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

Contents

16-18776 (E)

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

Agenda item 76: Report of the United Nations Commission on International Trade Law on the work of its forty-ninth session (*continued*) (A/C.6/71/L.10, A/C.6/71/L.11, A/C.6/71/L.12 and A/C.6/71/L.13)

Draft resolution A/C.6/71/L.10: Report of the United Nations Commission on International Trade Law on the work of its forty-ninth session

1. **The Chair** announced that Belgium, Indonesia, Israel, the Republic of Moldova and Ukraine had joined the sponsors of the draft resolution.

2. *Draft resolution A/C.6/71/L.10 was adopted.*

Draft resolution A/C.6/71/L.11: Model Law on Secured Transactions of the United Nations Commission on International Trade Law

3. *Draft resolution A/C.6/71/L.11 was adopted.*

Draft resolution A/C.6/71/L.12: 2016 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade Law

4. *Draft resolution A/C.6/71/L.12 was adopted.*

Draft resolution A/C.6/71/L.13: Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law

5. *Draft resolution A/C.6/71/L.13 was adopted.*

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

6. **The Chair** invited the Committee to continue its consideration of chapters I to VI and XIII of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

7. **Mr. Adamhar** (Indonesia) said that the topic of protection of persons in the event of disasters was of constant concern to his country: Indonesia was located in a seismically active region known as the Pacific Ring of Fire, where roughly 90 per cent of all earthquakes occurred. The Association of Southeast Asian Nations (ASEAN) had done much work on the issue, as reflected in the numerous references to its instruments such as the Agreement on Disaster Management and Emergency Response and the 1976 Declaration on Mutual Assistance on Natural Disasters in the Commission's commentaries to the draft articles on protection of persons in the event of disaster.

8. On the draft preamble, his delegation concurred with the decision to use, in place of phrases such as "by virtue of their sovereignty" or "sovereign equality of States", which had been previously proposed, the phrase "sovereignty of States", which reaffirmed the primary role of affected States in the provision of disaster relief assistance. It was important that the entire set of draft articles should be understood in relation to that principle. Although by definition all persons affected by disasters were vulnerable, the use of the phrase "particularly vulnerable" in draft article 6 had merit for disaster-prone countries like Indonesia, and also acknowledged the growth of State practice in that regard. Indonesian legislation laid down the obligation to provide treatment that was suitable and specific to vulnerable categories such as infants, children, disabled persons, pregnant women and the elderly during and after disasters.

9. Although the Commission indicated in paragraph (7) of its commentary to draft article 6 (Humanitarian principles) that the question of how rights were to be enforced had deliberately been left open, Indonesia considered that a more definitive approach was needed. Thus, when determining the needs of particularly vulnerable groups, affected States should be entitled to take into account their own relevant policies and regulations, while upholding the principle of non-discrimination and ensuring respect for fundamental rights. Draft article 7 (Duty to cooperate) appeared to impose new duties on States during times of disasters, but the fulfilment of such duties should only be determined with due regard to the principle of sovereignty. His country's own experience showed that in times of disaster, the affected country was under constant pressure to make critical and prudent assessments concerning which assistance might be useful and which might not, and where and how to appropriately deploy the assistance. On the other hand, Indonesia supported paragraph 2 of article 13 (Consent of the affected State to external assistance), which stated that consent to external assistance should not be withheld arbitrarily.

10. Turning to the identification of customary international law, he said that in paragraph 2 of draft conclusion 3 (Assessment of evidence for the two constituent elements), the Special Rapporteur had managed to clarify further the relationship between the two constituent elements of customary international law: while they were inseparable, their existence had to be considered and verified separately. On draft conclusion 11 (Treaties), the Special Rapporteur had identified three ways in which a treaty provision could form a rule of customary international law, which were reflected in paragraph 1 (a), (b) and (c). With reference to draft conclusion 12 (Resolutions of international organizations and conferences), he said it was true that such resolutions played an important role in the formation and identification of customary international law. However, before a resolution or any normative position adopted by an international organization or at an international conference could be regarded as reflecting customary international law, it was necessary to examine the practice of States in respect of said resolution or normative position and the degree of its acceptance as law. The very wording of draft conclusion 12, paragraph 1, namely that a resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law, justified the need for caution.

11. With regard to draft conclusion 13 (Decisions of courts and tribunals), his delegation wished to emphasize the importance of the real effect of judicial decisions, which depended on the weight given to each decision. Concerning draft conclusion 15 (Persistent objector), he shared the view that both judicial decisions and State practice had confirmed that a State was not bound by an emerging rule of customary international law if it had persistently objected to said rule and had maintained its objection after the rule had crystallized. The role of the persistent objector was indeed important for preserving the consensual nature of customary international law. In that connection, the Commission should exercise caution in deciding whether inaction might be considered as expressive, or creative, of customary international law.

12. **Mr. Sevilla Borja** (Ecuador) said that the draft articles on protection of persons in the event of disasters, adopted on second reading, were aimed at promoting international cooperation and solidarity in the prevention and reduction of disasters and at facilitating effective responses, with full respect for the rights of affected persons. Such an approach was all the more important given the growing frequency and severity of disasters, both natural and man-made. Ecuador endorsed the Commission's recommendation that the General Assembly should develop a convention on the basis of the draft articles, especially since there was no binding legal instrument of universal scope in that important area.

13. The Commission had likewise submitted to the Sixth Committee two important sets of draft conclusions, adopted on first reading, and the commentaries thereto: the first provided instructive and well-founded clarification of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties; while the second was aimed at building a juridical methodology for the identification, in specific cases, of rules of customary international law. That methodology would be of great service to legal practitioners, in particular judges, who were often called upon to determine whether rules of customary international law could be discerned in the cases before them.

14. In 2016, after a decade-long hiatus, the regional course in international law for Latin America and the Caribbean had been held as part of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. Such regional courses were of great importance for achieving the Programme's objectives; they provided a wide range of legal practitioners, including government lawyers, judges, academics and researchers, with an opportunity to focus on contemporary issues of international law under the guidance of international law experts. The Programme must be given the necessary resources to ensure that the courses were held annually in the various regions.

15. Ecuador welcomed the initiatives proposed by the Commission for 2018: holding the first part of its seventieth session in New York and arranging an event to commemorate its seventieth anniversary. The latter was particularly appropriate, since for nearly 70 years, the Commission's work had helping to promote the strengthening and orderly expansion of the international legal system, peaceful coexistence on the basis of international law, as well as cooperation and

solidarity in the defence of the interests and values shared by the international community.

