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Chair: Mr. Charles . . . . . (Trinidad and Tobago)

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

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (A/70/10)

1. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its sixty-seventh session (A/70/10). The Committee would consider the Commission's report in three parts. The first part consisted of chapters I to III (the introductory chapters), chapter XII (Other decisions and conclusions of the Commission), chapter IV (The Most-Favoured-Nation clause) and chapter V (Protection of the atmosphere). The second part was devoted to chapter VI (Identification of customary international law), chapter VII (Crimes against humanity) and chapter VIII (Subsequent agreements and subsequent practice in relation to the interpretation of treaties). The third part would address the remaining chapters of the 2015 report (chapter IX: Protection of the environment in relation to armed conflicts; chapter X: Immunity of State officials from foreign criminal jurisdiction; and chapter XI: Provisional application of treaties).

2. **Mr. Singh** (Chairman of the International Law Commission) said that the current session was the penultimate year of the current quinquennium. As chapter II showed, the Commission had completed its work on the topic "The Most-Favoured-Nation clause". It had also made substantive progress on the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", such that the completion of the topic as a whole was within reach. It had also continued its substantive consideration of the topics "Protection of the atmosphere", "Protection of the environment in relation to armed conflicts", "Immunity of State officials from foreign criminal jurisdiction" and "Provisional application of treaties". Moreover, it had begun and had already made some progress on "Crimes against humanity", a topic included in the programme of work in 2014. It had in turn included the topic "*Jus cogens*" in its programme of work and had appointed Mr. Dire Tladi as Special Rapporteur. The composition of the Commission had changed in 2015 further to the election of Mr. Roman A. Kolodkin to fill the casual vacancy occasioned by the resignation of Mr. Kirill Gevorgian, who was currently serving on the Bench of the International Court of Justice.

3. In chapter III of the report, the attention of Governments was drawn to information on practice whose provision would be particularly useful to the Commission as it continued its consideration of the various topics.

4. The Commission had continued its traditional exchanges with the International Court of Justice, as well as its cooperation with other bodies engaged in the progressive development of international law and its codification. In addition to a visit by Judge Ronny Abraham, President of the International Court of Justice, who had addressed the Commission and briefed it on the Court's recent judicial activities, Mr. Zeid Ra'ad Al Hussein, the United Nations High Commissioner for Human Rights, in a first visit ever, had addressed the Commission on the activities of his Office and some of its concerns in the area of human rights and had commented on the topics "Crimes against humanity" and "Immunity of State officials from foreign criminal jurisdiction".

5. The Commission reiterated its commitment to the rule of law in all of its activities and was appreciative that in 2015 the debate on the rule of law at the national and international levels had been devoted to the role of multilateral treaty processes in promoting and advancing the rule of law. It also drew attention to its recent body of works, which had been submitted for consideration by the Sixth Committee, including: (a) the draft articles on responsibility of States for internationally wrongful acts, 2001; (b) the draft articles on prevention of transboundary harm from hazardous activities, 2001; (c) the draft articles on diplomatic protection, 2006; (d) the draft articles on the law of transboundary aquifers, 2008; (e) the draft articles on the effects of armed conflicts on treaties, 2011; (f) the Guide to Practice on Reservations to Treaties, 2011; (g) the draft articles on the responsibility of international organizations, 2011; and (h) the draft articles on the expulsion of aliens, 2014.

6. Pursuant to paragraphs 10 to 13 of General Assembly resolution 69/118 of 10 December 2014, the Commission had exchanged views on the feasibility of holding part of its sixty-eighth session (2016) in New York, based on information provided by the Secretariat regarding estimated costs and relevant administrative, organizational and other factors, including its anticipated workload in the final year of the current quinquennium, and had come to the conclusion that it would not be feasible. It had nevertheless noted that such convening,

taking into account the estimated costs and relevant administrative, organizational and other factors, could be anticipated during the first segment of a session either during the first (2017) or second (2018) year of the next quinquennium. Accordingly, it had requested the Secretariat that preparatory work and estimates should proceed on the basis that the first segment of the Commission's seventieth session in 2018 would be convened at United Nations Headquarters in New York. The Commission recommended that in 2016 its session should be held in Geneva from 2 May to 10 June and from 4 July to12 August 2016.

7. He expressed appreciation for the work of the Commission's Secretariat: the Codification Division of the Office of Legal Affairs. The Commission was most appreciative of the Division's valuable assistance in its servicing of the Commission and its involvement in research projects on the Commission's work.

8. Introducing chapter IV (The Most-Favoured-Nation clause), he recalled that the Commission had placed the topic on its programme of work in 2008 and had since 2009 transacted its business in the framework of a Study Group. The Study Group had completed its work by submitting its final report at the 2015 session.

9. The report on the topic was divided into five parts. Part I provided the background, including the origins and purpose of the work of the Study Group, an analysis of the prior work of the Commission on the 1978 draft articles on the most-favoured-nation (MFN) clause, and of developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment, as well as an analysis of MFN provisions in other bodies, such as the United Nations Conference on Trade and Development and the Organisation for Economic Co-operation and Development. From the beginning, the general orientation had been not to seek a revision of the 1978 draft articles or to prepare a new set of draft articles.

10. Part II of the report addressed the contemporary relevance of MFN clauses and issues concerning their interpretation, including in the context of the General Agreement on Tariffs and Trade and the World Trade Organization, other trade agreements, and investment treaties. It also considered the types of MFN provisions in bilateral investment treaties (BIT) and highlighted the interpretative issues that had arisen in relation to the MFN clauses in BITs, namely: (a) defining the beneficiary of an MFN clause; (b) defining the necessary treatment; and (c) defining the scope of the MFN clause.

