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Chair:	Mr. Danon	(Israel)
later:	Mr. Turbék (Vice-Chair)	(Hungary)
later:	Mr. Danon (Chair)	(Israel)
later:	Mr. Katota (Vice-Chair)	(Zambia)

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16-18858 (E)

The meeting was called to order at 10.10 a.m.

Statement by the President of the International Court of Justice

1. **Mr. Abraham** (President of the International Court of Justice) said that his statement would address the contribution of the International Court of Justice to the development and clarification of international environmental law. That subject was particularly relevant for the current session of the Commission, since the consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm was on the Committee's agenda, and because of the growing importance of environmental issues on the international stage and in disputes brought before the Court.

2. The Court was the principal judicial organ of the United Nations and enjoyed general subject-matter jurisdiction, but might hear any dispute of a legal nature, regardless of its subject matter. Questions relating to the protection of the environment had begun to appear relatively recently in the jurisprudence of the Court, as the concerns underpinning those questions were the result of a new and growing awareness within the international community of the potentially harmful effects of human activity on the environment. That awareness had led to the adoption of a number of international instruments imposing obligations on States, some of which contained compromissory clauses conferring jurisdiction upon the Court to settle any disputes. However, no disputes had to date been submitted to the Court using that basis for jurisdiction. The Court's jurisdiction over environmental disputes had instead been founded on declarations made by the parties under an optional clause, a special agreement, provisions contained in treaties concerning the peaceful settlement of disputes, or compromissory clauses in treaties that referred only incidentally to the protection of the environment.

3. The Court had emphasized the importance it attached to environmental protection as early as 1996, in its advisory opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, in which it had recognized that the environment was under daily threat, that the use of nuclear weapons could constitute a catastrophe for the environment, and that the environment was not an abstraction but represented the living space, the quality of life and the very health of human beings, including generations unborn. The Court had recalled the concepts of protection of the rights of future generations and sustainable development in its 1997 judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, in which Hungary and Slovakia had requested the Court to clarify their respective obligations with regard to the implementation and termination of a treaty concluded between them on the construction and functioning of a barrage system on the Danube.

4. In its judgment, the Court had observed that while throughout the ages mankind had, for economic and other reasons, constantly interfered with nature without consideration of the effects upon the environment, new norms and standards had been developed and set forth in a great number of instruments that had to be taken into consideration not only when States contemplated new activities but also when continuing with activities begun in the past. The Court had referred to the concept of sustainable development, stating that it aptly expressed the need to reconcile economic development with protection of the environment. Cases concerning the preservation of the marine environment, the conservation of biodiversity, the protection of international watercourses and the protection of shared or common resources had since been brought before the Court. Until very recently, the Court had only dealt with those issues as elements of cases that primarily concerned obligations relating to other fields of law, such as international humanitarian law, State responsibility and the law of treaties.

5. The Court had made a number of key contributions to the clarification of the rules of international law in relation to the protection of the environment, even in cases where it had to deal with issues that were not related directly to the topic. In the two abovementioned cases, for example, the Court had recognized that the existence of the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control had become part of the corpus of international law relating to the environment.

6. The first case in which the Court had been asked to apply the rules of international law concerning activities alleged to be at least potentially harmful to

the environment was *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, filed in 2006. In that case, the Court had been asked to determine whether Uruguay had breached its obligations under the Statute of the River Uruguay, a treaty between the parties which had entered into force in 1976. In its application, Argentina had alleged that the authorization, construction and future commissioning by Uruguay of two pulp mills on the River Uruguay was in breach of the treaty, in particular because of the effects of such activities on the quality of the waters of the River Uruguay and the areas affected by the river.

7. In its judgment of 20 April 2010, the Court had made it clear that its jurisdiction was limited to examining the allegations of breaches by the respondent of its obligations under the Statute. However, it had also explained that, in accordance with the relevant rules of treaty interpretation, the interpretation of the Statute must take into account the context and any relevant rules of international law applicable in the relations between the parties. In that context, the Court had elaborated on the obligations incumbent upon States under general international law relating to the environment, first pointing out that the principle of prevention, as a customary rule, had its origins in the due diligence that was required of a State in its territory. On the basis of its statement in its 1949 judgment on the merits in the *Corfu Channel* case that it was every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, the Court had concluded that a State was obliged to use all the means at its disposal in order to avoid activities which took place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State, recalling that that obligation had become part of the corpus of international law relating to the environment. The Court had gone further, recognizing the existence of a practice that had gained so much acceptance among States that it might be considered a requirement under general international law, namely to undertake an environmental impact assessment where there was a risk that the proposed industrial activity might have a significant adverse impact in a transboundary context, in particular, on a shared resource. The *Pulp Mills* judgment was thus a substantial step towards clarifying the regime applicable to States embarking on activities that had the potential to substantially affect the environment of another State. Nevertheless, given the scope of the Court's jurisdiction in that case, the relevance of the decision for general international law was meant to be limited.

8. In the period between the application by Argentina and the Court's *Pulp Mills* judgment, Ecuador had filed an application in March 2008 instituting proceedings against Colombia, in which it alleged that, by spraying toxic herbicides near, at and across its border with Ecuador, Colombia had violated the rights of Ecuador under customary and conventional international law. The parties had disagreed as to whether Colombia had violated obligations incumbent upon it under customary international law on the prevention of transboundary harm. However, the case had been removed from the Court's List in 2013, following the discontinuance of the proceedings by Ecuador.

9 The Court had not had the opportunity — or rather the necessity — to further clarify the applicable rules of customary international law concerning the environment until its December 2015 judgment on the merits of the joined cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. That judgment would certainly be considered as setting the Court's jurisprudence on the matter, as it had clarified a number of important questions: it had confirmed that general international law imposed both substantive and procedural obligations on States with regard to activities carried out in their territory that could have a detrimental impact on the environment, clarified the scope and content of those obligations, and specified the rules applicable to the assessment of the evidence and the burden of proof.

10. With regard to substantive obligations, the Court had recalled its statement in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, restated in the *Pulp Mills* judgment, that a State was obliged to use all the means at its disposal to avoid activities which took place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. In the *Costa Rica v. Nicaragua* case, the Court had found that it had not been established that the respondent had breached its

substantive obligations concerning transboundary harm, since the applicant had failed to prove that the respondent's activities had caused any harm to the applicant's territory. More interestingly, the Court's reason for considering that the respondent in the *Nicaragua v. Costa Rica* case could not be considered to have breached its substantive obligations was that the applicant had not proved that the respondent had caused the applicant significant transboundary harm. The Court had thus confirmed that only significant harm would allow for the conclusion that a State had breached its substantive obligations under customary international law concerning transboundary harm.

11. With respect to procedural obligations, the Court had, in the same judgment, stated that in order to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential to adversely affect the environment of another State, ascertain if there was a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment. The Court had clearly stated that the principle did not apply only to industrial activities. It was apparent from the judgment that a State contemplating any such activity had a two-step procedural obligation that must be fulfilled before the activity began. First, it must ascertain whether the activity entailed a risk of significant transboundary harm, for example by having a preliminary risk assessment carried out. If a potential risk was identified in the first stage, the State must carry out an environmental impact assessment to determine whether the risk was real and, if it was, to assess its nature and scope. The Court had recalled its statement in the *Pulp Mills* judgment that it was for each State to determine in its domestic law or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to various factors. Thus, domestic law played a role in the fulfilment of the obligation, even in cases where the obligation was based on customary international law.

12. It appeared from the Court's judgment that the fulfilment of the two-step procedural obligation to evaluate the adverse impact of an activity before engaging in it could also lead to the recognition of the existence of another procedural obligation: the Court had stated that if the environmental impact assessment confirmed that there was a risk of significant transboundary harm, the State planning to undertake the activity was required to notify and consult in good faith the potentially affected State, where that was necessary to determine the appropriate measures to prevent or mitigate that risk.

13. The judgment had also clarified that, while it was incumbent upon the parties to provide the evidence to support their factual allegations, which might include scientific reports by experts, it was the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate. The Court had thus reasserted its exclusive responsibility to assess the evidence before it, which must not be delegated to experts appointed by the parties or even by the Court. With regard to the burden of proof, the Court's reasoning indicated that there was no exception, in the field of the prevention of transboundary harm, to the principle that it was up to the party alleging a fact to demonstrate its existence.

