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Chair: Mr. Ahmad (Vice-Chair) . . . . . (Pakistan)

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16-18859 (E)

In the absence of Mr. Danon (Israel), Mr. Ahmad (Pakistan), Vice-Chair, took the Chair.

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

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

1. **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).

2. **Mr. Martín y Pérez de Nanclares** (Spain), commending the Commission on its provisionally adopted draft articles on the topic of crimes against humanity and the commentary thereto, was aware of the inherent difficulty of the issue, the wide variety of contentious issues that it raised and the divide that had occurred within the Commission. Even separating crimes against humanity from other crimes, such as genocide and war crimes, was a decision involving more than a few problems. It was no surprise, therefore, that the Special Rapporteur's second report had twice as many pages as the maximum recommended by the Commission in 2011. However, that length and level of detail should not be extended to the wording of the draft articles.

3. Generally speaking, his delegation considered the new draft articles appropriate and balanced. They followed the model of treaties concerning offences and crimes. However, certain issues of enormous significance still needed more in-depth analysis, for example military tribunals, amnesty, the liability of legal persons, extradition and States' margin of appreciation. Moreover, on a good number of occasions the reason why one option had been chosen over another, when there were several legal possibilities, could be more clearly indicated.

4. It was particularly relevant that draft article 5 (Criminalization under national law) included provisions on ensuring that the offences in question were not subject to any statute of limitations (para. 5), and on the liability of legal persons (para. 7). However, certain very specific questions required some attention. The relationship between draft article 5 and draft article 3, on the definition of crimes against humanity, could be better clarified in the commentary. Among other reasons, it needed to be made clear whether each State's obligation to take the necessary measures to ensure that crimes against humanity constituted offences under its criminal law was applicable to the entire definition set out in article 3, or only to paragraph 1. It was also essential that terminological or any other considerations raised by each State when criminalizing crimes against humanity did not depart from the meaning given to those crimes in draft article 3.

5. The wording of draft article 5, paragraph 2, should be more detailed, for example by following the wording in the Rome Statute.

6. In draft article 5, paragraph 7, although it was appropriate to provide that States must adopt measures to establish the liability of legal persons, the wording should go beyond existing State practice. Being a delicate issue, it required more thorough analysis. On draft article 6 (Establishment of national jurisdiction), his delegation endorsed the decision to follow the model of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment instead of merely copying article 8 of the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind. That was more complicated and might seem disjointed, but it was a better reflection of the crime concerned and was also in line with the standpoint of the *Institut de droit international* expressed in its 2015 resolution on universal civil jurisdiction with regard to reparation for international crimes.

7. The report did not provide enough information about draft article 7 (Investigation), and neither did the commentary. In contrast, the reports produced in recent years by various bodies on the perpetration of international crimes in Libya or Syria did provide interesting information on the topic. Draft article 7 should also specify that investigations should be "prompt and thorough" (*pronta y exhaustiva*). The question of cooperation between States also deserved the future attention of the Commission.

8. With regard to draft article 10 (Fair treatment of the alleged offender), his delegation was pleased that paragraph 2 provided for cases of dual nationality, but had doubts about the provision relating to stateless persons. The reference to "the State which, at that person's request, is willing to protect that person's rights" was a departure from most human rights

treaties. Nor was it consistent with the criterion contained in article 8, paragraph 1, of the Commission's articles on diplomatic protection, which entrusted the protection of stateless persons to the State in which they were lawfully and habitually resident. His delegation did not seek to alter the criteria set forth in draft article 10, but it would be useful to include some additional explanation in the commentary.

9. Commending the Commission on the provisionally adopted texts on the topic of protection of the atmosphere, his delegation believed that the reference in the new preambular paragraph to the needs of developing countries was not consistent with the more balanced focus that currently prevailed in that regard. Article 2, paragraph 2, of the Paris Agreement, which spoke of "common but differentiated responsibility", was along the lines of that new approach, and the instrument which the Commission eventually adopted should be too.

10. Whether to include in draft guideline 4 a reference to transparency and public participation as important elements in the environmental impact assessment procedure might be a moot point. On the other hand, draft guideline 7, on intentional large-scale modification of the atmosphere, should expressly state that military activities were excluded from its scope.

11. On the topic of *jus cogens*, the Commission's debate on the first three draft conclusions elaborated by the Special Rapporteur confirmed that, however important the subject, drawing conclusions would be a very difficult and complicated undertaking. His delegation continued to believe that it was essential to preserve the open and flexible nature of the process of creating *jus cogens* norms; producing a list of such norms might call that objective into question.