11. Part III analysed: (a) the policy considerations in investment relating to the interpretation of investment agreements, taking into account questions of asymmetry in BIT negotiations and the specificity of each BIT; (b) the implications of investment dispute settlement arbitration as "mixed arbitration"; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

12. Part IV surveyed the different approaches in case law to the interpretation of MFN provisions in investment agreements, addressing in particular three central questions: (a) whether MFN provisions were in principle capable of applying to the dispute settlement provisions of BITs; (b) whether the jurisdiction of a tribunal was affected by conditions in BITs regarding which dispute settlement provisions might be invoked by investors; and (c) in determining whether an MFN provision in a BIT applied to the conditions for invoking dispute settlement, what factors were relevant in the interpretative process. It also examined the various ways in which States had reacted in their treaty practice to the *Emilio Agustin Maffezini v. Kingdom of Spain* decision, including by: (a) specifically stating that the MFN clause did not apply to dispute resolution provisions; (b) specifically stating that the MFN clause did apply to dispute resolution provisions; or (c) specifically enumerating the fields to which the MFN clause applied.

13. Part V of the report contained the conclusions reached by the Study Group, which the Commission had adopted. It was important to note that MFN clauses remained unchanged in character from the time the 1978 draft articles had been concluded. The core provisions of the 1978 draft articles continued to be the basis for the interpretation and application of MFN clauses today. However, they did not provide answers to all the interpretative issues that could arise with MFN clauses.

14. The Commission underlined the importance and relevance of the Vienna Convention on the Law of Treaties, as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses was to be undertaken on the basis of the rules for the interpretation of treaties as set out in the Convention. The central interpretative issue in respect of the MFN

clauses related to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that could be obtained under an MFN provision depended on the interpretation of the MFN provision itself.

15. The matter remained one of treaty interpretation, even though the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, as first decided in the *Maffezini* decision, had brought a new dimension to the thinking about MFN provisions, and perhaps consequences that had not been foreseen by parties when they had negotiated their investment agreements. Indeed, whether MFN clauses were to encompass dispute settlement provisions was ultimately up to the States that negotiated such clauses. Explicit language could ensure that an MFN provision did or did not apply to dispute settlement provisions. Otherwise the matter would be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis. The interpretative techniques reviewed in the report were designed to assist in the interpretation and application of such provisions.

16. The topic of "Protection of the Atmosphere" (chapter V) had been included in the Commission's programme of work in 2013, and in 2015 the Commission had had before it the Special Rapporteur's second report, which had provided a further analysis of the draft guidelines submitted by the Special Rapporteur in his first report in 2014. The Commission had consequently been presented with a set of revised draft guidelines 1 to 3 relating to the use of terms, the scope of the draft guidelines and the common concern of humankind. Additionally, two draft guidelines, 4 and 5, had been submitted on the general obligation of States to protect the atmosphere and on international cooperation.

17. The debate in the Commission had led to the referral to the Drafting Committee of draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report. The referral had been made with the understanding that draft guideline 3, on the common concern of humankind, would be considered in the context of a possible preamble. At the Special Rapporteur's request, the referral of draft guideline 4, on the general obligation of States to protect the environment, had been deferred until 2016. The Special Rapporteur wished to undertake a further analysis of the matter in the light of the debate in plenary.

18. Upon consideration of the report of the Drafting Committee, the Commission had provisionally adopted four preambular paragraphs; draft guideline 1, on use of terms; draft guideline 2, on scope; and draft guideline 5, on international cooperation, together with commentaries thereto. They were reflected in paragraphs 53 and 54 of the report.

19. The Commission had recognized that a proper consideration of the topic required an appreciation of the science concerning the atmosphere and its interaction with the Earth's natural environment. Accordingly, a useful dialogue with scientists had been organized by the Special Rapporteur, during which an informal exchange of views had taken place that had greatly facilitated the Commission's work. It was expected that another dialogue would be organized in 2016.

20. In addressing the topic, the Commission sought, through the progressive development of international law and its codification, to provide guidelines that might assist the international community as it addressed critical questions relating to transboundary and global protection of the atmosphere. In accordance with the 2013 understanding reached concerning the inclusion of the topic in the programme of work, the Commission did not wish to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, nor to "fill" gaps in treaty regimes, nor to impose on current treaty regimes legal rules or legal principles not already contained therein. The preamble reflected the objective of the understanding while recognizing that the protection of the atmosphere from atmospheric pollution and atmospheric degradation was a pressing concern of the international community as a whole. In doing so, it also sought to capture the relevance of the functional aspect of the atmosphere as a medium through which transport and dispersion of polluting and degrading substances occurred.

21. The atmosphere itself was defined in draft guideline 1 (Use of terms), which offered, for the time being, definitions of three essential terms for the purposes of the draft guidelines, the other two being "atmospheric pollution" and "atmospheric degradation". Although no definition had been given of "atmosphere" in the relevant international instruments, the

Commission had considered it necessary to provide a working definition for the draft guidelines. The definition of "atmosphere" as the envelope of gases surrounding the Earth was inspired by that offered in 2014 by Working Group III of the Intergovernmental Panel on Climate Change in the Fifth Assessment Report. The definition, which corresponded to the scientific one, focused on the "physical" dimensions of the atmosphere.

22. In providing the definitions of "atmospheric pollution" and "atmospheric degradation", an effort had been made to address transboundary air pollution, as well as global atmospheric problems. The focus in both considerations was the activities of humans, i.e. "anthropogenic" atmospheric pollution and atmospheric degradation. The draft guidelines were not concerned with causes of natural origins such as volcanic eruptions and meteorite collisions. According to the Intergovernmental Panel on Climate Change, the science indicated with 95 percent certainty that human activity was the dominant cause of observed warming since the mid-twentieth century. The focus on human activity, whether direct or indirect, was thus deliberate; the current guidelines sought to provide guidance to States and the international community.

23. "Atmospheric pollution" and "atmospheric degradation" having been defined, the formulation of draft guideline 2 (Scope of the draft guidelines) was accordingly simplified to deal with the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The alternative formulations appearing in brackets signified that there was still an open question as to whether the draft guidelines should be referred to as guiding principles. That matter would be the subject of further consideration.

24. Buttressing the fourth preambular paragraph, paragraphs 2 and 3 of the draft guideline reflected the 2013 Understanding. Paragraph 4 was a saving clause, providing that the draft guidelines did not affect the status of airspace under international law, nor were the guidelines intended to address questions concerning outer space, including its delimitation.