16. **Mr. Sharma** (India), referring to the draft conclusions on the identification of customary international law, said that paragraph 3 of draft conclusion 4 (Requirement of practice) stated that the conduct of actors other than States and international organizations was not practice that contributed to the formation, or expression, of rules of customary international law, but could be relevant when assessing the practice of States or international organizations. In paragraph (9) of its commentary to the draft conclusion, the Commission included non-State armed groups among entities other than States and international organizations, and stipulated that the reaction of States to the conduct of non-State armed groups might be constitutive or expressive of customary international law. However, his Government read both the draft conclusion and the commentary thereto to say that the conduct of non-State armed groups was not at all constitutive or expressive of customary international law.

17. With regard to draft conclusion 8 (The practice must be general), his delegation agreed that the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. Although universal participation in a treaty was not required, it was important that the participating States should be representative of the various geographical regions and have had the opportunity or possibility of applying the rule. With regard to draft conclusion 9, India agreed with the Commission that practice that was accepted as law (*opinio juris*) must be undertaken with a sense of legal right or obligation.

18. Draft conclusion 10 referred to government legal opinions as a form of evidence of acceptance as law. Despite the value of such opinions, it might be difficult to identify such opinions, as many countries did not publish the legal opinions of their law officers. With regard to draft conclusion 11 (Treaties), his delegation was of the view that all treaty provisions were not equally relevant as evidence of rules of customary international law: only treaty provisions that created fundamental norms could generate such rules. Strong opposition to a particular treaty, even if from only a few countries, could be a factor that should be taken into account when identifying customary international law. Lastly, India agreed with the provision in draft conclusion 12 that a resolution by an international organization or an intergovernmental conference could not, of itself, create a rule of customary international law.

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

20. **Mr. Polakiewicz** (Observer for the Council of Europe), referring to draft conclusions 6 (Forms of practice) and 12 (Resolutions of international organizations and intergovernmental conferences) on the identification of customary international law, said that practice developed within the framework of an international organization could indeed be useful in the identification of customary international law. In its commentaries to the draft conclusions, the Commission might wish to mention the Declaration on the Jurisdictional Immunities of State Owned Cultural Property, adopted by the Committee of Legal Advisers on Public International Law (CAHDI), which encapsulated the common understanding of *opinio juris* on the basic rule that a certain kind of State property — cultural property on loan or on exhibition — enjoyed jurisdictional immunity. The success of that Declaration could only be conducive to the further development and identification of customary international law.

21. With respect to draft conclusion 13 (Pronouncements of expert treaty bodies) on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Council of Europe concurred with the role ascribed to expert treaty bodies. It had its own expert bodies whose members served in their personal capacity and were in charge of monitoring the implementation of treaties. Consequently, he suggested that reference should be made to some of the independent monitoring bodies established within the framework of Council of Europe conventions. The European Court of Human Rights used the conclusions and recommendations of such independent monitoring mechanisms, and through their integration into the Court’s case law, they might even in some cases acquire legally binding force. That approach, which was wholly consistent with the idea of the Court as a living instrument, allowed it to develop its jurisprudence in line with commonly accepted standards.

22. He welcomed the decision to include the settlement of disputes to which international organizations were parties in the Commission's long-term programme of work. The Special Rapporteur had indicated that the examination of that topic would be limited to the settlement of disputes between international organizations and States and between international organizations themselves. However, the Council of Europe had done some work in that field and would welcome the possibility of widening the topic to include disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization. CAHDI was currently examining the settlement of disputes over third-party claims for personal injury or death and property loss allegedly caused by an international organization, and had agreed to keep the topic on its agenda for 2017.

23. **Ms. Du Pasquier** (Observer for the International Committee of the Red Cross (ICRC)), commending the Commission on the adoption, on second reading, of a set of draft articles on the protection of persons in the event of disasters, said that recent situations had illustrated the serious humanitarian consequences of disasters and the need to consolidate the legal framework governing the protection of persons following such events. ICRC had no doubt that the draft articles and the commentaries thereto would make an important contribution to contemporary international law. However, since it was crucial that the substance of the draft articles should not contradict the rules of international humanitarian law, situations of armed conflict, including during so-called complex emergencies, must be expressly excluded from the scope of the draft articles.

24. ICRC noted with appreciation the amendments made by the Commission regarding the relationship between the draft articles and the rules of international humanitarian law. Unfortunately, those amendments did not fully address the concerns which it had conveyed to the Commission in its written observations in January 2016. ICRC also noted the Commission's recommendation to the General Assembly to elaborate a convention on the basis of the draft articles. However, whichever form the draft articles might take, as currently drafted, they presented a risk of conflict with norms of international humanitarian law and might ultimately undermine the ability of impartial humanitarian organizations, such as ICRC, to carry out their tasks in a principled manner and in accordance with the mandate assigned to them by States.

25. Her organization congratulated the Commission on the adoption, on first reading, of a set of draft conclusions on the identification of customary international law. It greatly appreciated the Commission's consideration of questions arising in identifying customary international law, such as which forms of State practice were to be taken into account, whether there was a predetermined hierarchy among the various forms of practice, and what the significance of treaties was for customary international law. In 2005, ICRC had published its own study on customary international humanitarian law, based on almost ten years of research. The study and regular practice updates were available in the ICRC database, thus contributing to the accessibility of practice in international humanitarian law. The considerations underlying that study were generally in line with the approach taken by the Commission.

26. **Ms. Larrabee** (Observer for the International Federation of Red Cross and Red Crescent Societies (IFRC)) said that managing international assistance operations had become increasingly complex in view of the number of actors involved, among other factors. In the absence of specific domestic legal frameworks and policies for the management of such operations, ad hoc approaches were often followed, resulting in a loss of State oversight, inappropriate or poor quality relief and unnecessary delays, fees and paperwork, which all hindered the speed and effectiveness of assistance. IFRC and its member national Red Cross and Red Crescent Societies had first started studying the problem in 2007, spearheading the negotiation and adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines). Since then, national societies in over 50 countries had supported their authorities in comprehensive reviews of their laws and procedures for managing international assistance, and some 24 countries had adopted new laws or regulations drawing on such support. However, many States remained insufficiently prepared for the most common regulatory challenges in managing outside assistance. A 2015 survey of governmental and non-governmental disaster responders from over 90 countries had found that

regulatory issues continued to be a major challenge in operations. In that regard, the Commission's proposal that States should consider developing a new global legal framework was very welcome.

27. The draft articles had many strong elements, including their emphasis on human dignity, human rights, cooperation and respect for sovereignty as well as on disaster risk reduction. If they were adopted in the form of a framework treaty, they could have a positive impact in accelerating the development of more detailed national laws and procedures about international disaster cooperation. However, the text could still be strengthened through further negotiations. A more operational text could have a more direct impact on the most common regulatory problem areas in international response. Although important improvements had been made in the final draft, the text remained overly cautious with regard to the issue of protection, but not quite cautious enough regarding its applicability to mixed situations of conflict and disaster.