12. Spain was not entirely convinced that draft conclusion 2 should allude to *jus dispositivum* norms, and it did not understand what exactly the difference was between "abrogation" and "derogation" in international law. As for draft conclusion 3, his delegation agreed with those who had expressed doubts about the need for a reference in paragraph 2 to the hierarchical superiority of norms of *jus cogens*. That position merely reflected their peremptory nature, as set out in paragraph 1.

13. His delegation agreed with those who had expressed the need to distinguish between a norm's *jus cogens* nature and its *erga omnes* scope. The International Court of Justice always referred to *erga omnes* scope without explicitly stating the *jus cogens* nature of norms and principles that all would agree to classify as such.

14. **Mr. Alday** (Mexico), commending the Commission on the provisional adoption of the 10 draft articles on crimes against humanity and the commentary thereto, stressed the importance of the preventive aspect included in the draft articles and the focus on punishment, which was in line with standards of treaties applicable to other international crimes. His delegation agreed that the draft articles should complement rather than duplicate the obligations contained in existing treaties on international criminal and human rights law.

15. The added value of the exercise would be the codification of a direct international obligation for States to criminalize and punish crimes against humanity and to cooperate and provide mutual assistance in their investigation and prosecution. A specific oversight body should not be set up, since that would duplicate the work of human rights treaty monitoring bodies.

16. His delegation took note that the references to forms of authority and participation, responsibility for crimes committed under orders from a superior and the prohibition on the statute of limitations for such crimes drew upon the standards set out in the Rome Statute of the International Criminal Court.

17. His delegation agreed on the need to define crimes against humanity. The commentary to draft article 5 should be recast to reflect, that the absence of a classification of crimes against humanity as such in national legislation did not prevent such crimes from being prosecuted when other categories of crime existed that constituted crimes against humanity, such as torture or enforced disappearance. Draft article 5 should also include a reference to the prohibition of the death penalty for such offences. On paragraph 3 (b), his delegation agreed that the standard in respect of the responsibility of superiors should be the Rome Statute, which differentiated between the responsibility of military superiors and that of civilian superiors. The draft articles and the commentary thereto should also

reflect the ongoing debate between international judges and academics on the type of non-military organization that could be considered a perpetrator of crimes against humanity. It should be borne in mind that the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind required that individuals who committed such offences must be acting at the instigation or with the toleration of the authorities of a State.

18. His delegation agreed with the forms of competence reflected in the draft articles and the flexibility which States had with regard to active and passive personality. It appreciated the inclusion of the obligation to prosecute or extradite and to treat alleged offenders fairly. The question of whether to include a draft article on the liability of legal persons must be treated with caution and required further consideration. As noted in the commentary, most legal systems did not recognize such a legal concept.

19. Future work should address the definition and scope of the obligation of States to cooperate and provide legal assistance for the investigation and prosecution of crimes against humanity so as to close existing gaps.

20. On the topic "Protection of the atmosphere", his delegation stressed that ensuring such protection was an *erga omnes* obligation of great importance for the international community and required international cooperation, the legal scope of which should be clearly established. Efforts should focus on the protection of shared natural resources, which would help promote sustainable development. The fragmentation resulting from the multitude of treaty norms on the subject testified to the need to produce a comprehensive and systematic regulatory framework. The Commission's dialogue with the scientific community would facilitate a better understanding of the specialized topics involved.

21. His delegation was concerned that the draft guidelines might go beyond the Special Rapporteur's mandate, thereby duplicating existing environmental protection measures and interfering with other agreements, such as the Paris Agreement and the amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer. The definitions of the terms used in the study of the topic should be based on scientific criteria and should have a useful legal focus. The scope should be restricted to anthropogenic activities which might affect the protection of the atmosphere. The Special Rapporteur should produce a summary explaining the objective of the draft guidelines, and not a list, since many of the substances and human activities on the list were in fact causes of atmospheric pollution.

22. Bearing in mind the two aspects of protection, his delegation believed that, from the point of view of preservation, it was necessary to focus on the principle of *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another) as it applied to transboundary atmospheric pollution or in public places and the prevention and reparation of damages. From the perspective of conservation, emphasis should be placed on general principles underlying the sustainability of protection, such as good faith, the precautionary principle and environmental impact assessment. Pursuant to customary international law, States had the duty to protect the environment in their jurisdiction as well as in areas outside national control. Both individuals and the collectivity must take measures designed to protect the environment, thereby promoting sustainable development.

23. The Commission should carefully consider whether to include draft article 7 (Intentional large-scale modification of the atmosphere), given that the subject was controversial, practice was scarce and the debate was evolving.