25. Draft guideline 5 dealt with international cooperation, which the Commission considered to be at the core of the whole set of draft guidelines. States had the obligation to cooperate, as appropriate, with each other and with relevant international organizations, for the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The reference to "as appropriate" denoted a certain degree of flexibility and latitude for States in carrying out the obligation to cooperate, depending on the nature and subject matter required for cooperation. Such cooperation might take a variety of forms and included the sharing of scientific knowledge, exchange of information and joint monitoring. The provision sought to emphasize that when it came to the protection of the atmosphere, safeguarding the common interests of the international community as a whole informed international cooperation.

26. For the further development of the topic, any additional information received, preferably by 31 January 2016, on domestic legislation and the judicial decisions of the domestic courts would be appreciated. He thus concluded his introduction on chapter V of the report, as well as on the first cluster of issues.

27. **Mr. Fornell** (Ecuador), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), recalled that the Community, at its third Presidential Summit, held in Belen in January 2015, had reiterated its firm commitment to the principles of international law. CELAC acknowledged the leading role played by the International Law Commission in the progressive development of international law and its codification, as well as in the promotion of the rule of law. A number of important international conventions had derived from the Commission's work, and even the Commission's draft documents were often referred to in the judgments of the International Court of Justice, which clearly illustrated that the Commission's work could influence that of the Court. In pursuance of its functions, the Commission required doctrinal material, case law and examples of State practice in the area of international law. The contribution of Member States was therefore critical. The contribution of international, regional and subregional courts and tribunals and academic institutions was also key to that process. The Community highlighted the need for all Member States to continue providing strong support for the Commission's work.

28. The Community underscored the difficulties faced by many States and their legal departments in providing the information requested, owing to disparities in resources among teams of international lawyers in different countries rather than to a lack of

interest. In order to enhance the legitimacy of the progressive development and codification of international law, it was extremely important to ensure that all States effectively participated in the discussions.

29. CELAC reiterated its call for the Commission to hold half its sessions at United Nations Headquarters in New York. That would enable Sixth Committee delegates to attend the deliberations as observers and would foster an early engagement in the topics, including by capitals, even before the Commission's report was circulated. While the Community noted with appreciation the Commission's recommendation, contained in paragraph 298, to consider holding part of its seventieth session (2018) in New York, it was important to revert to the overarching proposal of holding one half session in New York, as reflected in paragraph 388 of the report of the Commission on the work of its sixty-third session (A/66/10). The fruitful informal dialogues held in New York between some of the Commission's special rapporteurs and delegates to the Sixth Committee during the intersessional period had demonstrated the potential reciprocal gains of such interaction. The Organization's austerity measures should take into account the efficiency and productivity of its processes.

30. Bringing the Commission closer to Sixth Committee delegates during part of its sessions would have a positive impact on the quality of the interaction with capitals when Member States formulated comments and observations in written form to the Commission. CELAC was pleased that chapter III of the report, while considering as still relevant the Commission's requests for information on the topics of protection of the atmosphere, identification of customary international law and crimes against humanity, also indicated a list of specific issues concerning five of the items on the Commission's agenda on which comments from Member States would be of particular interest. The Community had requested that questionnaires prepared by Special Rapporteurs should focus on the main aspects of the topic under study, and General Assembly resolution 67/92 had drawn the attention of Governments to the importance of having their views on all the specific issues identified in the report.

31. While recognizing and appreciating the efforts made in recent years, the Community believed that more could be done to strengthen cooperation and dialogue between the Commission and Member States. It was regrettable, for example, that owing to budgetary constraints not all special rapporteurs on topics under discussion could come to New York to interact with Sixth Committee delegates. Their participation was essential to the effectiveness of thematic debates in the Sixth Committee; it should always be scheduled at a date close to the meeting of legal advisers and should not overlap with other relevant meetings of the General Assembly that could prevent their attendance.

32. CELAC reaffirmed the importance of submitting comments and observations by 31 January 2016, in particular on the specific issues identified in chapter III. It appreciated the Commission's decision to include the topic "*Jus cogens*" in its programme of work.

33. The Commission's productivity must be matched by adequate funding in order to enhance the dissemination of documents that were vital to the progressive development and codification of international law. CELAC welcomed the establishment of the new Commission website. However, it could not accept that periodic publications by the Codification Division of the Office of Legal Affairs might be endangered for financial reasons. It supported the continuation of the legal publications prepared by the Codification Division (as referred to in paragraph 300 of the report), in particular *The Work of the International Law Commission*. It welcomed the dissemination activities carried out by the Codification Division and the Division of Conference Management and the voluntary contributions to the Trust Fund to eliminate the backlog in the publication of the *Yearbook of the International Law Commission*, and it invited States to consider making additional contributions.

34. CELAC welcomed the significant progress being made in the Commission's work. However, its relations with the Sixth Committee must continue to be improved so that the General Assembly could better process and utilize the Commission's invaluable work. The Community reiterated its firm commitment to contributing to that process and to working towards the common goal of progressively developing and codifying international law.

35. **Ms. Lehto** (Finland), speaking on behalf of the Nordic countries of Denmark, Iceland, Norway, Sweden and her own country, said that the Nordic

countries noted with satisfaction the efforts to make the Commission's documents more easily accessible on its website. It was of importance to the Member States that information in the Commission's annual reports was provided in a practical format. The Nordic countries therefore noted with appreciation that the presentation of the draft conclusions provisionally adopted by the Drafting Committee were included in the Commission's report. That practice made the report more user-friendly and should be continued in future.

36. With regard to the topic of the protection of the atmosphere, the Nordic countries were in favour of developing guidelines to help address critical issues relating to its transboundary and global protection. That was an issue for which international cooperation was crucial. At the same time, such work must not interfere with or duplicate relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change.

37. The Nordic countries agreed with the Commission's decision to express the international community's concern about problems relating to the atmosphere as a factual statement in the preamble to the draft guidelines rather than as a normative statement, and also with the use of the phrase "a pressing concern of the international community as a whole".

