported the Commission's decision to keep the scope of the draft articles limited by, for example, not seeking to cover issues such as amnesties and immunity.

107. His delegation supported the Commission's recommendation that States elaborate a convention on the basis of the draft articles, either within the framework of the General Assembly or at a diplomatic conference. Such a convention would complement, rather than compete with, the Rome Statute and could also facilitate national prosecutions, thereby strengthening the complementarity provisions of the Rome Statute. The elaboration of a convention would also provide a good opportunity for States to work together to fill a lacuna in the fight against the most serious crimes. The rules set out in such a convention, especially on jurisdiction, must be clear and afford minimum scope for abuse; however, his delegation was confident that such issues could be addressed at the negotiation stage.

108. On the topic "Peremptory norms of general international law (*jus cogens*)", the completion of the first reading of the draft conclusions gave States the opportunity to step back and look at the project overall. From the outset, his delegation had supported the Commission's work on the topic, which could have practical value for States, judges and practitioners. However, as previously noted by his delegation and others, the topic was not an easy one, and, given the need to secure wide support from States, his delegation continued to urge the Commission to take a cautious approach.

109. For the most part, the Commission had done so, which was welcome. However, in certain respects the Commission had adopted a somewhat expansive and theoretical approach, which had resulted in a set of draft conclusions that covered a diverse range of sensitive issues and that did not, in all respects, reflect current law or practice. In some instances, they also did not reflect the specific views and concerns expressed by States in the Committee. That approach had no doubt been driven in part by the lack of State practice relating to *jus cogens* and the dearth of existing rules of international law in that area. However, that was no justification, particularly when, as in the present case, the Commission did not make clear when it was codifying existing law and when it was suggesting the progressive development of the law or the creation of new law. Given the importance and complexity of the topic and the potentially far-reaching consequences of the draft conclusions, it was imperative for the Commission to expressly address those matters on second reading.

110. His delegation had provided further observations in an annex to its written statement, available on the PaperSmart portal, covering issues such as the introduction of the notion of "fundamental values" in draft conclusion 3 (General nature of peremptory norms of general international law (*jus cogens*)); the need for caution in referring to the Security Council in the commentary to draft conclusion 16 (Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)); and the question of the list of norms annexed to the draft conclusions. His Government would submit further detailed written comments and encouraged others to do likewise; input from States was vital.

111. **Mr. Válek** (Czechia) said that the draft articles on prevention and punishment of crimes against humanity adopted on second reading would fill a significant gap in the framework governing the prosecution of crimes under international law. His delegation welcomed the fact that both the substantive and procedural aspects of the investigation and prosecution of crimes against humanity were covered in the draft articles. The text constituted a model of a modern criminal law treaty; in particular, his delegation was pleased to note the inclusion of provisions on the protection of victims and witnesses, fair treatment of alleged offenders and the promotion of broad cooperation among States. His delegation welcomed most of the changes that had been made to the draft articles and commentaries before their adoption on second reading; as a result, the text was generally clearer and provided better guidance for the relevant actors. In particular, his delegation appreciated the fact that draft article 11 (Fair treatment of the alleged offender) now included a reference to the alleged offender's rights under international humanitarian law, and the fact that draft article 14 (Mutual legal assistance) provided for cooperation with international

mechanisms established by the United Nations or by other international organizations. His delegation supported the elaboration of a convention on the basis of the draft articles, preferably by an international conference of plenipotentiaries.

112. On the topic "Peremptory norms of general international law (*jus cogens*)", the Commission had decided, despite the request of a number of States, to include an illustrative list of *jus cogens* norms in an annex to the draft conclusions adopted on first reading, thus unnecessarily igniting debate about its content. The choice of some of the norms, such as the right of self-determination, was not explained adequately in the commentary. Further explanation was also needed with regard to the choice of terms such as "the basic rules of international humanitarian law" and the character of some norms previously referred to by the Commission as peremptory norms, such as the prohibition of the use of force. In view of his nation's experience with the shameful Munich Agreement, imposed on Czechoslovakia under the threat of force more than 80 years previously, it was difficult to understand why the list – even if it was only illustrative – did not include the prohibition of the threat and use of force. It was with precisely that situation in mind that the Commission had included, in what later became the 1969 Vienna Convention on the Law of Treaties, a provision on treaties that were *ab initio* null and void. The prohibition of the threat and use of force was at the very basis of article 52 of the Vienna Convention, and the Convention was the primary source for the Commission's draft conclusions. It would be preferable if the examples of peremptory norms of international law were not included in an annex but only mentioned in the commentaries with references to sources from State practice, case law and literature supporting their characterization as peremptory norms.

113. His delegation noted with interest the inclusion of the topics "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea" in the Commission's long-term programme of work. Topics should be moved from the long-term programme of work to the current programme of work only after careful consideration and proper explanation as to why preference was being given to a particular topic over other topics. The Commission should also take due account of the overall volume of its work and the speed of progress on the topics currently before it, with a view to their timely completion.

114. His delegation had repeatedly proposed that the Commission take up the topic "Universal criminal jurisdiction", and indeed the Commission had recently decided to include it in its long-term programme of work. The issue was the subject of intense discussions, was relevant for State practice and, in his delegation's view, met the criteria for the selection of topics. His delegation was in favour of moving the topic to the Commission's current programme of work.