24. On the topic of *jus cogens,* his delegation agreed that the best way to address the matter was in the form of conclusions and commentary thereto. Such conclusions illustrated the nature, scope, formation and, above all, the legal effects of *jus cogens* norms. Given the peremptory nature of such norms, the conclusions must take into account State practice, the decisions of international, regional and national tribunals and doctrine.

25. The inclusion of an indicative list, provided it was not exhaustive, might be a very useful tool for identifying the content of *jus cogens*. Such an undertaking should be carried out carefully to avoid the list being considered restrictive and to ensure that it reflected the various sources of international law, including court rulings, State practice and doctrine. That took on particular relevance in respect of norms

that complied with the elements of *jus cogens* but had not yet been the subject of court proceedings. His delegation agreed with the Special Rapporteur that, even if an illustrative list was not provided, the commentary would need to provide some examples of *jus cogens* norms, in which case the Commission would have to specify the sources on which they were based.

26. The draft conclusions should avoid deviating from article 53 of the Vienna Convention on the Law of Treaties; the language of draft conclusion 3, paragraph 1, should therefore be reconsidered.

27. With regard to future work on the topic, the Special Rapporteur should address the sources of *jus cogens*, their relationship with *erga omnes* obligations and the non-derogable nature of their legal consequences, especially in cases of non-compliance or violations. His delegation suggested that a study should be carried out on the emergence of new norms of *jus cogens* that derogated from earlier ones and their invalidating effects, including the question of who determined the existence of conflicting norms. His delegation hoped that the treatment of the topic would be in harmony with other topics currently under consideration.

28. **Ms. Morris-Sharma** (Singapore) said that the topic "Protection of the atmosphere" was of the utmost practical significance, transboundary haze pollution having posed a real and considerable problem to the health and economy of Singapore and other countries in the region over the years.

29. Earlier in 2016, in response to the Commission's request for States to provide information on domestic legislation and judicial decisions of domestic courts relevant to its work on the topic, Singapore had submitted information on its recently enacted Transboundary Haze Pollution Act of 2014, which held companies accountable for the environmental and health impact of their actions. Singapore was pleased to note that its domestic legislation had been considered in the Special Rapporteur's third report, and it looked forward to further dialogue with the Commission.

30. Her delegation endorsed draft guideline 3 (Obligation to protect the atmosphere), in particular the emphasis in paragraph (1) of the commentary thereto on its central importance. It agreed with the Special Rapporteur that the maxim *sic utere tuo ut alienum non laedas* had been accepted in inter-State relations as the principle that the sovereign right of a State to use its territory was circumscribed by an obligation not to cause injury to, or within, the territory of another State.

31. Her delegation noted with interest the explanation in paragraph (5) of the commentary to draft guideline 3 that States were required to exercise due diligence to "ensure" that the activities of individuals and private industries within their jurisdiction or control which were not normally attributable to a State did not cause significant adverse effects and that States were required to take appropriate measures to control public and private conduct. Singapore welcomed the reference to the possibility for States to act "individually" or "jointly". That would strengthen the obligation for States to cooperate as set out in draft guideline 8. Her delegation noted a common thread of cooperation, at least on the basis of sovereign equality and good faith.

32. Draft guideline 4 flowed from the State's obligation in draft guideline 3 to exercise due diligence in taking appropriate measures to prevent atmospheric pollution and atmospheric degradation. In order to give countries flexibility and latitude it would be preferable not to address the specific procedural aspects of an environmental impact assessment in the draft guideline itself.

33. Concerning future work, the Special Rapporteur had indicated that in 2017 the Commission could deal with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law). That would be a useful exercise, provided that it remained within the parameters of the 2013 understanding, whereas his proposal to deal in 2018 with the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere might be inconsistent with the 2013 understanding.

34. **Mr. Koch** (Germany) said that, as a staunch supporter of international criminal law, Germany welcomed the Commission's work on the highly relevant topic of crimes against humanity. A convention on the subject would not only complement treaty law on the core crimes, but might also foster

inter-State cooperation on the investigation, prosecution and punishment of such criminal acts and provide further impetus to efforts to end impunity for atrocity crimes.

35. As one of the original signatories of the Rome Statute and an ardent supporter of the International Criminal Court, Germany welcomed the clear focus on the Statute. To ensure its success, the project must be compatible with existing rules and institutions of international criminal law, in particular the International Criminal Court and its Statute.

36. Germany counselled against proposing any additional institutionalized mechanisms under the Convention, as that would necessarily create space for different interpretations.