38. Although they understood the rationale, the Nordic countries wondered whether the definition of atmospheric pollution in subparagraph (b) of draft guideline 1 (Use of terms) should be restricted to effects extending beyond the State of origin. The restriction belonged instead in draft guideline 2 (Scope of the guidelines). As for draft guideline 5 (International cooperation), the Nordic countries supported the formulation of an obligation to cooperate, together with the wording "as appropriate", which left room for flexibility, depending on the nature and subject matter of the cooperation and the forms which cooperation could take. That qualification might also have an impact on the assessment of any potential international responsibility.

39. Much work had already been done in the field of international environmental law, especially with regard to climate change. It was to be hoped that the Commission would work on that issue, in line with the scope of the topic as decided in 2013, and that the guidelines it produced would bring added value to the environmental law regime while acknowledging work already concluded and taking account of existing treaties.

40. The Nordic countries commended the final report of the Study Group on the most-favoured nation clause. The identification of the more precise legal content of various MFN clauses might contribute to a greater coherence of international law in that field. An important aspect thereof was the grounding of the Study Group's approach in the principles reflected in articles 31 to 33 of the Vienna Convention on the Law of Treaties. That was in line with the analysis provided by the Commission in the context of its study on fragmentation of international law.

41. The Study Group had been right to draw upon the practice and considerations that had emerged from the General Agreement on Tariffs and Trade, the World Trade Organization, the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development and to examine a typology of sources of case law, including arbitral awards. That had shown the existence of differences in the approaches taken in the interpretation of MFN provisions, particularly by arbitrators.

42. The Nordic countries also appreciated the Study Group's work on identifying contemporary challenges posed by MFN clauses, including the question of whether such clauses were to encompass dispute settlement provisions in investment treaty arbitration. That had brought a new dimension to the discussion. The final report would be a useful tool for promoting legal certainty, and the Nordic countries took note of the practical implications that it might well have for treaty practice.

43. **Mr. Pang** Khang Chau (Singapore) thanked the Secretariat for establishing the new, more user-friendly website for the Commission, which contributed to the teaching, dissemination, study and wider appreciation of international law.

44. His delegation welcomed the Study Group's final report on the most-favoured-nation clause. It appreciated the Study Group's intent in setting out a framework and guidance for the proper application of the principles of treaty interpretation to MFN clauses, and it agreed with its conclusions that the interpretation of MFN clauses was to be undertaken on the basis of the rules for the interpretation of treaties as set out in the Vienna Convention on the Law of

Treaties and that the scope and nature of the benefit that could be obtained under an MFN provision depended on the interpretation of the MFN provision itself.

45. The report would be useful for practitioners and treaty negotiators and also as an additional resource in questions concerning the interpretation and application of MFN provisions. It was to be hoped that it would help prevent the fragmentation of international law and provide greater coherence in the approaches taken in arbitral decisions on MFN provisions.

46. With regard to the topic of protection of the atmosphere, his delegation appreciated the Commission's efforts to ensure that the definitions of terms were consistent with the views of scientists. He noted that, for the Commission, the legal consequences of the concept of "the common concern of mankind" remained unclear in international law relating to the atmosphere, and he agreed with its decision to deal with the concept in the context of the preamble. That approach ensured an expression of concern over pollution of the atmosphere, while avoiding the difficulties of providing normative content for the "common concern of mankind".

47. As the Commission had recognized in its report, international cooperation was at the core of the draft guidelines. Clearly, atmospheric pollution was not bounded by the limits of national jurisdiction. It was also often part of a multifaceted problem for which there was no single path to a solution. Cooperation among the countries involved was therefore essential.

48. In draft guideline 5, the Commission had recognized the obligation on the part of States to cooperate, "as appropriate". The commentary to that draft guideline explained that the phrase "as appropriate" denoted a certain flexibility and latitude for States in carrying out the obligation to cooperate. Flexibility and latitude were important, but there was room in the guidelines for further elaboration of the principles that should guide international cooperation. In his delegation's view, there was a common thread of cooperation, at least on the basis of sovereign equality and good faith. It would be useful for those and any other important principles of international cooperation in respect of the protection of the atmosphere to be distilled and reflected, if only in the commentaries. For instance, with regard to the principle of good faith, his delegation noted that, in the statement of the Chairman of the Drafting Committee, it was stressed that good faith had been considered as implicit for any international obligation and had therefore been deleted. That understanding was important and should be articulated in the commentary.

49. His delegation also welcomed the explanation in paragraph (2) of the commentary to draft guideline 5 on the forms of appropriate action which States might take. Individual State action was an important way of demonstrating a commitment to international cooperation on the protection of the atmosphere. To cite one example, Singapore had recently enacted the ASEAN Transboundary Haze Pollution Act to regulate behaviour that caused or contributed to transboundary haze pollution. The Act applied the principle of *sic utere tuo ut alienum non laedas* and, in keeping with the principle of international cooperation, sought to complement the efforts of other countries to hold to account companies that burned forests or engaged in unsustainable land clearing practices, even if such companies had no geographical or other connection with Singapore.

50. His delegation was concerned about the wording of draft guideline 5, paragraph 2, as it singled out the enhancement of scientific knowledge above all other forms of cooperation. Paragraph (13) of the commentary to draft guideline 5 merely stated that the Commission considered enhancing scientific knowledge key, without further elaboration, even though, in paragraphs (11) and (12), reference was made to instruments designed to promote cooperation in other areas, such as regulatory institutions and international emergency actions and communications. It was worth noting that cooperation could include not only monitoring the activities which caused or contributed to the pollution of the atmosphere, analysing data to inform response efforts and managing the impact of atmospheric pollution, but also promoting technical cooperation, such as the exchange of experiences and capacity building The Commission should give further thought to draft guideline 5 with those comments in mind.

51. **Mr. Horna** (Peru) said that his delegation had taken note with interest of the final report of the Study Group on the topic "The Most-Favoured-Nation clause", and in particular the point made that the interpretation of MFN clauses was to be undertaken on the basis of the rules for the interpretation of treaties as set out in the Vienna Convention on the Law of

Treaties. He welcomed the Commission's decision to include the topic "*Jus cogens*" in the programme of work. That would make a significant contribution to the Commission's work on the sources of international law.