28. IFRC hoped that Member States would take up the Commission's recommendation to consider the draft articles as the starting point for a new treaty. If that was not the preferred option, however, it was critical that alternative options should be found to accelerate progress so that future disasters did not find States underprepared. IFRC would continue to offer its support in fostering dialogue among States and other stakeholders about the various options at the national, regional and global levels.

29. **Mr. Valencia-Ospina** (Special Rapporteur on the topic "Protection of persons in the event of disasters") said that for the past eight years, he had had the honour to guide the Commission's work on the topic of protection of persons in the event of disasters. As Special Rapporteur, he had benefited from the discussions held in the Commission and from the views expressed by over 100 Member States and international organizations, all of which had enabled him to present to the Commission proposals that had been ultimately accepted. He wished to thank all the delegations that had spoken on the final text, which had in general been welcomed and whose importance and urgency had been recognized by all participants in the debate. He wished in particular to thank all the delegations that had complimented him on the work he had done, but thanks were in fact due to the Commission as a whole, because that work had been a collective endeavour. The final outcome had been adopted by consensus, as had the recommendation that the text should serve as the basis for the conclusion of an international treaty. Based on the discussions held so far, he was convinced that the General Assembly would give the most serious consideration to that recommendation.

30. **Sir Michael Wood** (Special Rapporteur on the topic "Identification of customary international law") thanked all delegations that had spoken on the topic of identification of customary international law. The Committee's reactions to the Commission's output were essential to the common endeavour of progressive development and codification. The Commission had requested the Codification Division to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, in respect of the complete set of 16 draft conclusions on the identification of customary international law provisionally adopted by the Commission on first reading. The aim of the questionnaire was to survey the publicly available sources of State practice and to collect data that was not publicly available but could be made available if resources were provided. Even very short answers would be useful. He strongly encouraged all Member States to complete the questionnaire and submit it to the Codification Division, to ensure that the memorandum was as complete as possible and fully reflected the positions of Member States.

31. **Mr. Nolte** (Special Rapporteur on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties") thanked all delegations for their thoughtful and extensive comments on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. He was glad that the reactions had been, while nuanced, generally positive, and they would be of great assistance during the consideration of the topic on second reading, which he hoped would lead to a successful conclusion.

32. **The Chair** thanked the Special Rapporteurs for their remarks and conveyed gratitude, on behalf of the Sixth Committee, for their hard work on their respective topics.

33. **Mr. Comissário Afonso** (Chairman of the International Law Commission), introducing chapters VII to IX of the Commission's report on the work of its sixty-eighth session (A/71/10), and referring to chapter VII, on the topic "Crimes against humanity", said that the Commission had had before it the second report of the Special Rapporteur (A/CN.4/690), in which six draft articles had been proposed, as well as a memorandum by the Secretariat (A/CN.4/698) providing information on existing treaty-based monitoring mechanisms that could be of relevance to future work on the topic. The six draft articles had been referred to the Drafting Committee, which had also been requested to consider the question of the criminal responsibility of legal persons on the basis of the concept paper to be prepared by the Special Rapporteur. The Commission had provisionally adopted draft articles 5 to 10 together with their commentaries after considering the Drafting Committee's two reports.

34. Draft article 5 (Criminalization under national law) set forth various measures that each State must take under its criminal law to ensure that crimes against humanity constituted offences, to preclude any superior-orders defence or any statute of limitation and to provide for appropriate penalties commensurate with the grave nature of such crimes. The Commission had decided to include, in paragraph 7 of the draft article, a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it had drawn from language that had been widely accepted by States in the context of other crimes and that allowed States considerable flexibility in fulfilling their obligations. The provision was modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

35. Draft article 6 (Establishment of national jurisdiction) provided that each State must establish jurisdiction over the offences referred to in draft article 5 in certain specific cases. Paragraph 1 (a) required that jurisdiction should be established when the offence occurred in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". Paragraph 1 (b) called for jurisdiction when the alleged offender was a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (c) concerned jurisdiction when the victim of the offence was a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction", but that was optional because many States preferred not to exercise it. Paragraph 2 addressed a situation where the other types of jurisdiction might not exist, but the alleged offender "was present" in the territory under the State's jurisdiction and the State did not extradite or surrender the person in accordance with the draft articles. Paragraph 3 made it clear that the draft article did not exclude any other jurisdiction that was available under national law.

36. Draft article 7 (Investigation) addressed situations where there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed in a territory under a State's jurisdiction. That State was best situated to conduct such an investigation, so as to determine whether crimes in fact had occurred or were occurring and, if so, whether governmental forces under its control had committed the crimes, whether forces under the control of another State had done so or whether the crimes had been committed by members of a non-State organization. A comparable obligation had featured in some treaties addressing other crimes.

37. Draft article 8 provided for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender was present. Draft article 9 (*Aut dedere aut judicare*) obliged a State in the territory under whose jurisdiction an alleged offender was present to submit the alleged offender to prosecution within the State's national system. The only alternative means of meeting that obligation was if the State extradited or surrendered the alleged offender to another State or competent international criminal tribunal that was willing and able to submit the matter to prosecution. That obligation, commonly referred to as *aut dedere aut judicare*, was contained in numerous multilateral treaties addressing crimes.

38. With regard to paragraph 1 of draft article 10 (Fair treatment of the alleged offender), he said that while the term "fair treatment" included the concept of a fair trial, many treaties included an express reference to fair trial, in order to stress its particular importance.

In addition to fair treatment, an alleged offender was also entitled to the highest protection of his or her rights, whether arising under national law or international law. Paragraph 2 addressed the State's obligations with respect to an alleged offender who was not of the State's nationality and who was in prison, custody or detention. Paragraph 3 provided for the exercise of rights in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person was present, provided that such laws and regulations did not prevent such rights being given the full effect for which they were intended.

39. The Commission had reiterated the request it had made in 2014 for information on the topic. In particular, it would be grateful to States for information on whether their national laws expressly criminalized crimes against humanity as such, conditions under which they were capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity, and decisions of their national courts that had adjudicated on questions concerning crimes against humanity.

40. Turning to the topic "Protection of the atmosphere", he said that the Commission had had before it the third report of the Special Rapporteur (A/CN.4/692), which analysed several key issues, including the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation, and the requirement of due diligence and environmental impact assessment. It had also explored questions concerning sustainable and equitable utilization in relation to the atmosphere, as well as legal limits on certain activities aimed at the intentional modification of the atmosphere. Since including the topic in its programme of work in 2013, the Commission had provisionally adopted three draft guidelines and four preambular paragraphs. Following its debate on the report, the Commission had decided to refer five draft guidelines, together with a new preambular paragraph, to the Drafting Committee. The Sixth Committee thus had before it draft guidelines 3 to 7 and the new preambular paragraph (fourth preambular paragraph). As in the previous year, the Commission had held a useful dialogue with scientists which had greatly facilitated its work.