37. **Ms. Lijnzaad** (Netherlands), referring first to the topic "Crimes against humanity", noted that the definition in draft article 3 was nearly the same as in article 7 of the Rome Statute. Given that the definition in the Rome Statute reiterated an existing rule of customary international law, it made sense to use it.

38. Her delegation agreed with the Special Rapporteur's conclusion that, in order to be truly effective, the enforcement of crimes against humanity should take place at the national level. That was also why the preamble to the Rome Statute stressed that the effective prosecution of the most serious crimes of concern to the international community must be ensured by taking measures at the national level.

39. That point was also reflected in the principle of complementarity. The primacy of prosecution of international crimes at the national level was not only logical, it also had major practical advantages. In that connection, her delegation expressed its concern about the insufficient criminalization of crimes against humanity at the national level, the report having indicated that at best 54 per cent of the States Members of the United Nations had some form of national law expressly on crimes against humanity. That was an obligation which followed from both the Rome Statute and the Geneva Conventions, and if that figure did not improve, difficulties would arise for the enforcement of a treaty on crimes against humanity. More importantly, it would jeopardize the worldwide prosecution and punishment of such acts.

40. Another matter of concern to her delegation was that a convention on the prohibition of crimes against humanity should include provisions on mutual legal cooperation and assistance between States. Although draft article 9 (*Aut dedere aut judicare*) reflected the obligation to prosecute or extradite, that obligation alone would not be sufficient to cover the ways such cooperation should take place. Additional forms of cooperation and assistance should be specifically addressed in the next report.

41. Her delegation also drew attention to the initiative to conclude a new multilateral treaty on mutual legal assistance and extradition for the prosecution at national level of the most serious international crimes. To date, 52 States from all continents had expressed support for opening negotiations on such an instrument, and support was growing steadily. Close cooperation between the Commission and the promoters of the initiative would be welcome.

42. Her delegation continued to believe that the topic of *jus cogens* should not have been included in the Commission's programme of work. The report confirmed her delegation's view that there was no evidence that progressive development on the topic was needed.

43. The clear majority of sources cited by the Special Rapporteur would qualify as "doctrine". That included separate opinions of judges at the International Court of Justice. There was good reason why "doctrine" was listed in the Statute of the Court as a subsidiary source of international law: as the Special Rapporteur correctly noted, it could not be decisive. There was also an abundance of *opinio juris* or, more aptly, *opinio juris cogentis*. However, the report did not clarify how, in practice, States dealt with the notion of *jus cogens* and what complexities, if any, it gave rise to. Whatever the outcome of the Commission's work on the topic, it should take into account and be based upon the practice of States. If it appeared that there was insufficient State practice, the Commission should reconsider whether its work on the topic was needed.

44. The Commission should not provide a list, illustrative or otherwise, of the norms considered to have the status of *jus cogens*. Even if illustrative, the list's mere existence would create a high threshold for future norms to be considered *jus cogens*. The

authoritative nature of such a list would likely prevent the emergence of State practice and *opinio juris* in support of other norms.

45. As the Special Rapporteur had noted, further clarification was required with respect to the legal effect of the concept of non-derogation in relation to norms of *jus cogens* in general and in the context of human rights law in particular. The report seemed to emphasize the question of whether States could contract out of norms of *jus cogens*. As an aspect of non-derogation, the impossibility of contracting out of such a norm seemed self-evident. However, her delegation doubted whether that was a cardinal issue: after all, it would be quite unusual for States to want to conclude an agreement expressly contrary to a norm of *jus cogens*. Rather than focusing on the impossibility of contracting out of a *jus cogens* norm, the question should be how the status of *jus cogens* affected an assessment of a State's responsibility for conduct and the availability of rules justifying such conduct.

46. Her delegation saw no need to take a decision on universal versus regional *jus cogens*. The qualification of "universal" attached to norms of *jus cogens* was part of its hierarchically superior position, rather than a geographical element. The fact that a norm applied universally would underscore its non-derogable nature, rather than the other way around.

47. Her Government agreed that the outcome of work on the topic should take the form of conclusions and that some degree of flexibility with respect to changing conclusions previously adopted might be necessary in the light of subsequent findings. However, to complete the topic successfully, the Commission should strive to ensure some form of continuity in its approach.

48. Her delegation welcomed the Commission's decision to include the topic "Settlement of international disputes to which international organizations are parties" in its long-term programme of work. In some respects, it was a logical follow-up to the Commission's work on the responsibility of international organizations. The syllabus stated that the proposed topic would be limited to the settlement of disputes to which international organizations were parties. It would not cover disputes to which international organizations were not parties, but in which they were involved in some other way. Her delegation agreed with that delimitation of the topic.