14. Thus, through its pronouncements in all of the abovementioned cases, the Court had already significantly clarified the regime applicable to inter-State relations in the field of international environmental law. Given the growing importance of environmental concerns, it was likely that some of the remaining questions would come before the Court in the future. Nonetheless, a number of tools were available to the Court to enable it to respond to the specific challenges posed by cases involving environmental issues. The Court had always shown its willingness to adapt its methods of work in order to better fulfil its role in connection with such disputes. For example, it had created the Chamber for Environmental Matters in 1993 to deal with any environmental case falling within its jurisdiction. While the Chamber had never been used, and elections to the Chamber had consequently been suspended in 2006, the reasoning behind its establishment had never been questioned and its creation bore witness to the Court's willingness to use all available tools to take into account the specific nature of cases concerning the environment.

15. It was clear from the cases of an environmental nature brought before the Court that certain provisions

in its Statute and Rules, although of general application, allowed for the specific characteristics of disputes with an environmental dimension to be taken into account in order to ensure the optimal handling of the claims. For example, pursuant to article 41 of its Statute, the Court had the power to indicate, if it considered that circumstances so required, any provisional measures which ought to be taken to preserve the respective rights of either party. Such measures were intended to protect the rights of the parties pending a final decision and could only be taken where there was a real and imminent risk that irreparable prejudice would be caused to the rights in a dispute before the final decision was delivered. As the Court had noted in its judgment in the *Gabčíkovo-Nagymaros Project* case, in the field of environmental protection, vigilance and prevention were required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Provisional measures were thus a particularly useful tool to ensure that a decision of the Court in a case involving allegations of environmental damage did not come after serious and irreversible damage had already been caused.

16. The Court had had occasion to rule on requests for the indication of provisional measures in a number of cases involving environmental components. In the *Nuclear Tests* cases *(New Zealand v. France)* and *(Australia v. France)*, concerning the legality of atmospheric nuclear tests conducted by the Government of France in the South Pacific region, the applicants, who had sought to protect their right not to have radioactive fallout on their territory, had requested the Court to order France to refrain from conducting nuclear tests pending a final decision. The Court had considered that the evidence before it did not exclude the possibility of irreparable prejudice being caused to the rights invoked by the applicants by the deposit on their territory of radioactive fallout from the tests and had therefore indicated, as a provisional measure, that France should avoid nuclear tests causing the deposit of radioactive fallout on the territory of Australia, New Zealand and certain islands in respect of which New Zealand had invoked special responsibilities.

17. Another way in which the Court was able to take into account the specific characteristics of disputes involving environmental issues was through certain methods for establishing the facts provided for in its Statute and Rules, including the appointment of experts by the parties or the Court and site visits by the Court. Expert analyses could be particularly appropriate for environmental law disputes, given the abundance and the technical and scientific complexity of the factual data often submitted by the parties. The Statute and Rules of the Court recognized the right of the parties to have recourse to experts in presenting their cases, during both the written and the oral proceedings. The Court's jurisprudence showed that reports and statements by experts were carefully examined by the Court. In the joined cases involving Costa Rica and Nicaragua, the Court had referred to the experts' reports in its evaluation of whether a navigable channel had existed for a significant period of time in the location claimed by Nicaragua and to determine whether there were risks associated with the Nicaraguan dredging programme.

18. The findings of experts had also been useful in the assessment of the evidence submitted by Nicaragua for the purpose of determining whether the construction of a road by Costa Rica had caused significant damage to the San Juan River, which was in Nicaraguan territory. The testimony of experts presented by the parties had also been helpful in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, in which Australia had alleged that Japan had violated some of its obligations under the International Convention for the Regulation of Whaling by pursuing a whaling programme falsely presented as being for purposes of scientific research. The experts had provided useful information pertaining to the significance of the sample sizes selected and whether the research could be conducted using non-lethal methods.

19. Under article 50 of its Statute and article 67 of its Rules, the Court had the power to also arrange for an expert opinion to be given. The Court had only made use of that option twice: first in the Corfu Channel case, and then very recently in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, neither of which concerned environmental protection. It had considered in the past that there were no grounds for it to exercise that power when it appeared that it had been capable of ruling on the questions before it without having recourse to it.

Nevertheless, the option might prove useful in future cases involving allegations of damage or risk of damage to the environment, and it was worth noting that the Court had recently shown that it was prepared to make use of it.

20. Lastly, in accordance with article 66 of its Rules, the Court had the power to conduct a visit to the place to which the case in question related. The Court had only made use of that possibility once, to collect evidence in the *Gabčíkovo-Nagymaros Project* case, although it might still do so in the future in cases involving allegations of environmental damage. Indeed, the Permanent Court of International Justice had also conducted such a visit only once: in its *Diversion of Water from the Meuse (Netherlands v. Belgium)* case.

21. **Mr. Momtaz** (Islamic Republic of Iran), referring to the cases on the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* brought by the Marshall Islands against three nuclear-weapon powers, said that the finding of the International Court of Justice that it could not proceed to the merits of the cases, based on the absence of a dispute between the parties, had been severely criticized. He noted that the President of the Court, in his declarations expressing reservations about the findings, had stated that the Court did not seem always to have been so rigorous regarding the condition relating to the existence of a dispute. Although the President had joined the majority in voting in favour of the judgments, on the basis that judges were morally, though not legally, bound by the Court's jurisprudence once it had been established, he had also stated that precedent was not inviolate. The President should therefore consider whether, by holding so firmly to previous case law, the Court risked fossilizing its jurisprudence and preventing it from evolving in line with developments in international law. The question was particularly important bearing in mind that the relevant cases related to *erga omnes* obligations, concerning the protection of the environment, and that the Marshall Islands was therefore in some sense representing the international community as a whole.

22. **Mr. Abraham** (President of the International Court of Justice) said that, regarding the specific cases mentioned, he could add nothing to what had already been said in the Court's judgments, his own declarations, and the separate and dissenting opinions of a number of judges. Precedent was certainly not inviolate and all jurisdictions, whether domestic or international, must be ready to develop their jurisprudence when they deemed it necessary. However, judges also had to make sure they maintained some consistency in their jurisprudence, to avoid creating legal insecurity. Parties coming before a judge must, based on an examination of precedent, have at least some security regarding the likely outcome of the case. Otherwise, an impression of arbitrariness might be given. It was therefore important to find a balance between the need to ensure that jurisprudence was consistent and the need, where appropriate, to adapt it in line with new requirements or evolving situations. He was aware that it was not easy on a case-by-case basis to know when to prioritize consistency and when to focus on the development of case law; however, the Court always discussed such issues fully and in depth.

23. **Mr. Alabrune** (France), said that while many delegations had often suggested that the distinction between States that had made unilateral declarations recognizing the compulsory jurisdiction of the Court and those that had not was the key element determining the Court's ability to exercise its jurisdiction, it must be recalled that States could in fact be subject to the Court's jurisdiction without making such declarations. They could, for example, accept its jurisdiction through compromissory clauses in the treaties to which they were party, or through special agreements. Another possibility provided by article 38, paragraph 5, of the Rules of the Court was that of *forum prorogatum*, a procedure whereby an application instituting proceedings was filed against a State at a time when that State had not recognized the jurisdiction of the Court, but that State had the option to accept such jurisdiction subsequently so as to enable the Court to entertain the case. He wondered if the rule of *forum prorogatum* might be more widely used in the future; to his knowledge, France was the only State that to date had accepted the Court's jurisdiction on that basis. It should also be borne in mind that declarations recognizing the compulsory jurisdiction of the Court often contained many reservations, which could be invoked to contest the Court's jurisdiction when another State wished to bring a case before it on the

basis of such a declaration. Lengthy discussions on the issue of jurisdiction often ensued, delaying or sometimes preventing the Court from considering cases on their merits. Moreover, States sometimes modified a declaration in order to limit further their acceptance of the Court's compulsory jurisdiction. It was therefore counterproductive for delegations to state that the Court could exercise its jurisdiction solely on the basis of unilateral declarations.