41. The fourth preambular paragraph was a factual statement: "*Aware* of the special situation and needs of developing countries," which reflected considerations of equity, as highlighted in the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development, and as reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change and article 2 of the 2015 Paris Agreement. Draft guideline 3 (Obligation to protect the atmosphere) was central to the text. The formulation was based on principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. As formulated, the draft guideline was without prejudice to whether or not the obligation to protect the atmosphere was an *erga omnes* obligation, in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts. The draft guideline also embodied the obligation of due diligence, which required States to ensure that activities within their jurisdiction or control did not cause significant adverse effects.

42. Draft guideline 4 dealt with the important question of environmental impact assessment. It was formulated in the passive tense — "States have the obligation to ensure that an environmental impact assessment is undertaken", in order to signal that the obligation was one of conduct and that, given the nature of economic actors, it did not necessarily attach to the State itself to perform the assessment. What was required was that the State should put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities. Notification and consultation were also keys to such an assessment. For an environmental impact assessment to be triggered, the proposed activities should be those which were likely to cause a significant adverse impact on the atmosphere. What constituted "significant" involved a factual determination.

43. Draft guidelines 5 (Sustainable utilization of the atmosphere) and 6 (Equitable and reasonable utilization of the atmosphere) drew upon the environmental principles of sustainable, equitable and reasonable utilization and applied them with specific reference to the protection of the atmosphere. They indicated that the atmosphere was a natural resource with limited assimilation capacity, an aspect not always made obvious. Like minerals, oil and gas or water resources, the atmosphere, in its physical and

functional components, was exploitable and exploited. The formulation "its utilization should be undertaken in a sustainable manner" was simple and not overly legalistic, seeking to reflect a paradigmatic shift towards viewing the atmosphere as a natural resource that ought to be utilized in a sustainable manner. Although equitable and reasonable utilization of the atmosphere was an important element of sustainability, as reflected in draft guideline 5, it had been considered important to set it out as an autonomous principle in draft guideline 6.

44. Draft guideline 7 dealt with specific aspects of intentional large-scale modification of the atmosphere — activities whose very purpose was to alter atmospheric conditions. The text addressed only intentional modification on a large scale, and the term "activities" was to be broadly understood, although the draft guideline applied only to non-military activities, as military and other activities were governed by other regimes outside the scope of the draft guideline.

45. The Commission had reiterated the request it had made in 2014 for the provision of relevant information, preferably by 31 January 2017, on domestic legislation and the judicial decisions of domestic courts.

46. Addressing the topic "*Jus cogens*", he said the Commission had had before it the first report of the Special Rapporteur (A/CN.4/693), which set out the general approach and provided an overview of conceptual issues. It traced the historical evolution of *jus cogens*, discussed its legal nature and proposed three draft conclusions. Following the plenary debate, the Commission had decided to refer draft conclusions 1 and 3 to the Drafting Committee, which had not had time to conclude its work. The members of the Commission had recognized the wide support expressed by Member States in the Sixth Committee for consideration of the topic. Some members of the Commission had preferred to limit the scope of the topic to the law of treaties, while others had maintained that it should be extended to other areas of international law, such as the responsibility of States for internationally wrongful acts.

47. With regard to the methodology to be pursued, Commission members had agreed with the Special Rapporteur that, in principle, the study should be based on both State and judicial practice, and supplemented by scholarly writings. Some members had drawn a distinction between judicial practice, which could aid in determining the existence of *jus cogens*, and the practice of States, which gave the norms their peremptory character. Some had argued that peremptory norms derived their obligatory force from a general practice of States, undertaken as a matter of law. Members had suggested that elements of *jus cogens* included impermissibility of derogation; recognition as such by the international community; universal applicability; hierarchical superiority; and protection of international public order (*ordre public*). Some members had stated that peremptory norms were essentially norms of customary international law, while others had pointed out that treaties might be at the origin or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law.

48. One of the most divisive issues had been the possibility of developing an illustrative list of norms that had acquired the status of *jus cogens*. In addition, some members had categorically rejected the possible existence of regional *jus cogens*, because such a possibility, by definition, contradicted the universal applicability of *jus cogens*, while others had pointed to examples in which regional institutions, such as the Inter-American Commission on Human Rights, had referred to such norms. The Commission had also discussed the incompatibility of the notion of the persistent objector with *jus cogens* and had agreed that both those issues deserved further study and reflection.

49. Members had discussed the draft conclusions proposed by the Special Rapporteur and generally supported the development of draft conclusions on the topic. Regarding draft conclusion 1 (Scope), the questions of whether the process of identification was merely a matter of recognition or included a normative exercise and whether the activities of non-State actors should be included had been debated. Several members had raised doubts about the scope and relevance of draft conclusion 2 (Modification, derogation and abrogation of rules of international law), on the ground that it treated *jus cogens* as both hierarchically superior to and an exception to a standard rule. The Special Rapporteur appeared to have accepted the suggestion that it dealt with issues outside the scope of the topic and that it did not need to be referred to the Drafting Committee.

50. Several members had proposed that draft conclusion 3 (General nature of *jus cogens* norms) should be recast as a definition of *jus cogens*, tracking the wording of article 53 of the 1969 Vienna Convention on the Law of Treaties as closely as possible. The Commission had further debated the meaning and role of the notion of "hierarchical superiority" in the application and identification of peremptory norms; the necessity of referring to "fundamental values of the international community"; and the universal applicability of *jus cogens*, three elements which, the Special Rapporteur had maintained, found support in the practice of States and the pronouncements of courts and tribunals.

51. Lastly, the Special Rapporteur had proposed to dedicate his second report to the rules on the identification of norms of *jus cogens* and the third report to the consequences of *jus cogens*, and had said that future reports might look into the possibility of treaty-based *jus cogens* and the relationship between *jus cogens* norms and *erga omnes* obligations, as well as general principles of law. The members had expressed support for that plan and had made other suggestions for future work.

52. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, the Republic of Moldova and Ukraine, said that the European Union took a strong interest in the protection of the atmosphere, a topic which had been identified as one of its central missions in its founding treaties.

53. Concerning draft guideline 2 (Scope of the guidelines), the European Union considered that the type of activities that caused pollution, including precursors of pollution, and activities that destroyed the atmosphere, should be covered by the draft guidelines. The current formulation did not show whether the text was aimed exclusively at prohibiting dual-impact substances which were the subject of negotiations among States or whether, on the contrary, it was to apply to all dual-impact substances that were the subject of any type of negotiation. Moreover, the wording suggested that black carbon and tropospheric ozone were already under discussion at the international level. Additional clarification in the commentary to draft guideline 2 would be welcome.