52. His delegation was pleased that the Commission, in response to the request made in General Assembly resolution 69/123 on the rule of law at the national and international levels, had formulated specific comments on multilateral treaty processes on the basis of proposals under articles 16 and 23 of its Statute, and it stressed in particular the draft statute for an international criminal court, 1994, and the articles on responsibility of States for internationally wrongful acts, 2001.

53. In view of the General Assembly's desire to enhance further the interaction between the Sixth Committee and the Commission, as expressed in a number of Assembly resolutions since 2000, he welcomed the Commission's recommendation that preparatory work and estimates should proceed on the basis that the first segment of its seventieth session (2018) would be convened at United Nations Headquarters in New York. Nevertheless, it was important to reconsider the proposal to hold half of the Commission's sessions in New York, including the proposal contained in paragraph 388 of report of the Commission on the work of its sixty-third session (A/66/10).

54. His delegation shared the Commission's concern about the financial situation, which threatened the continuity and development of legal publications prepared by the Secretariat, and in particular *The Work of the International Law Commission* in the various official languages. It commended the Secretariat for setting up a new website, an excellent tool available to Member States for disseminating the Commission's work. It reiterated the importance of the International Law Seminar and was pleased that in 2015 a special session had been held on international administrative tribunals, which could contribute to a better dissemination of the work of those bodies.

55. **Mr. Tiriticco** (Italy) said that the report of the Study Group on the most-favoured-nation clause could make a useful contribution to the debate in international law and assist in the interpretation and application of MFN clauses. It was also an important addition to the draft articles adopted in 1978 on the same topic, which remained a valuable term of reference, especially with regard to the *ejusdem generis* principle, as a guide for the appropriate interpretation of MFN clauses in full compliance with the principle of State consent as the main source of treaty rights and obligations. His delegation shared the conclusions on the topic adopted by the Commission at its 3277th meeting on 23 July 2015, in particular the emphasis placed on ensuring that the interpretation of MFN clauses was consistent with the relevant provisions of the Vienna Convention on the Law of Treaties.

56. As to the question of whether, in investment treaty arbitration, MFN clauses should apply only to substantive obligations or also to dispute settlement provisions, his delegation subscribed to the Commission's conclusion that it was a matter of interpretation of MFN clauses on a case-by-case basis, and that, accordingly, States were well-advised to negotiate such clauses in explicit terms. When such clauses were not explicit, the application of MFN clauses to dispute settlement provisions should not be presumed.

57. His delegation noted with satisfaction that work on the draft guidelines on the protection of the atmosphere was proceeding on the understanding that the scope of the topic should be without prejudice to political negotiations on climate change, ozone depletion and long-range transboundary air pollution. That point had been properly addressed in preambular paragraph 4. His delegation was also pleased to see the contours of the scope of the guidelines clearly delineated in draft guideline 2, together with the decision to give further consideration to the bracketed language in paragraph 1. The language proposed in draft guideline 5 on international cooperation showed how that key general principle of international law was applicable to the protection of the atmosphere. To that end, his delegation endorsed the language contained in draft guideline 5, paragraph 2, including with regard to the enhancement of scientific knowledge.

58. On the topic of crimes against humanity, his delegation was convinced of the potential benefits of developing a convention on the subject. It endorsed the approach proposed and pursued by the Commission at the current stage of its work. It favoured the decision to confine, for the time being, the scope of the draft articles to crimes against humanity. It endorsed the Commission's view that the draft articles would avoid any conflicts with obligations of States arising under

the constituent instruments of international or "hybrid" criminal courts or tribunals, including the International Criminal Court: whereas the draft articles would consist of obligations to adopt national legislation and to engage in inter-State cooperation within the framework of a "horizontal" relationship, the Rome Statute governed a "vertical" relationship between the Court and its States parties.

59. Italy also supported the Commission's approach whereby not only would the draft articles be without prejudice to the Rome Statute, but they should also contribute to the implementation of the principle of complementarity under the Statute in addressing inter-State cooperation on the prevention of crimes against humanity as well as on the investigation, apprehension, prosecution, extradition and punishment at the national level of persons who committed such crimes.

60. His delegation looked forward to discussions on the new topic "*Jus cogens*".

61. The Commission's crucial contribution to the promotion of the rule of law at the national and international levels and to the codification and development of international law could be further strengthened through increased and improved informal interaction with the Sixth Committee.

62. **Mr. Popkov** (Belarus) said that the report on the most-favoured-nation clause laid the foundation for further consideration of issues regarding the application of that principle in the area of economic relations and investments, and in particular investment dispute settlement. Not all the conclusions on the topic were complete, but they might help States make corrections to the practice of concluding international treaties on investment protection and improve international investment arbitration procedures.

63. His delegation agreed with the Study Group that interpretations of the provisions of the agreement on investment protection, when they included MFN clauses and procedural aspects of dispute settlement, should be carried out first and foremost on the basis of articles 31 and 32 of the Vienna Convention on the Law of Treaties. However, it was important not to underestimate the influence of other applicable norms in international treaty law and other factors, including the aims and content of the investment protection agreements and the specific nature of international arbitration procedure.

64. The object and purpose of international investment treaties, including the promotion of economic relations between States, presupposed a balanced approach to defending investor rights. Norms of international treaties on investment protection should not be interpreted to the detriment of the sovereign right of States to define, in such treaties, the legal regime for promoting and protecting investments and to specify mechanisms for dispute settlement. The adoption of the practice of interpreting the MFN clause as a maxim, allowing its application to investment dispute settlement issues without a direct reference thereto in the treaty itself, could have serious consequences for international investment protection legal regimes. Unjustified limitations on the rights of States that were receiving investments might discourage them from concluding investment protection agreements or allowing investments in important sectors of the national economy.

65. In the legal sense, a broad interpretation of the clause might distort the genuine intentions of the contracting States at the time of the treaty's conclusion and make detailed regulations in their investment dispute settlement procedures pointless. It also failed to give due consideration to the fundamental principles of international arbitration, which was based on the free exercise of the parties' will to refer disputes to an independent third party before or after they arose. With regard to investor-State disputes, the arbitration body was determined by the contracting States themselves, which outlined in the treaty the range of investment dispute settlement procedures, and by the investors, who could turn to one of those arbitration procedures.