24. **Mr. Adamhar** (Indonesia) said that his delegation supported the continued tradition of visits by the President of the International Court of Justice to the Sixth Committee, which enabled representatives from capitals to report back to their Governments on the Court's activities.

Agenda item 78: Report of the International Law Commission on the work of its sixty-eighth session (*continued*) (A/71/10)

25. **The Chair** invited the Committee to continue its consideration of chapters VII to IX of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

26. **Ms. Telalian** (Greece), referring to the topic "Crimes against humanity", said that if the intention of the Commission and the Special Rapporteur was to elaborate a draft convention on the topic, which her delegation understood to be the case, the best approach would be to be guided by and draw on standard provisions that had been repeatedly used in widely ratified treaties concerning other crimes. The second report of the Special Rapporteur (A/CN.4/690) included an exhaustive presentation of relevant clauses from such treaties.

27. Her delegation generally approved of the amendments that had been made to the wording of the draft articles on crimes against humanity as provisionally adopted. The restructuring of the paragraphs of draft article 5 was welcome, although the draft article could be further improved by splitting some of its provisions so that distinct issues, such as the responsibility of superiors and the imprescriptibility of crimes against humanity, were dealt with in separate articles.

28. With regard to the criminal responsibility of legal persons, which had been the subject of much debate within the Commission, it should be noted that that concept was not recognized under many legal systems, including that of her country. However, Greek legislation provided for a wide array of administrative sanctions that could be applied against legal persons. Given the diversity of State practice in that respect and the divergence of views within the Commission, the decision to include in draft article 5, paragraph 7, the same wording as that used in article 3, paragraph 4, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was an acceptable way to deal with the issue. Her delegation's understanding was that the proposed paragraph would oblige States to take measures only if they deemed it appropriate to do so and that States would be allowed the highest degree of flexibility in their approach to the liability of legal persons.

29. Her delegation noted that the previous reference to "territory under its jurisdiction or control", in draft article 6, paragraph 1 (a), and also in draft articles 7, 8 and 9, had been replaced by "territory under its jurisdiction", in order to bring them in line with article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Her delegation also welcomed the explanation provided in the commentary to draft article 6 that the wording was intended to encapsulate the territory de jure of the State, as well as territory under its jurisdiction or de facto control, and noted the Commission's intention to revisit the text of draft article 4.

30. Greece could accept the stipulation in draft article 6, paragraph 1 (b), that a State should establish its jurisdiction over acts committed by stateless persons habitually resident in its territory, provided that the establishment of such jurisdiction remained optional. However, her delegation questioned whether the exercise of passive personality jurisdiction should remain optional, as it currently was under draft article 6, paragraph 1 (c).

31. In draft article 7 (Investigation), the deletion of paragraphs 2 and 3 initially proposed by the Special Rapporteur, which dealt with cooperation among States, was welcome. While the Special Rapporteur had described their provisions as useful innovations, he had offered little or no information in that regard. It would be more appropriate to address that matter in

other draft articles. Her delegation also welcomed the reformulation of draft article 8 (Preliminary measures when an alleged offender is present) to bring it in line with article 6 of the Convention against Torture.

32. The Commission should align the wording of draft article 9 (*Aut dedere aut judicare*) more closely with article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague formula"), which had been incorporated into numerous conventions aimed at repressing specific offences, including instruments on terrorism, the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. Specifically, the draft article should read: "The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender him/her to another State or competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution." Furthermore, since draft articles 7 and 8 were based on the corresponding provisions in the Convention against Torture, her delegation saw no reason why draft article 9 should not be based on that Convention as well. However, her delegation agreed with the Commission that it was not necessary to replicate article 36 of the Vienna Convention on Consular Relations in draft article 10 (Fair treatment of the alleged offender).

33. With regard to the topic "Protection of the atmosphere", the draft guidelines provided a solid basis for the Commission's future work on the topic. Her delegation highly appreciated the overall structure of the draft guidelines, in particular the link established in paragraph (1) of the commentary to draft guideline 3 between the due diligence obligation of States to protect the atmosphere, expressed in draft guideline 3, and the ensuing obligations to conduct environmental impact assessments and to use the atmosphere in a sustainable, equitable and reasonable manner, as set out in draft guidelines 4, 5 and 6. Draft guideline 3 thus provided for an overarching duty of care for the protection of the atmosphere, while the obligations contained in draft guidelines 4, 5 and 6 flowed from and concretized aspects of that general duty. Her delegation was pleased that draft guideline 3 covered all three elements of the duty to protect: prevention, control and reduction. However, it would be preferable if the wording of the draft guideline could be amended so that the element of control preceded that of reduction, in order to reflect the usual chronological order of occurrence of the two elements.

34. Furthermore, all three elements, articulated in the draft guideline as the obligation to "prevent, reduce or control", were inseparable, such that a State that had failed to fulfil its obligations in the area of prevention could not argue that that failure was offset by its subsequent compliance with the other two components. Accordingly, the phrase "prevent, reduce or control" should be replaced by "prevent, reduce and control". It might also be worth highlighting that point in the commentary to the draft guideline.

35. Her delegation welcomed the reference in paragraph (5) of the commentary to draft guideline 3 to the evolutive nature of the duty to protect the atmosphere, which was conditioned by evolving standards of both science and technology. In that regard, the reference to standards of "technology" should be expanded to refer to standards of "science and technology".

36. With regard to draft guideline 4, her delegation agreed that environmental impact assessments were usually conducted by private entities, and not by the State itself, provided that they respected the parameters and requirements established by the applicable legislation. However, paragraph (2) of the commentary to the draft guideline should be adjusted to make it clear that although the obligation to conduct the environmental impact assessment did not necessarily attach to the State itself, the State's authorization was still required for the proposed activity to be undertaken. In addition, the paragraph should stress that the potentially affected State should be notified or consulted if a risk of atmospheric pollution was identified, as provided for in principle 19 of the Rio Declaration on Environment and Development. Furthermore, the reference to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kyiv Protocol) in paragraph (6) of the commentary to draft guideline 4 should be expanded to explicitly state that the Protocol, unlike the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), was applicable even in cases where there was no risk of the

plans and programmes evaluated in the environmental impact assessment having a transboundary effect.

37. Greece supported draft guideline 5 (Sustainable utilization of the atmosphere), as the sustainability principle applied to both renewable and non-renewable natural resources. However, for reasons of clarity, paragraph (3) of the commentary should better define the term "utilization" or, alternatively, include examples of such utilization, which would also inform the reader's understanding of the principle of equitable and reasonable utilization set out in draft guideline 6. The commentary to draft guideline 5 also seemed rather short for such an important provision.

38. Turning to the topic of *jus cogens*, she said that Greece had supported the concept as an established element of contemporary international law since the elaboration of the Vienna Convention on the Law of Treaties and considered peremptory norms to be an expression of the fundamental values of the international community. In light of the evolution of international law in the time since the adoption of the Convention and the growing number of decisions of international and national courts referring to *jus cogens*, the Commission's expertise would be invaluable in helping States gain a better understanding of the legal nature and implications of the concept. Greece therefore welcomed the inclusion of the topic on the Commission's agenda and looked forward to the adoption of a complete set of conclusions on the topic.

39. The Commission's approach to its work on *jus cogens* should duly respect the sensitivity of the topic, in particular with regard to the criteria for the identification of norms that had reached the level of *jus cogens*. In that connection, Greece welcomed the Special Rapporteur's proposal to successively address the nature, identification and consequences of *jus cogens* while bearing in mind the interplay between the three elements. The Commission's input was most needed in uncharted areas such as the implications of *jus cogens* beyond the law of treaties and the mutability process, by which a peremptory norm was modified or abrogated by a subsequent norm of the same nature.

40. Greece would consider with interest the Commission's future work on the persistent objector doctrine and its application in the area of *jus cogens*. However, her delegation wished to caution against theories that could undermine the well-established universal applicability of *jus cogens* norms.