54. On environmental impact assessment, the European Union proposed that States should be required to update their atmospheric protection policies regularly, taking into consideration the possible synergies between air quality and climate policy. States might take into account the overall performance of international institutions in that regard. The draft guidelines should also specify a scale for measuring the extent to which an activity could cause a significant adverse impact on the atmosphere; the European Union strongly supported the application of a threshold, in order to ensure a balanced assessment.

55. With regard to draft guideline 5 on sustainable utilization of the atmosphere, he said that the European Union was fully in favour of the statement that the atmosphere was a limited resource which should be used in a sustainable manner. In order to take fully into account the character of the atmosphere as a common resource of mankind, it should be emphasized that the protection of the atmosphere could not be achieved unless the international community worked to limit the degradation of that essential planetary resource.

56. The urgent need for sustainable economic development so as to ensure that industrial activities ceased to contribute to atmospheric degradation should therefore be recognized. In that connection, the Paris Agreement reflected clearly the commitment to sustainable development with a view to protecting the atmosphere. It set a limit on the increase in average global temperatures and expressed the need to put a cap on global emissions and to achieve emission neutrality by the second half of the twenty-first century. The World Health Organization guidelines on air quality also underscored the importance of achieving air pollution levels that helped to reduce premature deaths caused by atmospheric pollution.

57. Protection of the atmosphere required the involvement, not only of a single State or international organization, but of the international community as a whole. The European Union, with its 28 member States, was committed to real action to confront environmental threats to the foundations of societies and the health of citizens.

58. **Ms. Hauksdóttir** (Iceland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries attached great importance to the prevention and punishment of crimes against humanity and endorsed the consideration of the draft articles on the topic as complementary to the Rome Statute of the International Criminal Court. They also welcomed the focus on actions taken at the national level and on cooperation between States.

59. The list of "accessorial" modes of responsibility contained in draft article 5, paragraph 2 (c), did not explicitly include conspiracy or incitement. The Commission had explained in its commentary that it had decided to base the terms used in draft article 5, paragraph 2, on the Rome Statute and that in various international instruments, the related concepts of "soliciting", "inducing" and "aiding and abetting" the crime were generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constituted the offence. Accordingly, the formulation should not be interpreted as being narrower than the modes of responsibility contained in the Rome Statute or in many national criminal codes. The criminal codes of the Nordic countries criminalized conspiracy to commit and incitement or instigation to commit a crime against humanity.

60. Concerning the establishment of national jurisdiction in draft article 6, she said that under their criminal codes, the Nordic countries generally had established not just "territorial jurisdiction" but also "active personality jurisdiction" over not only stateless persons resident in those countries but also over resident foreign nationals in respect of the most serious crimes of international concern. Under certain circumstances, they might also exercise criminal jurisdiction over crimes committed abroad but directed at their nationals or permanent residents. Importantly, draft article 6 and the "triple alternative formula" for establishing national obligation set out in its paragraph 1 should be read in conjunction with draft article 9, which set out the obligation to extradite or prosecute (*aut dedere aut judicare*). However, in order to effectively support the *aut dedere aut judicare* obligation, national courts needed to have jurisdiction to try the alleged offender if he or she was not extradited or surrendered. Depending on the circumstances, that might require resorting to a jurisdictional basis beyond "territorial" or "active personality". In addition, draft article 6 did not exclude the exercise of even wider jurisdiction if that was provided for in national law. Under international law, crimes against humanity were seen as crimes subject to universal jurisdiction. Therefore, the Nordic countries would encourage adding a specific reference to universal jurisdiction at the end of draft article 6, paragraph 3.

61. Regarding draft article 7, on the obligation of States to investigate acts constituting crimes against humanity in any territory under their jurisdiction, the Nordic countries understood that the formulation "in any territory under its jurisdiction" covered both de jure and de facto jurisdiction, and included places and facilities under the State's control. There could be merit in making it clear that the State's obligation to investigate encompassed acts constituting crimes against humanity when committed by a member of its armed forces abroad. The Nordic countries attached great importance to due process considerations and therefore agreed with the Commission that alleged offenders should at all stages of proceedings be guaranteed fair treatment, including fair trail and full protection of their rights, as reflected in draft article 10. With reference to the obligation in draft article 5, paragraph 6, to ensure that crimes against humanity were punishable by appropriate penalties taking into account their grave nature, she said that the Nordic countries would like the text to draw inspiration from article 77 of the Rome Statute, which did not include the death penalty as an applicable penalty for genocide, crimes against humanity and war crimes.

62. Turning to the topic of protection of the atmosphere, she said that the Nordic countries had noted with interest draft guideline 7 and welcomed the emphasis on caution before undertaking any activities aimed at the intentional large-scale modification of the atmosphere. The need to protect the atmosphere from specific substances had long been a topic of discussion in the context of international regulation and a general framework for the protection of the atmosphere from pollution and degradation had already been proposed in the past. The Nordic countries hoped that the guidelines the Commission was developing would bring added value to the environmental law regime,

while neither interfering with nor duplicating relevant political negotiations.

63. Turning to the topic of *jus cogens*, she said that the Nordic countries shared the assessment of the Special Rapporteur that it was probably not advisable to seek to elaborate a list of *jus cogens* norms. It would be more useful to focus on the conceptual aspects of the topic, rather than risking being bogged down in lengthy discussions on which specific norms might have gained status as *jus cogens*. Moreover, such a list might have a negative impact on the status of equally important norms not included on the list, and might affect the dynamic development of legal norms. The concept of regional *jus cogens* norms was difficult to reconcile with the universal and unconditional character normally ascribed to *jus cogens*, and the notion of persistent objector was not compatible with the concept of *jus cogens*. In addition, the Nordic countries questioned the necessity of referring to "the values of the international community" in draft conclusion 3, paragraph 2, as the term *jus cogens* referred to norms accepted as such by the whole international community.

64. Finally, as to the outcome of the Commission's consideration of the topic, while the Nordic countries did not object to the elaboration of conclusions, they considered that the topic was best dealt with through a conceptual and analytical approach rather than through the elaboration of a new normative framework for States.

65. **Ms. Diéguez La O** (Cuba), referring to the draft articles on crimes against humanity, said that Cuba approved of the approach whereby the criminalization of acts that constituted such offences was left to domestic jurisdiction. With respect to the topic of protection of the atmosphere, she said it would be useful for the Commission to address the effect on the environment of the use of all types of weapons, and in particular of the development, stockpiling and use of nuclear weapons. Any text on the subject should include a regime of responsibility encompassing reparation, reconstruction and indemnification for harm. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", Cuba had submitted its comments through a note verbal addressed to the United Nations Secretariat. The provisional application of treaties must not be used abusively and such application must be in strict compliance with the Vienna Convention on the Law of Treaties, in the sense that it was the will of the parties to a treaty, which must remain paramount. Provisional application must not be a substitute for the entry into force of a treaty, as certain domestic legal requirements must be met before a treaty could enter into force.