66. Special procedural norms on dispute settlement should be interpreted separately from the basic norms on investment protection, bearing in mind the individual nature and circumstances of investment cooperation between States and their relationship to specific investment dispute settlement procedures and mechanisms. Where the MFN clause was vaguely worded, it would be preferable to take a *contra proferentem* approach, which would guarantee stability for the treaty regimes and also equal status for the different parties.

67. It was regrettable that the Commission had decided not to develop standard provisions on the MFN principle for economic and investment agreements. The adoption of such provisions would allow a greater

harmonization of the relevant international treaty practice and would guarantee better predictability.

68. Notwithstanding the doubts previously expressed by his delegation, the methodology chosen by the Special Rapporteur on the topic of protection of the atmosphere gave hope for a successful conclusion of the work undertaken. His delegation was pleased that the assistance of specialists had been sought in defining terms such as "atmosphere". That approach was useful for the drafting of scientifically based formulations in legal instruments on specialized subjects and would also minimize subsequent discussion on such wording.

69. The separation of the draft guidelines from other international instruments and negotiation processes in the area of environmental protection was justified and should be approved. However, any list entailed the risk that important elements might be missed out. His delegation therefore regarded the wording in the preamble as a working model. The subject of regulation, guiding principles and the introduction of a general provision on their non-applicability to other areas of international environmental law should be considered at a later stage. Those remarks referred to draft guideline 2.

70. His delegation opposed the inclusion of the phrase "pressing concern". A more positive signal would be sent by referring to the concept of "care" rather than using words that expressed anxiety.

71. On the concept of atmospheric pollution, it would be helpful to review the usefulness of broadening the draft guidelines, at least with regard to atmospheric pollution and international cooperation, to include pollution not caused by human activity. His delegation endorsed the brief definition of "atmosphere" adopted by the Commission. However, it was not entirely appropriate to define the term via the phenomenon against which the guidelines were directed.

72. The inclusion of the proviso "as appropriate" in draft guideline 5, paragraph 1, should be reconsidered. Given the overall optional nature of the document, any additional restrictions on the obligation to cooperate would neutralize the legal content of that commitment.

73. **Ms. Lijnzaad** (Netherlands) congratulated the Commission on its excellent website, which had made the Commission's work and the broader topic of the codification and progressive development of international law available to the public at large. The same could not be said of the current website of the United Nations, which in its new form unfortunately reduced the visibility of the Organization's work on international law. Her delegation called on the Legal Counsel to ensure that information on international law remained readily accessible.

74. Discussions on the topics in the clusters scheduled for the current week were important, as the presence of the legal advisers from capitals allowed for an in-depth sharing of views. The division of the subjects over the three clusters appeared somewhat unbalanced in 2015, and some of the most important topics on which her delegation would particularly appreciate hearing the views of others had been scheduled for the following week, by which time most legal advisers would have left New York. More consideration should be given in 2016 to the scheduling of discussions on the various topics.

75. Her delegation welcomed the finalization of work on the topic "The Most-Favoured-Nation clause". As to the conclusions of the Study Group, she noted that no significant changes to the 1978 draft articles had been deemed necessary and that the report's focus had been on guidance with respect to the application and interpretation of said draft articles. The Netherlands agreed that guidance should be based on the Vienna Convention on the Law of Treaties.

76. The report helpfully concluded that the general rules of interpretation as codified in the Vienna Convention also applied to treaty provisions constituting an MFN clause, the starting point being the actual wording of the clause, in the light of the object and purpose of the treaty. However, her delegation attached importance to the *ejusdem generis* principle, and the treatment to be claimed on the basis of an MFN clause must be determined on a case-by-case basis.

77. The Netherlands had a Model Bilateral Investment Agreement, on the basis of which MFN clauses were usually specified in that they were limited to treatment for "investment" and were not applicable to provisions regarding dispute settlement. In her delegation's view, dispute settlement clauses were specific to each bilateral investment treaty and therefore should not be covered by MFN clauses.

78. The Netherlands remained unconvinced that the topic of *jus cogens* should be included in the

programme of work of the Commission, for reasons stated extensively in 2014. It failed to see the point of studying the notion, as there were no signs from States that any codification was required. Nor did her delegation see a need for its progressive development. Moreover, the timing was less than ideal, since the topic of customary international law, from which the question of *jus cogens* had been excluded for good reason, was still being considered.

79. **Mr. Tichy** (Austria) congratulated the Commission on finalizing its work on the topic "The Most-Favoured-Nation clause". The Commission's clarification of the implications of such clauses, in particular in international trade and investment treaties, was a valuable contribution to public international law.

80. His delegation welcomed the adoption of the five summary conclusions reflecting the main outcome of the Study Group's work. It concurred with the Commission's view that the scope of MFN clauses was to be determined by the rules on interpretation set out in the Vienna Convention on the Law of Treaties and that the central, controversial question on the extent to which MFN clauses encompassed dispute settlement provisions could be most appropriately addressed through explicit language in the relevant treaties. However, his delegation was not convinced of the accuracy of the statement in paragraph 42 (e) of the report that "[o]therwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis". The word "otherwise" suggested that only in the absence of explicit language in a treaty did dispute settlement tribunals have the power to interpret MFN clauses on a case-by-case basis. In actual fact, any application of a treaty required its interpretation, even if such interpretation appeared obvious. A more nuanced formulation should have been adopted, indicating that in the absence of explicit language, dispute settlement tribunals enjoyed a broader margin of interpretative freedom.

81. On the topic of protection of the atmosphere, Austria welcomed the dialogue which the Commission had had with scientists, thereby promoting a better understanding of the complex physical phenomena involved. The preamble to the draft guidelines highlighted the pressing need to address the topic. On draft guideline 1 (Use of terms), his delegation wondered why the definition of "atmospheric pollution" limited the scope of the guidelines to the transboundary effects of atmospheric pollution. All pollution in the atmosphere inevitably had transboundary effects. Thus, the qualification "transboundary" should be deleted, because it was redundant, and it even complicated matters, since any assertion of pollution would first require proof of its transboundary effects.