41. With regard to the draft conclusions on *jus cogens* proposed by the Special Rapporteur in his first report (A/CN.4/693), her delegation was of the view that the concept of *jus dispositivum*, defined in draft conclusion 2, paragraph 1, had no place in a set of conclusions on *jus cogens*. The Commission might also wish to consider merging paragraph 2 of draft conclusion 2 with paragraph 1 of draft conclusion 3, as both contained elements that would contribute to a comprehensive definition of *jus cogens* norms.

42. **Ms. Reshef Mor** (Israel), in reference to the topic "Crimes against humanity", said that her country had since its inception been deeply committed to international justice and the prevention and punishment of crimes against humanity. Israel had been one of the first nations to accede to the Convention on the Prevention and Punishment of the Crime of Genocide and to adopt domestic legislation accordingly, and was currently drafting domestic legislation explicitly prohibiting crimes against humanity, in accordance with customary international law.

43. The effective codification of customary crimes against humanity would benefit the entire international community. However, codification efforts had raised questions that would need to be considered as the work progressed. Caution was needed when considering the establishment of mechanisms for the enforcement of or adherence to the proposed treaty on the matter, as such mechanisms could potentially be abused by States and other actors in order to advance their political goals rather than protect the rights of victims. Any codification of the topic, including any list of crimes and their definitions, should reflect customary international law and the broadest possible consensus among States. Furthermore, decisions concerning the precise form that codification should take should be deferred until substantial further progress had been made on the topic. Her Government had gained valuable experience from its work towards the adoption of domestic legislation on crimes against humanity and would readily contribute to the drafting of the new proposed treaty.

44. Any codification of crimes against humanity should cover crimes committed by both State and non-State actors, with particular attention being given

to the increase in crimes against humanity committed by non-State actors and the specific issues associated with that phenomenon.

45. Turning to the topic of *jus cogens*, she said that Israel recognized the importance of *jus cogens* as a widely accepted doctrine of international law. Its Supreme Court had been one of the first to recognize the existence and relevance of *jus cogens* norms, in the 1962 Eichmann Trial. However, while Israel continued to recognize those norms as a reflection of the general will of the international community, it reiterated its concerns regarding the codification of *jus cogens* norms and the manner of their application.

46. The intense debate at the previous session of the Commission had reinforced her delegation's view that the discussion regarding the drafting of an illustrative or comprehensive list of *jus cogens* norms was premature. A comprehensive list was likely to create more disagreement than consensus, and an illustrative list could dilute the strength and binding nature of peremptory norms. Given the lack of agreement on the identification of *jus cogens* norms, the Commission should consider deferring the identification process and focusing for the time being on an examination of the legal consequences of a norm having *jus cogens* status.

47. **Ms. Metelko-Zgombić** (Croatia), speaking on the topic of crimes against humanity, said that, despite the continued commission of such atrocities around the world, crimes against humanity remained the only core set of crimes within the jurisdiction of international criminal tribunals in respect of which no dedicated convention existed. As a country that had experienced first-hand the commission of far too many acts constituting crimes against humanity, Croatia staunchly supported all efforts aimed at developing a global legal instrument to prevent and punish such crimes and hoped that the Commission's work over the coming years would lead to further progress in that regard.

48. Her delegation noted with appreciation the Commission's provisional adoption of draft article 5, which set out the obligation for States to criminalize crimes against humanity in their national jurisdictions. The Croatian Criminal Code, with its list of crimes and forms of liability, fully reflected the contents of that draft article. In particular, her delegation welcomed the inclusion of the concept of command or other superior responsibility in draft article 5, paragraph 3 (a) and (b), which confirmed that crimes against humanity were usually accompanied by some dereliction of duty by a superior. It was her delegation's understanding that draft article 5, and in particular paragraph 3 (a) and (b) thereof, implied that a single act constituting a crime against humanity could simultaneously engage the responsibility of more than one superior at different levels in the chain of command, a principle that also emerged clearly from the case law of the International Tribunal for the Former Yugoslavia, for example in *Prosecutor v. Milorad Krnojelac, case No. IT-97-25*.

49. Furthermore, her delegation appreciated the distinction drawn between "a military commander or person effectively acting as a military commander" and other "superior and subordinate relationships". The fact that such relationships had not been further characterized indicated that they were not necessarily restricted to the military chain of command. The wording used in draft article 5, paragraph 3 (a) and (b), satisfactorily reflected the current state of play in modern warfare and the existence of different types of superior and subordinate relationships. It expressed the possibility that the responsibility of de jure or de facto military commanders, as well as other superiors, including civilians, could arise not only with respect to crimes committed by military forces under their effective command and control, but also with respect to crimes committed by individuals under such control, even if those individuals did not belong to military structures. In conclusion, her delegation fully concurred with the understanding of command or other superior responsibility set out in draft article 5, paragraph 3 (a) and (b), as well as with the definitions of crimes against humanity proposed in the draft articles more generally.

50. **Ms. Escobar** (El Salvador), speaking on the topic "Crimes against humanity", said that the draft articles reflected the significant progress that had been made on the topic. Her delegation reiterated its support for the drafting of a text devoted exclusively to crimes against humanity, as already existed for other serious crimes, such as genocide and war crimes. While the Rome Statute of the International Criminal Court, which El Salvador had recently ratified, had played a critical role in determining the characteristics of such crimes, a comprehensive instrument on crimes against humanity was overdue.

51. El Salvador agreed that States had an obligation to ensure that crimes against humanity constituted offences at the domestic level, as provided for in paragraph 1 of draft article 5. However, it was concerned that paragraph 2 of that draft article, which aimed to regulate the various ways of engaging in a criminal activity, including direct perpetration and various other modes of participation, did not cover indirect perpetration. The criminal responsibility framework established by the draft articles should clearly differentiate between the various forms of perpetration and participation, taking into account developments in international criminal law.

52. The draft articles should also include the concept of indirect perpetration, which was generally defined as acting through another person. It was distinct from other modes of participation, as the perpetrator did not commit the crime directly but rather used another person as an instrument. Indirect perpetration had been a well-established feature of international law since its explicit inclusion in article 25 of the Rome Statute, pursuant to which a person was criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person committed such a crime through another person, regardless of whether that other person was criminally responsible. Including indirect perpetration in the draft articles would make it clear that individuals who did not did not physically execute a crime but who ordered, planned and arranged for its execution through a power structure, would be liable for punishment. It would also make it possible to deal with crimes perpetrated by entities ranging from criminal organizations and gangs to State structures. El Salvador therefore urged the Commission to include in the draft articles the concept of indirect perpetration, which was recognized by the International Criminal Court and contemporary doctrine and had been incorporated into other instruments.

53. In paragraph (8) of its commentary to draft article 5, the Commission included the concept of attempting to commit a crime in its listing of the various forms of engagement in a crime. However, attempting to commit a crime should be considered as one of the stages in the commission of a crime rather than as an element of the perpetration thereof or participation therein. In that connection, the crime might be consummated or attempted regardless of the specific manner in which a person engaged in it. Thus, in the commentaries, attempting to commit a crime should be dealt with as a separate concept from such issues as instigating, conspiring and other ways of assisting or participating in a crime.

54. El Salvador welcomed the provision in the article 5, paragraph 5, of draft articles that crimes against humanity were not subject to any statute of limitations, as the mere passage of time should not limit the possibility of punishing those responsible for those serious crimes. However, given the importance of that provision, it would be worth considering transforming the paragraph into a separate article.

55. In its commentary to draft article 6 (Establishment of national jurisdiction), the Commission explained that paragraph 2 of the draft article aimed to cover situations where a State was obligated to establish jurisdiction even if the crime was not committed in its territory, the alleged offender was not its national and the victims of the crime were not its nationals. The exercise of jurisdiction in the absence of territorial or personal connection appeared to refer to the principle of universal jurisdiction, which was very appropriate, given the nature of the crimes in question. However, since the paragraph also referred to extradition, the wording could create confusion between the principle of universal jurisdiction and the principle of extradite or prosecute. Given that the latter was covered in a separate provision in the draft articles, her delegation suggested reformulating draft article 6, paragraph 2, in such a way as to shed light on its true scope.