66. **Mr. Balzaretti** (Switzerland), referring to crimes against humanity, said that Switzerland welcomed the fact that draft article 5 called on States to define, in their national legislation, the different types of acts constitutive of crimes against humanity and to take measures to establish the criminal responsibility of superiors. It was likewise appropriate that the text stated that obeying orders was not a ground for excluding the criminal responsibility of subordinates. His delegation was in favour of including in the draft article an express reference to the non-applicability of statutory limitations to such crimes. By broadly defining the scope of national jurisdiction to include not only territorial, but also active and passive personal jurisdiction, article 6, paragraph 1, provided a means for avoiding gaps in the existing regime for prosecuting crimes against humanity. Paragraphs 2 and 3 were similar in intent, in that they called for the establishment of jurisdiction based on the presence of the alleged offender in a State's territory, while at the same time expressly not excluding the possibility of exercising potentially broader jurisdiction in accordance with the State's laws.

67. The introduction of an *aut dedere aut judicare* clause in draft article 9 was a positive step; by providing for the surrender of an alleged offender to a competent international criminal tribunal, it gave due consideration to events of recent years. Switzerland viewed favourably the programme of work for a convention on crimes against humanity proposed by the Special Rapporteur, including the next set of draft articles, which would address such fundamental issues as mutual legal assistance and extradition. Switzerland hoped that the existing international legal framework would be duly taken into account and that provisions for safeguarding the primacy of national jurisdictions would be included where appropriate. It welcomed the Special Rapporteur's recommendation on seeking ways to avoid any conflicts with other agreements such as the Rome Statute.

68. Switzerland welcomed the Commission's decision to include the topic of *jus cogens* in its programme of work. The Swiss Constitution recognized the peremptory nature of *jus cogens* norms by establishing those norms as the substantive limits to constitutional amendments. Although peremptory norms had been a part of international law for a considerable period of time, there was a need to further clarify the concept of *jus cogens*. Switzerland therefore welcomed the Special Rapporteur's future programme of work and would welcome the preparation of an illustrative list of norms that had already acquired the status of *jus cogens*, which could facilitate the identification of other peremptory norms. Lastly, Switzerland had noted with enthusiasm the Commission's recommendation to organize events for the commemoration of its seventieth anniversary in 2018.

69. **Mr. Válek** (Czechia) said that the latest set of draft articles on the topic of crimes against humanity appropriately reflected and built upon the current international law framework, including the Rome Statute and a number of other criminal law treaties. Concerning draft article 5, paragraph 7, on liability of legal persons for crimes against humanity, he said the wording provided States with considerable flexibility in deciding whether to adopt such measures and to shape them in accordance with their national law. While legal persons should be liable for the commission of crimes against humanity, several conventions in the area of international criminal law, including the Rome Statute, did not provide for such liability. The Commission should therefore study the issue in more detail, taking into account the organizational policy element contained in the definition of crimes against humanity and the different interpretations given to it. His delegation supported the inclusion of draft article 10 in the text and appreciated the emphasis placed on fair treatment, including a fair trial and full protection of human rights of the alleged offender.

70. The protection of the atmosphere was a serious challenge to mankind, and political wisdom and courage were required to address it. While his Government agreed that the problem had international legal ramifications, those ramifications seemed to be a corollary to, rather than the substance of, the problem. On the Special Rapporteur's intention to deal with the interrelationship between what he qualified as the "law of the atmosphere" and the law of the sea, international trade and investment law and international human rights law, he said that such an approach, however interesting from an academic point of view, would move the topic even further from the primary purpose of the Commission, namely progressive development and codification of international law.

71. Given that the concepts underlying draft guidelines 3 to 7 having been developed primarily with reference to the transboundary impact of harmful activities, it was doubtful how they could properly operate on a global scale, and in particular in relation to the atmosphere, which embraced the Earth as a whole. For example, serious damage caused to a neighbouring State or damage on the high seas could be instantly identified, located and objectively assessed, but in the atmosphere, due to its properties, even extremely harmful activity within the jurisdiction of one State did not cause immediately significant damage to the atmosphere as a whole. Rather, it was the cumulative effect of harmful activities that had a "significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation", as draft guideline 4 put it. The question that then arose was where to place the threshold of a significant adverse impact. In its future work on the topic, the Commission should further analyse that question.

72. With regard to the topic of *jus cogens*, his delegation agreed with the methodological approach adopted by the Commission, whose work on the topic should be based on both State and judicial practice, supplemented by scholarly writings. The analytical work should be based on the definitions contained in the Vienna Convention on the Law of Treaties. His Government was quite sceptical about providing any list of *jus cogens* norms. On the other hand, the Commission could gather relevant information on the use of the concept of *jus cogens* in the recent practice of States and international courts. *Jus cogens* norms were exceptions to other rules of international law. They protected the fundamental values of the international community and were universally applicable. His delegation was not convinced about the existence of regional *jus cogens* norms; such a possibility seemed by definition to contradict the universal character of *jus cogens* norms. His delegation also took note of the Drafting Committee's

inconclusive debate on the proposed draft conclusions and would comment on them when they were adopted.

73. **Mr. Stephen** (United Kingdom) said that his Government agreed that there was currently no general multilateral framework governing crimes against humanity and saw benefit in exploring how an extradite-or-prosecute regime in respect of such crimes could operate. A future convention on that subject would need to complement, rather than compete with, the Rome Statute by facilitating national prosecutions. The United Kingdom would not welcome the expansion of the scope of the investigation into issues such as civil jurisdiction and immunity: in order to ensure wide ratification of the proposed treaty, the Commission should continue to keep the draft simple, along the model of earlier *aut dedere aut judicare* conventions. The United Kingdom would urge the Commission to complete work on the topic as swiftly as possible.

74. On protection of the atmosphere, the United Kingdom welcomed the inclusion of preambular text specifically recognizing the boundaries of the Commission's work in relation to political negotiations on climate change, ozone-depleting substances and long-range transboundary air pollution, as well as confirmation that the work would not seek to fill gaps in international regimes or to introduce new rules or principles. However, care must continue to be taken to ensure that the draft guidelines themselves maintained consistency with the preambular text and the understanding reached by the Commission in 2013. The inclusion of the preambular text would be rendered meaningless if the Commission went on to do precisely what it had agreed not to do under the 2013 understanding.

75. The United Kingdom acknowledged the importance of different national circumstances for the implementation of environmental policies. However, it questioned the need for specific preambular text on the special situation and needs of developing countries, in light of the fact that draft guideline 2, paragraph 2, indicated that the draft guidelines did not deal with questions concerning common but differentiated responsibilities. In addition, the proposed preambular text did not capture the fact that State practice had evolved to take a more balanced approach, as demonstrated by the 2015 Paris Agreement.