82. His delegation also questioned whether, in the definition in draft guideline l, it was appropriate to delete the word "energy" from the factors causing pollution, given that article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea explicitly referred to energy as a cause of pollution. The reason for the difference between those two definitions was unclear. Although paragraph (8) of the commentary to draft guideline 1 referred to energy as one of the substances causing atmospheric pollution, for the sake of clarity it would be preferable to include energy in the actual definition of "atmospheric pollution".

83. Paragraph 4 of draft guideline 2 (Scope of the guidelines) referred to the status of airspace under international law. However, since airspace was under the complete and exclusive sovereignty of the State concerned, its status was governed not only by international, but also by national law. Therefore, it should also be made clear that the guidelines did not affect the national legal regulation of the airspace; that could be done by replacing the phrase "status of airspace under international law" by "the legal status of the airspace". His delegation agreed with the statement in paragraph (8) of the commentary that the question of the delimitation between airspace and outer space had been under discussion in the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space for a long time; accordingly, there was no need to discuss it in the current context.

84. **Ms. Bošković-Pohar** (Slovenia) commended the Study Group for the completion of its report on the MFN clause. The report would serve as a source of useful information for treaty negotiators, political decision-makers and practitioners.

85. The discussions on the new topic "*Jus cogens*" should help clarify the nature of the concept, its contours and its effects. The document annexed to the report of the Commission on the work of its sixty-sixth session (A/69/10) had already identified several possible approaches for addressing the topic. Her

delegation was pleased that that document had treated *jus cogens* as a separate source, while also taking as a basis for future work existing legal sources relating to *jus cogens*, including the Vienna Convention on the Law of Treaties, the articles on State responsibility and the relevant case law. At the outset, it was important to examine in depth the nature of *jus cogens*, which was different because of its seriousness and, as such, reflected generally accepted values and the foundation of today's international order. Hence the need for a complete analysis of the categories of norms under *jus cogens*, including the possibility for certain norms to acquire the status of *jus cogens*, such as the principles set out in the Charter of the United Nations.

86. Her delegation also welcomed the Commission's intention to focus on the relationship and difference between *jus cogens*, on the one hand, and customary international law and procedural law, on the other. Although *jus cogens* would appear to meet the criteria of a norm of customary international law, as illustrated in particular by the decisions of the International Court of Justice, it would be too simplistic to classify it as such. The norms of *jus cogens* must be regarded as going beyond customary international norms, and they were incompatible with the concept of persistent objector.

87. Her delegation welcomed the Commission's efforts to promote the rule of law in response to General Assembly resolution 69/123, but despite the Commission's crucial role in the promotion of the progressive development and codification of international law, its work had slowed down in recent years. Although the Commission's efforts could lead to a progressive development of international law, it was important to continue its codification work.

88. The Commission had done excellent work on the topic of protection of persons in the event of disasters. Noting that the topic had not been on the Commission's agenda in 2015, her delegation would appreciate a successful second reading of the draft articles on the subject during the 2016 session, and it reaffirmed its full support for their formulation and for the commentary. The Commission had achieved a good balance between the protection of victims of disasters and of their human rights, on the one hand, and the principles of State sovereignty and non-interference, on the other. That approach should be retained, since it was the only way of ensuring that those rules would be recognized by States, international organizations and other entities. With regard to the topic "Protection of the atmosphere", Slovenia welcomed the incorporation of the draft guidelines as an *erga omnes* obligation, as well as the focus on the obligation to cooperate.

89. **Mr. Smolek** (Czech Republic) said that the work completed by the Study Group on the most-favoured-nation clause was particularly valuable, because it did not overlap with that of other international forums on the subject, such as the World Trade Organization or the United Nations Conference on Trade and Development, and focused on the interpretation of treaties, an area in which the Commission's competence was undisputed.

90. His delegation noted with particular interest that MFN clauses in bilateral investment treaties had been invoked to expand the scope of the treaty's dispute settlement provisions in several ways, which included: (a) to invoke a dispute settlement process not available under the basic treaty; (b) to broaden the jurisdictional scope where the basic treaty restricted the ambit of the dispute settlement clause to a specific category of disputes; and (c) to override the applicability of a provision requiring the submission of a dispute to a domestic court for a period of 18 months, prior to submission to international arbitration. The interpretative techniques contained in Part IV would be appreciated by practitioners who had to deal with those complex matters.

91. His delegation agreed with the conclusion that the interpretation of MFN clauses must be in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties; that also applied to bilateral treaties. It endorsed the Study Group's conclusions that the "mixed" nature of investor-State dispute settlement arbitration did not justify a different approach to the application of the rules on treaty interpretation when MFN provisions were being considered, that the investment agreement was a treaty whose provisions had been agreed to by States, that the individual investor had no role in the creation of the treaty obligations, but simply had a right to bring a claim under the treaty, and that, as a treaty, it must be interpreted according to the accepted rules of international law governing treaty interpretation.

92. The provisions of each treaty must be interpreted independently. The Study Group had rightly noted that while guidance could be sought from the meaning of MFN treatment in other agreements, each MFN

provision must be interpreted on the basis of its own wording and the surrounding context of the agreement it was found in and that, as a result, there was no basis for concluding that there would be a single interpretation of an MFN provision applicable across all investment agreements.

93. The topic of the protection of the atmosphere addressed one of the most serious current challenges. Robust measures must be taken, immense resources would be needed to deal with the issue and scientific advice must be followed. Legal experts would have a role to play at all stages in providing the legal framework for agreements. His delegation doubted, however, that the exercise for which the Commission had opted could effectively contribute to the global effort.

94. The Commission was not working on a draft legal instrument, and it would be inappropriate to request it to do so. Any attempt to identify customary rules of international law specific to the protection of the atmosphere would be premature. It was not the first time that the Commission had opted for a set of guidelines, but unlike in past cases, it was not clear who the addressees of those guidelines were and which legal problems the guidelines should help to overcome, bearing also in mind that the Commission's competence did not extend beyond legal issues in that field. It was still not evident whether those problems were connected with the phase of negotiation of legal instruments dealing with various aspects of the protection of the atmosphere, whether they were related to the application or interpretation of those instruments, or whether something else was involved.