56. Turning to the topic of protection of the atmosphere, she said that her delegation once again requested the Commission to review the Spanish version of the draft guidelines and the commentaries thereto. In particular, in draft guideline 1 (Use of terms) the phrase in Spanish "*por el hombre*" should be replaced with the words "*por los seres humanos*" in order to better reflect the English phrase "by humans".

57. With regard to draft guideline 6, El Salvador supported enshrining the equitable and reasonable utilization of the atmosphere as an autonomous principle, but felt that the commentaries should discuss the legal implications of the principle in greater depth and detail. Tt would be useful to clarify in the text of the draft guideline 7 what was meant by "intentional large-scale modification of the atmosphere" by

providing examples of activities that might be conducted with that intention.

58. She recalled the comments made by her delegation at the previous session on the limited scope of draft guideline 8 [5] (International cooperation), which had not been modified in any way since that time. In particular, her delegation was of the view that the draft article should not refer only to international organizations, as other entities were also actively tackling the issue of atmospheric degradation and pollution. Furthermore, very few forms of cooperation were envisaged in the draft guideline. Cooperation should not be limited to studies of causes and impacts and the exchange of information; it should also include other specific measures to prevent, reduce and control atmospheric pollution and atmospheric degradation.

59. The codification and progressive development of international law should be translated into texts that would be used over the long term. It was therefore inappropriate to indicate in the preamble that the draft guidelines were not to interfere with relevant political negotiations that were currently under way. Such statements could be included in the commentaries instead.

60. With regard to the topic of *jus cogens*, she said that the analysis of the history of *jus cogens* and the identification of its legal nature in the first report of the Special Rapporteur (A/CN.4/693) would be very useful for the proper consideration of the topic, as they demonstrated that *jus cogens* had been consolidated in international law even before the adoption of the Vienna Convention on the Law of Treaties.

61. With regard to draft conclusion 2, her delegation did not see the need to establish rules on the modification of or derogation from rules of international law separate from *jus cogens* norms. Not only was that not the purpose of the work on the topic, but it could also affect specific existing rules. For example, the Vienna Convention on the Law of Treaties contained specific rules on the amendment, modification and termination of treaties. Furthermore, the possibility of derogation under other sources of international law had its own particularities that did not need to be addressed in the work on *jus cogens*. Although *jus cogens* was an exception to the standard rule, it would not be appropriate to present it in a secondary manner in the draft conclusions.

62. Her delegation agreed that *jus cogens* norms protected the fundamental values of the international community, were hierarchically superior to other norms of international law and were universally applicable, as stated in draft conclusion 3. It would be extremely useful to analyse each of those elements of the nature of *jus cogens* norms separately and in detail in future reports.

63. For the development of the topic, it would be important to draw up an illustrative set of *jus cogens* norms, as a list or in any other format. El Salvador also agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* norms, as States could not object to such important norms as the prohibition of torture or genocide.

64. *Mr. Turbék (Hungary), Vice-Chair, took the Chair.*

65. **Ms. Zabolotskaya** (Russian Federation), offering comments on the draft articles on crimes against humanity, noted that draft article 5 (Criminalization under national law) was largely based on the relevant provisions of the Rome Statute of the International Criminal Court. With regard to paragraph 7 of the draft article, liability for crimes against humanity should be based on the intentional acts or failure to act of individuals, and not on the involvement of individuals in the activities of legal persons. At the same time, her delegation agreed that provision should be made for the adoption of rules on the basis of which legal persons could be prosecuted, on the understanding that each State took such measures in accordance with its national legislation. With regard to the rules for the establishment of national jurisdiction set out in draft article 6, priority should be given to the State in whose territory the offence was committed or the State of which the offender was a national, since those States had a greater interest in prosecuting the perpetrators of the crimes in question than the State of residence of the victim or the State in which the offender was present. With regard to the obligation of States to cooperate, her delegation did not wholly agree that it should be covered in draft article 4 (Obligation of prevention) rather than in draft article 7 (Investigation). Furthermore, the wording of the provision on cooperation in draft article 4 was too vague to permit the exact scope of a State's obligations in that regard to be determined.

66. The question arose, in connection with draft article 7, whether it was necessary to indicate that a State should carry out an "impartial" investigation. The use of that term might create the impression that some kind of special impartiality measures were applicable to the type of crime in question, whereas the commentary made it clear that the draft article referred simply to the general standards of investigation applicable to criminal proceedings. Similarly, her delegation was not convinced of the need for draft article 10 (Fair treatment of the alleged offender), since its provisions were not specific to the treatment of persons who had allegedly committed crimes against humanity. The draft article might create the impression that such persons enjoyed special rights in the context of investigations, but that was not the case. The reference in draft article 9 (*Aut dedere aut judicare*) to a competent international tribunal should be deleted. The purpose of the draft articles was to facilitate "horizontal cooperation" between States. Cooperation with international tribunals was regulated by special agreements and, in some cases, by decisions of the Security Council, and was not relevant to the draft articles. Lastly, in the view of the Russian Federation, the draft articles were without prejudice to rules relating to the immunity of State officials, and that should perhaps be spelled out in the text.

67. The topic of *jus cogens* was one of the key items currently on the Commission's agenda and the methodological approach chosen by the Special Rapporteur and the Commission to address it was balanced and pragmatic. Her delegation supported the intention not to depart from the Commission's usual working methods and to conduct a comprehensive study of the topic using a wide variety of materials and sources. The scope of the topic encompassed the analysis of *jus cogens* norms in international law as a whole, and the Commission's work should focus on the analysis of State practice, the most widespread judicial practice and scholarly writings. At the same time, treaty law, especially the 1969 Vienna Convention on the Law of Treaties, and the practice of States in applying that instrument, should be given priority. Her delegation looked forward to the Commission's study of *jus cogens* norms from the point of view of their effects, which were referred to in the Vienna Convention, and specifically the fact that any treaty that conflicted with a *jus cogens* norm was invalid. As to the idea of drawing up an illustrative list of *jus cogens* norms, her delegation feared that it might lead to interminable discussions of why some norms were included and some not. The main emphasis should be on identifying criteria for defining *jus cogens* norms on the basis of the Vienna Convention. Her delegation agreed with the Special Rapporteur that the establishment of a list might have the effect of blurring the topic by shifting the focus of discussion towards the legal status of particular norms, as opposed to the identification of the broader requirements and effects of *jus cogens*. There was currently no consensus on the matter either in the Commission or in the Sixth Committee; it could be addressed at a later stage of the Commission's work. Her delegation was not inclined to agree with the proposition that there were regional *jus cogens* norms but did agree that the outcome of the Commission's work should be a set of draft conclusions.

68. *Mr. Danon (Israel) resumed the Chair.*

69. **Mr. Ahmed** (Sudan), referring to the topic "Crimes against humanity", said that the purpose of the Special Rapporteur's second report (A/CN.4/690) had been to examine the measures that States should take in the context of their national laws with regard to crimes against humanity. States must be allowed the right to exercise jurisdiction in accordance with the principle of national sovereignty, which was enshrined in international instruments and customary international law. The report had endorsed the practices of temporary and permanent international criminal tribunals. However, that approach required caution: the trials of the Nürnberg Tribunal and the International Military Tribunal for the Far East, for example, were cases in which defeated States had been subjected to the will of the victors. Those tribunals had been characterized by revenge, politicization and bias. Far from being examples of fair trial or the expression of international law, their judgments represented the application of victor's justice. The defendants had been prisoners of war, a category that could not be prosecuted under international law. His delegation believed that some international tribunals represented an international order based on selectivity and double standards, and therefore could not be deemed legal.

70. In particular, the report had referred to the Rome Statute of the International Criminal Court, which was

increasingly controversial. The Statute had been ratified voluntarily by States that represented less than half of the world's population, and it was not on a par with a forum of the United Nations. The draft text produced by the International Law Commission and used by the Preparatory Commission for the International Court had tackled several vital issues, such as trigger mechanisms, relations with the Security Council, and the decision to accept the Court's jurisdiction for specific crimes. Regrettably, the final Rome Statute had proved very different from the model envisaged by the International Law Commission in the early 1990s. Moreover, with the encouragement of non-governmental organizations, the Statute had come to be interpreted following an approach described by the first President of the International Criminal Court as "positive ambiguity". Numerous distinguished legal scholars had voiced their opposition to that approach. Both the Statute and its application had become a wedge issue, making justice and peace mutually exclusive. It would therefore be highly inadvisable to learn from that example.