76. The United Kingdom was encouraged to see that the Commission had included in draft guideline 4 a threshold for environmental impact assessment of "significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation," which was important for ensuring that the process of assessment did not create unnecessary burdens or preclude activity with limited impacts, which would be at odds with draft guidelines 5 and 6 on utilization of the atmosphere. However, the wording on environmental impact assessments continued to raise concerns due to the very broad framing of when States were expected to apply them: assessments were necessary for "proposed activities", which could cover a whole range of things for which an environmental impact assessment was neither appropriate nor proportionate. It was also unclear when an assessment should take place and how thorough it should be. The language needed to be more focused, in line with the approach taken in European Union legislation, namely to require assessments for "projects" such as construction work or interventions in the natural surroundings.

77. The Commission could make a useful contribution to the clarification of international law in the difficult but important area of *jus cogens* if it confined the parameters of the topic to the explanation of how to identify pre-existing *jus cogens* and the consequences of such identification. Such an approach could also be of significant practical assistance, particularly to domestic courts. The topic must be developed with a close eye to the Commission's other work on the identification of customary international law. His Government would not be against the development of an illustrative (non-exhaustive) list of pre-existing *jus cogens* norms, although that would not seem to be essential and should not detract from the principal focus of the Commission's work on the topic. Finally, the United Kingdom agreed with the Special Rapporteur that draft conclusions were the most appropriate outcome for the Commission's work on the topic.

78. **Ms. Varga** (Hungary) said that the Commission had made significant progress towards the elaboration of a new convention on crimes against humanity with the provisional adoption of six additional draft articles and the commentaries thereto. Hungary agreed with the Commission that strong legal measures were needed to

prevent crimes against humanity and punish the perpetrators. It supported the Commission's formulation of draft articles with the intention that they might ultimately form the basis of such a convention which, solely by its existence, would help fight impunity and would reflect the strong determination of the international community on the matter. Draft article 5 (Criminalization under national law) was a crucial part of the future convention, for the very reason that the prosecution and punishment of perpetrators of crimes against humanity must be effective at the national level in order for the accountability mechanism to work at all. The criminalization and punishment of crimes against humanity in national law were also necessary for the establishment of effective national procedures.

79. Consideration might be given to whether punishment at the national level was possible based solely on international law. The Hungarian Constitutional Court had stated in 1993 that a typical feature of war crimes and crimes against humanity was that they were punishable irrespective of whether they were committed in breach of domestic law. That meant that international criminal law served as a basis for prosecution of such crimes before national courts, and that the *nullum crimen sine lege* principle, in such a case, applied with respect to international law. The Court had also noted that a prosecution based directly on international law would not violate the principle of legality, because *lex* in that case existed in international law, including customary law. Although there were examples of national proceedings where a domestic court had relied directly on international law, the ruling was regarded as a novel solution for national courts. Still, the whole question and the practice of States in that regard were worth further examination by the Commission.

80. Draft article 5, paragraph 3, referring to the command responsibility, was modelled on the Rome Statute and aimed to encourage harmonization among national laws. Nonetheless, the understanding and standard of such responsibility must be clarified. It must also be determined whether the formulation "should have known", used in the Rome Statute, was of a customary nature and if not, whether States would consider that it represented progressive development instead.

81. Regarding what was probably the most thoroughly discussed part of the draft articles, namely article 5, paragraph 7, on the liability of legal persons, she said that Hungary, like many other States, did not recognize the criminal liability of legal persons. It remained to be discussed whether a paragraph on liability of legal persons which, in most national legislations, was not understood as criminal liability, had any effect on the general aim of preventing and punishing crimes against humanity. Measures such as the disbanding of organizations that were involved in the commission or ordering of the commission of crimes against humanity were adopted at the national level irrespective of the criminal, civil or administrative liability of legal persons, as currently envisaged in the draft articles.

82. It was important to note that the draft articles did not contain any provisions on universal jurisdiction. While it was true that the existence of a customary rule on universal jurisdiction could not be clearly established, it might be considered *lex ferenda*. It was therefore important to examine how national laws addressed the issue and whether States would be prepared to accept the existence of universal jurisdiction for crimes against humanity, on the same footing as war crimes and genocide.

83. Concerning the immunity of State officials from foreign criminal jurisdiction, the Commission's task should be first and foremost to establish existing customary law and to compile international and national case law on the topic. If, after identifying existing customary law, it became apparent that the existing rules should be developed, then the Commission could clarify a way of progressively developing the law concerning the immunity of State officials. A major issue was the duration of immunity. It was widely accepted that immunity *ratione personae* began when a person took office and ended when that person left office; after a high-ranking State official left office, he or she could be prosecuted. However, if a Head of State, Head of Government, member of Government or member of Parliament granted himself or herself titles in perpetuity that were broad enough to cover certain crimes for a lifetime, that raised the question as to how immunity *ratione personae* could be considered to be in conformance with the obligation to punish international crimes. In her delegation's view, the international legal obligation to punish

persons who committed international crimes should be regarded as a limitation to immunity. The Commission should also ensure that exceptions to immunity were applied in a manner that was consistent with all other norms and principles of contemporary international law.

84. **Mr. Shin** Seoung-Ho (Republic of Korea), referring to the topic of protection of the atmosphere, said that his delegation supported the recognition of the special situation and needs of developing countries, in the fourth preambular paragraph, something that had been endorsed in a number of international instruments, including the 2015 Paris Agreement. With regard to draft guideline 1 (Use of terms), his Government was not convinced that it was possible to make a clear distinction between "atmospheric pollution" and "atmospheric degradation", even though the Commission attempted to differentiate between the two by stating, in paragraph (3) of its commentary to draft guideline 3, that atmospheric pollution had a "transboundary" element, while atmospheric degradation had a "global" dimension.

85. Regarding the use of the terms "sustainable utilization" and "equitable utilization" in draft guidelines 5 and 6, he said that both terms were employed in article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses, a text that, together with the draft articles on the law of transboundary aquifers, could be put to good use in the work on the current topic. Regarding draft guideline 7, his delegation respected the Commission's decision to refer to "intentional large-scale modification" of the atmosphere, rather than to "geo-engineering", but was of the opinion that the input of scientific experts in future might facilitate the consideration of such issues.