115. **Mr. Marciniak** (Poland) said that dialogue between the Commission and Member States within the framework of the Sixth Committee should be strengthened in order to support the Commission in its work. The practice of publishing an advance version of the Commission's report facilitated the preparation of comments by States and should be continued. Poland was also grateful to have had the opportunity to exchange views with the Chair of the Commission during the recent meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe.

116. His delegation wished to draw attention to the fact that the Commission took a somewhat different approach to different topics. For example, the topic of immunity of State officials from foreign criminal jurisdiction seemed to be the subject of careful discussion within the Commission and with States, whereas the topic of peremptory norms of general international law (*jus cogens*), though equally important, had been considered by the Commission in a rather swift manner and without in-depth dialogue with States, which could have repercussions for the outcome of the work on the topic. His delegation hoped that the latter approach would not set a precedent for the way in which the Commission worked on its projects.

117. His delegation favoured the holding of an international conference of plenipotentiaries to elaborate a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading, which would be a vital supplement to the current international framework for the prevention and punishment of atrocity crimes. His delegation would be providing detailed comments on the text of the draft articles at a later stage.

118. With regard to the topic "Peremptory norms of general international law (*jus cogens*)", his delegation considered, in line with the provisions of the 1969 Vienna Convention on the Law of Treaties, that peremptory norms were a cornerstone of the international legal order. The topic therefore required particularly careful consideration in order to avoid any possible confusion with respect to the identification and application of such norms. In that context, the adoption on first reading of the draft conclusions on the topic was

a rather unexpected step. The Commission had decided to work on the topic in 2015 but, in its reports from 2016 to 2018, indicated that it had not adopted any of the draft conclusions proposed by the Special Rapporteur. Moreover, no commentaries had been presented for States to comment on. His delegation recommended that the Commission refrain from following that unusual method of work in future.

119. There were possible divergences between the draft conclusions and the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In the judgment, the Court stated that there was no conflict between rules of *jus cogens* and the rules on State immunity because the latter were procedural in character. However, that legal solution was not referred to or reflected in either the conclusions or the commentaries thereto. Moreover, draft conclusion 3 (General nature of peremptory norms of general international law (*jus cogens*)) provided for the hierarchical superiority of *jus cogens* norms and contained no reference to any exceptions, limits or adjustments to that superiority. Since the draft conclusions were aimed at providing guidance to all those who might be called upon to determine the existence of peremptory norms of general international law (*jus cogens*), such as domestic courts, the issue should be further addressed and clarified.

120. His delegation supported draft conclusion 6, particularly insofar as the Commission emphasized therein the distinction between acceptance and recognition of *jus cogens* norms, on the one hand, and acceptance and recognition of norms of general international law, on the other hand. However, that provision did not seem to be reflected in the remainder of the draft conclusions. In particular, the evidentiary requirement for the acceptance and recognition of *jus cogens* norms under draft conclusions 8 and 9 was set at the same level or even lower than the level set for norms of customary international law. For example, in draft conclusion 9, paragraph 2, the Commission stated that the works of expert bodies could serve as subsidiary means for determining the peremptory character of a norm, despite the fact that such entities were not mentioned at all in the recently prepared conclusions on identification of customary international law.

121. Under draft conclusion 7 (International community of States as a whole), acceptance and recognition by "a very large majority of States" was required for the identification of a peremptory norm. However, in his delegation's view, it was not only the sheer number of States but also their representative character that mattered. On that basis, alternative wording such as "an overwhelming and representative majority of States" might be appropriate.

122. With regard to draft conclusion 13 (Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)), his delegation did not believe that it was legally possible to make a reservation to a treaty provision that reflected a peremptory norm. Such a reservation would likely be contrary to the object and purpose of the treaty and could affect the binding nature of a *jus cogens* norm if the treaty provision was the only basis of the norm concerned.

123. With regard to the legal consequences of peremptory norms, the Commission should consider introducing an additional draft conclusion on the relationship between *jus cogens* and general principles of law, similar to the provisions on the relationship between *jus cogens* and other sources of international law.

124. Lastly, on draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), he reiterated his delegation's position on the need for greater scrutiny of the duty of non-recognition of situations created by such breaches. The draft conclusion and the commentary thereto were based largely on the relevant parts of the 2001 articles on State responsibility and the commentaries thereto, despite the fact that significant developments had since taken place, such as the adoption of General Assembly resolutions on Crimea and the issuance of decisions of the European Court of Human Rights concerning the scope of the exception to the duty of non-recognition. Moreover, the idea that only serious breaches of *jus cogens* norms entailed a duty of non-recognition required further consideration. In particular, the question arose of whether there could be a "simple" breach of a *jus cogens* norm that did not entail an obligation of non-recognition.

125. The topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" merited attention. Poland had long attached importance to the issue of compensation for victims of such crimes and was still of the opinion that it required further discussion. One source of inspiration for the Commission could be the case law of the European Court of Human Rights relating to situations of armed conflict.

126. With regard to the topic "Prevention and repression of piracy and armed robbery at sea", his delegation was of the view that an appropriate international legal framework for combating piracy and

armed robbery already existed. In addition to the United Nations Convention on the Law of the Sea, there were numerous instruments adopted under the auspices of the International Maritime Organization, including conventions, resolutions, recommendations and guidelines. International law on piracy was therefore quite clear, and his delegation was not sure to what extent it required further elaboration, although the situation might be different when it came to the national laws of different countries.

The meeting rose at 1.10 p.m.