71. His delegation was particularly concerned at the stipulation in draft article 6, paragraph 3, that the draft articles did not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law. That formulation was vague and could be taken to allow the principle of universal jurisdiction to be invoked and expanded in a unilateral and selective manner by domestic courts for political purposes. The principle would thus become less a part of international law than a tool for use in international conflicts. The formulation of principles of international law was a complex and weighty matter that required an objective and thorough approach, one that eschewed political agendas. The principles of international law and international customary law should not be used as a pretext to intervene in States' internal affairs and undermine their stability.

72. The topic "Protection of the atmosphere" was vital, and its consideration should not interfere with political negotiations on related topics that were under way in other forums. His delegation supported the inclusion in the draft articles of the term "common concern of humankind", to underscore the fact that every State had an obligation to take tangible action to protect the atmosphere. The expression "exercise due diligence" in draft guideline 3 conveyed an obligation to make best possible efforts; however, paragraph (5) of the commentary thereto used the phrase "in accordance with the capabilities of the State", which was unduly vague and did not set a specific benchmark. It was essential for States to cooperate as necessary in protecting the environment, and for key concepts to be defined in more concrete terms.

73. Turning to the topic "*Jus cogens*", he said that it was important to avoid undue haste in declaring a particular norm to be *jus cogens* when it did not meet the necessary criteria or when its peremptory nature had been called into question. The identification of *jus cogens* norms was a complex process that required a cautious and comprehensive approach. His delegation agreed with the Commission's decision not to compile a lengthy list of accepted *jus cogens* norms. That task would have been difficult and impractical, and would also have impeded the open and flexible nature of the development of *jus cogens* norms. The Commission should collect further information on the practice of States, and should take a cautious approach when referring to the limited practices of States and international organizations. The International Court of Justice had also urged caution in the few judgments it had delivered with regard to *jus cogens*: it had limited itself to interpreting the connection between *jus cogens* norms, the mandate of the Court and the immunity of the State and of State officials, without seeking to define the nature of *jus cogens* norms. Despite the reference to *jus cogens* norms in the Vienna Convention on the Law of Treaties (1969), the category remained unclear. A clear definition of the nature and scope of *jus cogens* norms would be beneficial for all Member States. In drafting the relevant provisions, the Commission should base itself on the broad consensus among Member States regarding peremptory norms.

74. **Ms. Orosan** (Romania), speaking on the topic of crimes against humanity, said that her delegation supported the Commission's approach, in the draft articles it had provisionally adopted, of not departing from the relevant provisions of international conventions and statutes, including the Rome Statute of the International Criminal Court. The wording of draft article 5, paragraph 3, for example, was similar to that of article 28 of the Rome Statute. Romania favoured the inclusion of a provision that drew attention to the gravity of the offences within the scope of the draft articles and required the imposition of

appropriate penalties under criminal law. It also supported the non-application of any statute of limitations for such offences, as set out in draft article 5, paragraph 5; it had already taken such a policy decision in its own Criminal Code.

75. While draft article 6 established three forms of national jurisdiction, based on the principles of territoriality, active personality and passive personality, Romania supported the inclusion of a paragraph that left open the possibility for a State to establish other jurisdictional grounds for holding an alleged offender accountable, in accordance with national law. Bearing in mind the gravity of such offences, there was merit in ensuring that jurisdiction over them was as wide as possible, to preclude any impunity. Furthermore, the active personality principle should be strengthened in the case of offences committed by stateless persons residing in a State's territory, so that such persons were subject to standards similar to those applicable to citizens of that State.

76. With regard to draft article 7, her delegation supported the Commission's approach in adopting wording similar to that of article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As for draft article 9, an especially important provision, it seemed most appropriate to base its formulation on that of the "Hague formula". Her delegation also supported draft article 10, which underlined the need to provide alleged offenders with the necessary protection during proceedings. Romania would pay close attention to the Commission's future work on the topic of crimes against humanity, which was of particular importance for consolidating the international and national legal framework established to combat the most serious crimes and prevent impunity.

77. On the topic "Protection of the atmosphere", she said that the draft guidelines and commentaries provisionally adopted by the Commission reflected the difficulties encountered in seeking to respect the limitations of the topic. For example, draft guideline 3 (Obligation to protect the atmosphere) seemed to be worded in such a way as to avoid mentioning the precautionary principle, although as a result it was difficult to understand and even more difficult to apply. Her delegation therefore suggested replacing the phrase "exercising due diligence in taking appropriate measures" with wording similar to that used in the commentary to draft guideline 4, specifying that States should put in place the necessary legislative, regulatory and other measures to prevent, reduce and control atmospheric pollution and atmospheric degradation. It should be noted in respect of draft guideline 4 (Environmental impact assessment) that, while many activities might not individually have a significant adverse impact on the atmosphere, their cumulative impact might be significant.

78. Her delegation strongly suggested reviewing draft guideline 7 (Intentional large-scale modification of the atmosphere), as its current wording suggested that such measures were generally permissible, whereas that was not necessarily the case; for example, restrictions were imposed on the use of geo-engineering when it affected biodiversity. At the same time, the draft guideline should use more forceful language, rather than simply calling for activities aimed at intentional large-scale modification of the atmosphere to be conducted with prudence and caution, since such activities could have a significant impact on the quality of the atmosphere.

79. Turning to the topic "*Jus cogens*", she said that the Special Rapporteur's first report (A/CN.4/693) represented an excellent starting point. Her delegation would favour an approach that did not depart from the relevant provisions of the Vienna Convention on the Law of Treaties. It shared the Special Rapporteur's view that draft conclusions were the most appropriate outcome for the Commission's work on the topic. While it was fully aware of the objections raised by some Commission members regarding the possibility of developing an illustrative list of norms that had acquired the status of *jus cogens*, it considered that it would be useful to elaborate such a list, which could be included either in an annex to the draft conclusions or in the commentaries. It had some doubts about the existence of regional *jus cogens*, bearing in mind the contradiction with the universal applicability of *jus cogens*, as well as the practical consequences of such a conclusion. Lastly, her delegation supported the view that draft conclusion 2, as proposed by the Special Rapporteur, could be placed in the commentaries. The expression "other agreement" in the second sentence of paragraph 1 of that draft conclusion was ambiguous and needed further clarification.

80. *Mr. Katota (Zambia), Vice-Chair, took the Chair.*

81. **Mr. Reinisch** (Austria), speaking on the topic of crimes against humanity, said that his delegation concurred with the formulation of most of the draft articles provisionally adopted by the Commission, but would like draft article 5, paragraph 6, to explicitly exclude the imposition of the death penalty for crimes against humanity, in line with the Rome Statute. It also noted that, in draft article 5, paragraph 7, which dealt with the criminal and other liability of legal persons, the Commission had deviated from the Rome Statute by leaving it up to individual States whether to establish such liability or not. While his delegation supported the Commission's more flexible approach, that paragraph must not be understood as affecting State immunity.

82. There appeared to be no good reason for the discrepancy between paragraph 1 (a) of draft article 6 (Establishment of national jurisdiction), according to which a State was required to establish its jurisdiction, inter alia, when the offence in question was "committed in any territory under its jurisdiction", and paragraph 1 (a) of draft article 4 (Obligation of prevention), which provided that a State had to take "effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control". Although the Commission explained in paragraph (6) of its commentary to draft article 6 that the term "jurisdiction" was intended to be understood as including de facto control, it seemed that a harmonization of the wording was necessary to avoid misunderstandings. His delegation did not believe that draft article 4 should be revisited, as was suggested in the same paragraph of the commentary. Rather, the expression "jurisdiction or control" should be used throughout the draft articles, as was the case in human rights instruments.