95. The guidelines on reservations to treaties and the final report of the Study Group on MFN clauses were examples of situations in which the Commission had succeeded in identifying existing legal problems and indicating legal techniques for overcoming them, whereas such clarity was lacking in the topic of protection of the atmosphere. Instead, the Commission seemed to be restating general principles already contained in a number of international instruments, binding or not binding, without a proper explanation as to what the purpose of that repetitive exercise actually was.

96. **Mr. Galea** (Romania) welcomed the decision to include the challenging topic "*Jus cogens*" in the Commission's programme of work. Moreover, the topic "Immunity of State officials from foreign criminal jurisdiction was of great importance and must be extensively debated.

97. With regard to the topic of the most-favoured-nation clause, his delegation noted the Commission's conclusion that such clauses remained unchanged in character from the time the 1978 draft articles had been concluded, and that the core provisions of those draft articles continued to be the basis for the interpretation and application of MFN clauses. As Part V of the report indicated, the Vienna Convention on the Law of Treaties should be the point of departure in the interpretation and application of the MFN clauses contained in investment treaties as well.

98. The guidance to the effect that explicit language could ensure that an MFN provision did or did not apply to dispute settlement provisions was useful for policymakers, practitioners, drafters of international treaties, negotiators, jurisdictional and arbitral tribunals and all those who dealt with investment matters. Thus, the Study Group's work would be of special relevance for investment law and investment treaties. It was to be hoped that the Commission's conclusions would bring greater clarity and help prevent or limit differing interpretations of that important issue in the future.

99. However, policy guidance must be applied to the conclusion of future treaties or amendments. As stated by the Commission, the possible application of the MFN clause to dispute settlement was a matter of treaty interpretation. Even if articles 31 and 32 of the Vienna Convention applied to a bilateral investment treaty as a whole, two lines of jurisprudence had developed, one led by cases such as *Maffezini* and *Siemens A.G. v. The Argentine Republic*, according to which, in the absence of a contrary indication, and subject to specific elements, the MFN clause applied to jurisdiction, while a second line of case law, led by cases such as *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, or *ICS v. Argentina*, appeared to conclude that in the absence of a clear indication that the MFN clause did apply to jurisdiction, consent of a State to arbitration must not be presumed. In conclusion, the Commission found that, in the absence of explicit language, it would be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis. Given the existence of two divergent lines of case law, an additional general

indication on interpretative approaches would have been useful.

100. Romania endorsed the view according to which the question of the possible application of the MFN clause to dispute settlement was also one of "establishing jurisdiction" or establishing "consent to arbitrate". Bearing in mind the general reasoning of the International Court of Justice in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* case, according to which a substantive article "is such as to throw light on the interpretation of the other Treaty provisions […] but cannot, taken in isolation, be a basis for the jurisdiction of the Court", his delegation considered that consent to jurisdiction or arbitration was not to be presumed, but must be established beyond doubt.

101. His delegation also attached importance to the finding of the tribunal in the *ICS* case, according to which the "contemporaneity principle" applied when determining the intent of the parties at the time of the conclusion of the agreement: it could not be presumed that the parties had envisaged the application of the MFN clause to dispute settlement when they had inserted the clause in the agreement. Romania was reticent about the application of an "evolutive interpretation" in the current instance, as the draft report cited the *Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua)* case: such an evolutive interpretation should rely only on well-established bilateral State practice for each particular agreement.

102. On the topic of protection of the atmosphere, his delegation welcomed the clear definition of "atmosphere", which would also be useful in other contexts. As to the definition of "atmospheric pollution", Romania, as a party to the 1979 Convention on Long-range Transboundary Air Pollution, was in favour of inserting a reference to the significant adverse effects to living resources in draft guideline 1 (c).

103. His delegation welcomed the clear statement of States' obligation to cooperate for the protection of the atmosphere and in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. That was a key to global efforts to protect the atmosphere.

104. **Mr. Argüello Gómez** (Nicaragua) said it was a cause of "pressing concern" — to employ the phrase used in Part V of the report — that the results of the Commission's work had not had the same weight as the results achieved in the first half of its existence, a state of affairs for which the Sixth Committee was to a large extent responsible. For lack of action by the Sixth Committee and the General Assembly, the selection of topics for consideration had been left in the hands of the Commission members, who chose topics in good faith which they believed would serve the progressive development of international law, but the result was often just the opposite. In the final analysis, topics were chosen without the clear support of the Sixth Committee.

105. As to the discussion of the topics, there was no time for a real debate, and delegates did not hear what their colleagues had to say until they came to the meetings of the Sixth Committee. To remedy that situation, it had been proposed that the Commission should hold part of its sessions in New York, but there was a simpler way to promote participation without the cost and exhaustion of such an arrangement: to decide that members of the Sixth Committee who intended to make statements or comments should send them in writing 15 days before the start of the Sixth Committee's meetings. That way, members of the Commission and the Sixth Committee would have time to consider them and to respond, and it would be possible to have a real debate, and not just a simple reading out of statements.

106. His delegation commended the Commission for its idea of holding international law seminars with young legal experts from around the world. That deserved broad support, and his delegation joined the Commission in expressing recognition to those countries which had participated in the initiative and called on countries economically in a position to do so to follow their example.

107. The hollowing out of the important topic of protection of the atmosphere demonstrated the problems the Commission was facing. Draft guideline 4 had been deleted; there had been doubts as to whether that was an international obligation. In draft guideline 5, paragraph 1, the introduction of the words "as appropriate" meant that international cooperation was no longer an obligation. The aspect of greatest concern, however, was not that the topic had been watered down, but that it helped destroy the idea that what was at issue was a generally accepted right or obligation. The obligation to protect the environment, the Earth and the air that

everyone breathed was an absolutely fundamental right for the vast majority of humanity. In effect, it was a *jus cogens* obligation. In that connection, his delegation hoped that the new topic "*Jus cogens*" would have a better fate and that it would be possible to conclude that there was a *jus cogens* obligation to protect the atmosphere, because the contrary would imply that genocide was a crime of *jus cogens*, but that the extermination of humanity was not.

The meeting rose at 1 p.m.