86. Turning to the topic of *jus cogens*, one of the most critical issues in modern international law, he said it was appropriate that the Special Rapporteur had paid attention to its historical and methodological aspects and was recommending the development of draft conclusions. The scope of the topic was not limited to the law of treaties, and included areas of international law such as State responsibility and immunity. Therefore, draft conclusion 1 could be reworded to make the scope of the topic more closely related to other aspects of the international legal order. On future work on the topic, he said that despite the various objections against an illustrative list of *jus cogens* norms, his delegation considered that without some kind of list, the draft conclusions would be less effective. In addition, as the Commission acknowledged in its report (A/71/10), States had consistently invoked *jus cogens* in diplomatic and other communication as had international courts and tribunals and regional and national courts. Therefore, further comparative analysis of State practice and judicial decisions should be carried out.

87. **Mr. Xu** Hong (China) said that the Commission had set the objective of formulating an international convention on crimes against humanity, but States had not yet reached consensus on the matter. The Special Rapporteur's second report (A/CN.4/690) and the draft articles adopted by the Commission essentially relied on analogous deductions, primarily by sorting through and summarizing relevant provisions in other international conventions on combating international crimes. Such an approach did not amount to the codification of the provisions on crimes against humanity as found in existing laws, but rather the proposal to draft a new law. Though the Commission had used a similar approach in relation to some topics, such as the Convention on the Law of the Non-navigational Uses of International Watercourses, in view of the complexity and sensitivity of the topic of crimes against humanity, the advisability of that working method was open to question.

88. On the stipulation in draft article 5 that States should ensure that crimes against humanity were listed as offences under their respective criminal codes, the Chinese delegation was of the view that States should be given some latitude on the matter and be allowed to determine whether the crimes listed in the draft articles constituted crimes against humanity or some other offence in their national laws.

89. The deliberations on the topic of *jus cogens* should focus on clarifying the meaning of the basic elements of *jus cogens* as set out in article 53 of the 1969 Vienna Convention on the Law of Treaties by taking stock of State practice, with emphasis on codifying existing laws rather than drafting a new law. Any addition of new elements should be fully backed up by State practice and be universally accepted or recognized by States. The Special Rapporteur had identified universal applicability, superiority to other

norms of international law and protection of the fundamental values of the international community as the core elements of *jus cogens*. However, those elements were obviously at variance with the basic elements of *jus cogens* set out in article 53 of the Vienna Convention, thus amounting to an alteration of the concept. Since the elements of *jus cogens* had a bearing on the major interests of all States and direct implications for their rights, obligations and responsibilities, it was an open question whether there was a need to add new core elements and what implications such additions would have.

90. With specific regard to the contention that *jus cogens* norms were superior to other norms of international law, he asked if that implied that *jus cogens* should prevail over the Charter of the United Nations and the relevant resolutions of the Security Council. In his delegation's view, the preparation at the current stage of a list or annex related to the rules of *jus cogens* was not suitable. The correct approach would be to collect and study State practice relating to *jus cogens* and, on that basis, to clarify specific standards, before exploring the need or otherwise for a list or annex.

91. On the topic of protection of the atmosphere, the Chinese delegation considered that the draft guidelines that had been adopted by and large followed the understanding reached by the Commission in 2013 and reflected fairly objectively the outcome of relevant studies on the topic. However, the wording of the fourth preambular paragraph was rather weak and did not take full account of the special circumstances and real needs of developing countries. The formulation in the third report of the Special Rapporteur (A/CN.4/692), namely, "Emphasizing the need to take into account the special situations of developing countries", was more appropriate. Activities "intended to modify atmospheric conditions" on a large scale, as described in draft guideline 7, generally referred to geo-engineering activities, the pros and cons of which were still under discussion in the scientific community. In addition, if the activities in question violated the obligation to protect the atmosphere, they could be dealt with under draft guideline 3. Therefore, there seemed to be no need to come up with a special provision on the matter. The protection of the atmosphere was a multidimensional issue that involved politics, law and science. The Chinese delegation hoped that the Commission would fully realize its complexity and sensitivity, fully respect existing mechanisms and efforts, and conduct more integrated studies of international practices under regional mechanisms.

92. The Chinese delegation supported the conclusion in the fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701) that there was no exception in respect of immunity *ratione personae*. It did not, however, support the three exceptions to immunity *ratione materiae* posited by the Special Rapporteur, namely, serious international crimes, crimes that caused harm to persons or property in the territory of the forum State, and crimes of corruption. The bulk of the evidence cited in the report for and against those exceptions consisted of just a small number of objections to decisions of the International Court of Justice and civil cases before some national or international judicial bodies. Such evidence was hardly convincing and was clearly biased.

93. Serious international criminal offences did not constitute an exception to immunity from foreign criminal jurisdiction. Immunity was procedural in nature and fell under an entirely different category of rules compared with the substantive rules which determined the lawfulness of a given act. Therefore, the violation of substantive rules should not preclude the application of procedural rules, as had been confirmed by the International Court of Justice in its *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* cases. Although international conventions against serious international crimes obliged States parties to establish jurisdiction or to assume obligations of cooperation in investigation, apprehension and extradition, that was without prejudice to the immunity of officials from foreign criminal jurisdiction under customary international law, as had also been confirmed in the *Arrest Warrant* case.

94. As to crimes committed in the territory of the forum State that caused harm to persons or to property, the report mainly drew on international treaties governing consular immunity and State immunity, as well as on the legislation on immunity of countries like the United Kingdom, the United States, the Russian

Federation and Australia. However, the exceptions in respect of harm to persons or property as established by such treaties and domestic legislation applied exclusively to civil procedures. By drawing direct parallels between those exceptions and exceptions to the immunity of State officials from criminal jurisdiction, the report confused immunity from civil jurisdiction with immunity from criminal jurisdiction without sufficient support in legislation and in practice.

95. Regarding crimes of corruption, they generally did not involve immunity from the criminal jurisdiction of a foreign court and therefore did not warrant being singled out as an exception for study. Any official involved in a corruption case was held accountable primarily through domestic prosecution and, if the official fled abroad, he or she could be prosecuted in the home country after being extradited, repatriated or persuaded to return. Where assistance was required for prosecution in a foreign country, the State of the official should waive his or her immunity.

96. In respect of the topic of protection of the environment in relation to armed conflicts, the Chinese delegation supported the continued use of the three-phase approach, namely, before, during and after the conflict. Further work should address the timing for the application of the draft principles, specifying which principles applied to all phases and which applied to only one. The third report of the Special Rapporteur (A/CN.4/700) relied too much on legislative practice and regulations and lacked the backing of a sound analysis of in-conflict examples and acts.

97. Lastly, the Chinese delegation saw both a connection and a difference between the principle of *pacta sunt servanda* and the provisional application of treaties that might cause the two concepts to clash in practice. Any solution should be based on a proper balance between provisional application of treaties and domestic law. In light of the close connection between provisional application and other treaty law regimes, such as reservations to treaties, invalidity of treaties and succession of States, a more holistic approach was needed in considering the topic of the provisional application of treaties. The current conclusions should also be backed up with more practical examples.

The meeting rose at 6.05 p.m.