83. With reference to draft article 7 (Investigation), according to which a State was required to commence investigations whenever there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed in any territory "under its jurisdiction", it would also be important to consider whether a State should be obliged to investigate a crime committed outside a territory under its jurisdiction, for example, on board a ship or aircraft registered in that State. A related question concerned the obligation to investigate if suspects were present in the territory of a State or if crimes had been committed by its nationals while serving in peacekeeping operations.

84. Turning to the topic "Protection of the atmosphere", he said that it was not clear why draft guideline 4 only provided for environmental impact assessments to be undertaken in respect of proposed activities that were likely to cause a significant adverse impact on the atmosphere. In its work on the topic "Prevention of transboundary harm from hazardous activities", the Commission had deliberately used the broader formulation "assessment of the possible transboundary harm caused […], including any environmental impact assessment", in order to allow more flexibility. As for draft guideline 6 (Equitable and reasonable utilization of the atmosphere), while his delegation welcomed the respect for intergenerational equity, it wondered how and by whom the interests of future generations would be identified. Further explanations should be provided in the commentary.

85. It was not clear how draft guideline 7 (Intentional large-scale modification of the atmosphere) related to draft guideline 3 (Obligation to protect the atmosphere). While draft guideline 3 obliged States to protect the atmosphere by taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation, draft guideline 7 was formulated in much softer terms, merely stating that activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law. Moreover, draft guideline 7 did not specify the actors to which it applied, which could either be States or private persons, raising the question of how private activities could be directly addressed by a rule of international law, rather than by State legislation. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which was mentioned in the commentary to draft guideline 7, addressed only States, either as actors engaged in military or any other hostile use of environmental modification techniques, or as legislators. Accordingly, it would seem more appropriate to limit the scope of that draft guideline to States.

86. With regard to the topic "*Jus cogens*", the Special Rapporteur's first report (A/CN.4/693) had been highly

informative. Austria was strongly in favour of including an illustrative list of norms that had already acquired the status of *jus cogens* and it shared the Special Rapporteur's view that the Commission should not refrain from producing such a list merely because it might be misinterpreted as being exhaustive. The Special Rapporteur's suggestion, in paragraph 17 of his report, that examples of *jus cogens* norms referred to in the commentary could be included as an annex to the draft conclusions, was an acceptable way to assuage the concerns apparently expressed by some Commission members and States.

87. Referring to the three draft conclusions presented in the Special Rapporteur's report, his delegation agreed that a distinction should be made at the outset between *jus dispositivum* and *jus cogens*, in draft conclusion 2, paragraph 1. However, the words "agreement of" before "States" in the first sentence of that paragraph should be removed because, as correctly stated in the second sentence of the same paragraph, such changes could take place not only through various forms of agreements but also through customary international law. Furthermore, the expression "*jus dispositivum*" placed in brackets at the end of the first sentence might give rise to misunderstanding, since it directly followed the part of the sentence that described norms from which changes were prohibited, in other words "*jus cogens*". His delegation therefore suggested moving the reference to "*jus dispositivum*" in brackets so that it immediately preceded the phrase "unless such modification". That change would also be in line with draft conclusion 3, paragraph 1, where the expression "*jus cogens*" in brackets was placed immediately after "peremptory norms of international law". As a matter of drafting, it would be preferable to use the expression "peremptory norms of international law (*jus cogens*)" in draft conclusion 1, where the term *jus cogens* first appeared, rather than in draft conclusion 3, paragraph 1.

88. **Mr. Bliss** (Australia) said that his delegation commended the work undertaken by the Special Rapporteur on the topic "Protection of the atmosphere" and would continue to follow the topic closely. Such work must take into account international efforts to combat climate change, as well as other existing instruments relevant to the management of the atmosphere. Australia also welcomed the work of the Special Rapporteur on the topic "*Jus cogens*" and looked forward to reviewing the results of the Drafting Committee's consideration of draft conclusions 1 and 3, as proposed in the Special Rapporteur's first report (A/CN.4/693). The work of the Commission on that topic would remain fundamental to the international community's understanding of peremptory norms and careful consideration should be given to the manner in which the outcome of such work would be presented.

89. Turning to the topic of crimes against humanity, he said that his delegation welcomed the progress made by the Commission and its provisional adoption of a number of draft articles, together with the commentaries thereto. At a time when the international community was grappling with a range of intense conflicts characterized by the commission of crimes against humanity, its objective must be to prevent such crimes and, where they occurred, to ensure that those most responsible were held to account. The Commission's work to clarify the elements of crimes against humanity was crucial in that regard.

90. The Special Rapporteur had made clear that the draft articles on the topic sought to complement, not to replace or compete with, the legal framework for addressing crimes against humanity that already existed in the Rome Statute. The definition of crimes against humanity was taken directly from that Statute, and the commentary to draft article 1 underscored that the draft articles would avoid any conflicts with relevant existing treaties. His delegation welcomed the emphasis in the draft articles on the adoption of national laws and on inter-State cooperation on the prevention of crimes against humanity. It considered that the Commission's work on the topic would contribute to the efforts of the international community to prevent and punish those crimes, and encouraged States to implement effective legislative, administrative, judicial or other preventive measures, as envisaged by draft article 4 (Obligation of prevention).

91. Australia had expressly and comprehensively criminalized crimes against humanity in its national legislation, in accordance with the Rome Statute and draft article 3 as provisionally adopted by the Commission. It had established its jurisdiction over those offences regardless of whether the conduct constituting the alleged offence had occurred in Australia and whether the victim or alleged offender was an Australian citizen, resident or body corporate. It

had also established the offences of attempting to commit a crime against humanity; and of inciting, aiding, abetting, counselling or procuring the commission of such a crime, or conspiring to commit such a crime.

92. **Ms. Teles** (Portugal), speaking on the topic "Crimes against humanity", said that the Commission should treat the topic with caution and base its work on existing rules and practice so as to avoid coming into conflict with the existing legal framework for crimes against humanity. In particular, the Rome Statute should remain one of the key references for the Commission's work, and the relationship between the Statute and the draft articles on the topic must be kept in mind. Overall, the draft articles provisionally adopted by the Commission at its current session provided a good basis for consideration; in its drafting, the Commission should continue to consider solutions that had already been adopted in other legal instruments.

93. It was clear from the Commission's discussions that there was no consensus on the issue of the liability of legal persons, and not all States recognized such liability. The proposed wording of draft article 5, paragraph 7, provided a good basis for a solution, since it offered flexibility and gave discretion on the matter to States. However, there might be merit in further examining the question. It might also be necessary to modify draft article 6 (Establishment of national jurisdiction), and the commentary thereto, since it had initially been intended to cover only cases where the offender was an individual, not a legal person. Her delegation would continue to follow with interest the Commission's work on the topic, especially with regard to the issue of judicial cooperation, which could help combat impunity and ensure accountability for crimes against humanity.

94. The topic "Protection of the atmosphere" must be addressed in a balanced and positive way, bearing in mind all areas related to environmental law and the progress of scientific knowledge on environmental dynamics. Her delegation therefore welcomed the dialogue with scientists that had been organized prior to the Commission's debate on the topic. Environmental damage knew no borders; both people and ecosystems could be affected by environmental disasters that had occurred in the territory of other States. The draft guidelines should therefore make stronger reference to the joint action of States, which might in many cases be the most effective way to address and remedy environmental damage. While the atmosphere was certainly a natural resource, and must be treated as such, her delegation shared the doubts of some Commission members as to whether it could be given the same legal treatment as, for example, transboundary aquifers or watercourses. The Commission should therefore reflect more deeply on that issue and further develop its work on the consequences of recognizing the obligations related to the protection of the atmosphere as obligations *erga omnes*.

95. Turning to the topic "*Jus cogens*", she said that the information contained in the Special Rapporteur's first report had provided a good starting point for the work of the Commission. The topic of *jus cogens* was vitally important for the development of international law, as the existence of peremptory norms protected the core values of the international community; its inclusion in the Commission's programme of work had therefore been a remarkable achievement. However, *jus cogens* remained a contentious topic. Despite widespread consensus regarding the existence of peremptory norms of international law, there was no consensus on the particular norms that had already achieved that status or on what was required for a norm to be considered as *jus cogens*. The main challenge for the Commission in coming years would be to deliver tangible and concrete results; it should therefore adopt a pragmatic and realistic approach to the topic.

96. It would be challenging and interesting for the Commission to develop an illustrative list of norms that had acquired the status of *jus cogens*, as that would require the analysis of a wide range of norms in all fields of international law. It might also be useful to devise guidelines on jurisprudence and State practice that would shed light on how to identify a *jus cogens* norm. However, the preparation of an illustrative list might currently be premature, since it could consume much of the Commission's time on the topic. Furthermore, an excessive focus on such a list might be harmful for the development of the topic, as the Commission would lose the opportunity to explore an understanding of *jus cogens* norms from other standpoints; it would also represent a departure from the methodology proposed by the Special Rapporteur.

Her delegation looked forward to analysing in due course a complete set of draft conclusions, which seemed to be the most appropriate outcome for the topic.

97. **Mr. Troncoso** (Chile), speaking on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that, under the Special Rapporteur's leadership, consensus had been reached on a number of issues. For example, draft conclusion 7, paragraph 3, concerning interpretation versus modification or amendment, was an acceptable approach to a matter that had initially given rise to divergent opinions. His delegation was convinced that the outcome of the Commission's work on the topic would make a major contribution to international law.

98. Turning to the topic "Crimes against humanity", he said that draft article 5 (Criminalization under national law) appropriately and systematically addressed a number of issues. His delegation unreservedly supported the wording of draft article 5, paragraph 3, on the responsibility of commanders or other superiors, which not only complemented article 28 of the Rome Statute but also gave more substance to its provisions. National legal systems generally recognized the responsibility of those who directly committed, or participated in the commission of, an offence; however, given the gravity of acts constituting crimes against humanity, it was vitally important that national legal systems should also recognize the responsibility of military commanders. The criminalization of such responsibility was directly related to the obligation of States to prevent and punish crimes against humanity effectively. In addition, his delegation welcomed the wording of draft article 5, paragraph 4, according to which the fact that an offence referred to in the draft article had been committed pursuant to an order of a Government or of a superior, whether military or civilian, was not a ground for excluding criminal responsibility of a subordinate. That provision was also based on the approach taken in the Rome Statute, although article 33 of the Statute did allow for a limited superior orders defence, exclusively with respect to war crimes and not in the case of orders to commit acts of genocide or crimes against humanity.

99. His delegation supported the wording of draft article 5, paragraph 5, which required States to take the necessary measures to ensure that, under their criminal law, crimes against humanity were not subject to any statute of limitations. Although article 29 of the Rome Statute stated that crimes within the jurisdiction of the International Criminal Court should not be subject to any statute of limitations, it was essential that the same stipulation should be included in national legislation. His delegation would pay close attention to future discussions on the still emerging issue of inclusion of the liability of legal persons for crimes against humanity, to which the final paragraph of draft article 5 referred. It supported the wording and content of draft articles 6, 7, 8 and 9, and also considered draft article 10 to be of interest, in that it set out guidelines for the fair treatment of alleged offenders, thereby enshrining internationally recognized standards of due process in that regard.

100. The international initiative led by the Netherlands, together with Argentina, Belgium and Slovenia, to negotiate a multilateral treaty on mutual legal assistance and extradition for the domestic prosecution of crimes against humanity, genocide and war crimes had garnered considerable support, including from Chile, since it would give shape to a universal legal framework which would have a positive impact on efforts to combat impunity for the most serious international crimes. Dialogue between the Special Rapporteur, the Commission and the coordinators of that initiative should therefore be encouraged.

101. With regard to the important topic of *jus cogens*, the acceptance and recognition of peremptory norms of international law was no longer contested; however, the complexity of the topic had been revealed by the debate within the Commission on the form of the outcome for the topic. It would be useful to revisit draft articles 1 to 3, given that Member States had not reached consensus on their wording. While further consideration should be given to the question of whether the Commission should draft an illustrative list of norms that had already acquired the status of *jus cogens*, it seemed that the elaboration of such a list might present more disadvantages than advantages, not only because of the difficulty in reaching agreement on what to include in, or exclude from, such a list, but also because once it was established, it could easily be argued that other equally important rules of international law had inferior status. Article 53 of the 1969 Vienna Convention should remain the

cornerstone of the Commission's work; in particular, there should be no departure from the definition provided therein, while the considerations put forward in the *travaux préparatoires* of the Convention should also be taken into account. Among the important issues to be addressed in the draft articles were how a *jus cogens* norm should be identified, whether or not regional *jus cogens* norms existed, and the relationship between such norms and *erga omnes* obligations.

102. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he said that his delegation welcomed the Commission's decision to adopt provisionally draft article 2 (f) on the definition of an act performed in an official capacity and draft article 6 on the scope of immunity *ratione materiae*. Both of those provisions, expressed in simple yet precise language, were crucial to the final outcome of the Commission's work on the topic. The issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, addressed in the Special Rapporteur's fifth report (A/CN.5/701), was not a simple matter, since it involved such fundamental principles as the sovereign equality of States, together with the need to combat impunity for serious international crimes. In that regard, his delegation supported the proposed wording of draft article 7, paragraph 1 (a), which provided that immunity should not apply in relation to genocide, crimes against humanity, war crimes, torture and enforced disappearances. It also strongly supported the view that there could be no impunity for certain crimes, defined in international treaties, that undermined the values and principles recognized by the international community as a whole. It was to be hoped that at the next session, a further report by the Special Rapporteur or guidelines issued by the Commission would allow a decision to be reached on the fundamental issue of limitations and exceptions to immunity from foreign criminal jurisdiction.

103. As for the topic "Provisional application of treaties", his delegation largely agreed with the criteria set forth by the Special Rapporteur in his fourth report (A/CN.4/699 and A/CN.4/699/Add.1) regarding the relationship of provisional application to the other provisions of the 1969 Vienna Convention. For example, his delegation concurred with the Special Rapporteur that nothing prevented a State from formulating reservations as from the time of its agreement to the provisional application of a treaty. Concerning the invalidity of treaties, in the light of articles 27 and 46 of the Vienna Convention, it agreed that the principle according to which a State could not invoke the provisions of its internal law as justification for its failure to perform a treaty also applied in the case of treaties that had been subject to provisional application. With regard to the termination or suspension of the operation of a treaty as a consequence of a material breach, his delegation agreed with the Special Rapporteur that the provisional application of a treaty produced the same legal effects as if the treaty had actually been in force, provided that it continued to be provisionally applied, and that the rules relating to the termination and suspension of treaties therefore also applied to provisionally applied treaties.

104. His delegation agreed with the arguments presented by the Special Rapporteur in respect of draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee. However, draft guideline 4 (b) required further analysis; provisional application must always be subject to the consent of each of the States parties to the treaty and thus could not be imposed on them by means of a resolution adopted by an international organization or at an intergovernmental conference.

105. The possibility of provisionally applying a treaty was contingent not only on the provisions of the treaty itself or the agreement of the negotiating States, as provided in article 25 of the 1969 Vienna Convention, but also on whether it was permitted under the constitutional law of the States parties. Therefore, although his delegation agreed with the proposed draft guideline 10 (Internal law and the observation of provisional application of all or part of a treaty), according to which a State that had consented to undertake obligations by means of the provisional application of all or part of a treaty might not invoke the provisions of its internal law as justification for non-compliance with such obligations, it believed that, in the future, another guideline should be drafted to address the quite different situation of those States that, under their internal law, were obliged to limit the provisional application of a treaty. His delegation shared the Special Rapporteur's position concerning the advisability of elaborating a general draft guideline that would provide that the 1969 Vienna Convention

applied *mutatis mutandis* to provisionally applied treaties, thereby making it clear that other grounds for invalidity and termination provided for in the Convention, apart from those addressed in articles 46 and 60, could apply to provisionally applied treaties.

106. An exhaustive analysis of the provisions establishing the provisional application of a treaty would facilitate understanding of the topic. As already requested from the Secretariat by the Commission, a memorandum analysing State practice in respect of bilateral and multilateral treaties deposited or registered in the last 20 years with the Secretary-General, which provided for provisional application, could be very useful.

The meeting rose at 1.05 p.m.