49. Her Government suggested the inclusion of disputes of a private-law character to which an international organization was a party. As the question of the settlement of such disputes was closely related to the immunities enjoyed by international organizations and their obligation to make provisions for appropriate modes of settlement, the topic clearly involved issues of international law. Moreover, in the practice of international organizations it was principally the settlement of that kind of dispute that had raised questions, including the issue of private claims arising from the activities of United Nations troops. The relevance of also addressing the settlement of disputes with international organizations, including disputes of a private-law character, was an important reason why the Netherlands had placed the topic on the agenda of the Council of Europe's Committee of Legal Advisers on Public International Law.

50. Her Government was still not convinced of the need to include the topic "Succession of States in respect of State responsibility" in the Commission's programme of work. It accepted, however, that that might be a topic of relevance for other States.

51. A leading principle underlying State succession was that no vacuum in terms of State responsibility should emerge either in cases of dissolution of States or the creation of new States, whether it was a result of integration, association, secession or decolonization. State practice and case law suggested that successor States often concluded agreements to avoid the creation of a vacuum in terms of State responsibility. In situations of unilateral secession or annexation, such agreements would often be difficult to reach, but their absence did not result in a vacuum either: the former would be covered by article 10 of the articles on responsibility of States for internationally wrongful acts, and the latter by the rules on unlawful occupation. Consequently, and given the lack of State practice and judicial decisions indicating a legal lacuna, her Government doubted whether there was an immediate need for the Commission to take up the topic.

52. Concerning the desirability of meeting in New York, her delegation stressed that the Commission was an independent body and should continue to carry out its expert work away from Headquarters. The political debate in the Committee should not take place until the reflection on the substantive issues had been concluded

and the annual report presented, and not in conjunction with the traditional work of the Commission. To confuse the two stages of the working process would be neither wise nor desirable.

53. **Mr. Misztal** (Poland) said that the preparation of draft articles on the topic "Crimes against humanity" was of particular importance. That endeavour could close the regulatory gap in combating the most heinous crimes under international law. In that context, draft article 6, paragraph 3, needed to make it clear that the right of States to establish national jurisdiction must be exercised without prejudice to any applicable rules of international law. In draft article 8, paragraph 3, the word "immediately" should be replaced with "without delay". That would be more in line with international standards in that regard, in particular the wording in the Vienna Convention on Consular Relations. Similarly, in draft article 10, paragraph 2 (a), the words "representative of the State" should be replaced with "consular post".

54. As his delegation had stated in 2015, the draft articles would benefit from the introduction of a victim-oriented approach, with particular attention to the most vulnerable category of victims, namely children. It should thus be stipulated in draft articles 1 and 2 that the draft articles also applied to "a remedy and reparation for victims". Moreover, in draft article 4, paragraph 2, the phrase "as a justification of crimes against humanity" should be replaced with "as justification for failure to prevent crimes against humanity".

55. With respect to the topic "Protection of the atmosphere", his delegation suggested the insertion in the definition of "atmospheric degradation" of the words "ambient air quality", which was the term of art in that field. It also proposed that the last sentence of paragraph (7) of the commentary to draft guideline 3 should be replaced with the following: "In this context, it should be noted that not only is the Paris Agreement acknowledging in the Preamble that climate change is a common concern of humankind, but also that ambient air quality is a common concern of humankind, according to WHO Ambient Air Quality Standards and Guidelines. This clearly shows the importance of ensuring the integrity of all ecosystems, including oceans and the protection of biodiversity".

56. On the topic of *jus cogens*, his delegation endorsed the Commission's approach of taking the provisions of the Vienna Convention on the Law of Treaties as the starting point. The concept of regional *jus cogens* was by definition in contradiction with the very notion of norms of *jus cogens* and therefore should not be accepted, given that a prerequisite of such norms was acceptance and recognition by the international community of States as a whole.

57. All norms of *jus cogens* were *erga omnes* obligations, but the converse was not true. *Erga omnes* norms clearly entailed important obligations, but that did not mean that they also had *jus cogens* status. In general, *jus cogens* was a special kind of norm and not a specific, additional source of international law.

58. On the question of developing an illustrative list of norms that had acquired the status of *jus cogens*, his delegation noted that in paragraph 374 of the report of the Study Group on fragmentation of international law (A/CN.4/L.682), the Commission had already indicated "the most frequently cited candidates for the status of *jus cogens*". Reference to examples of those norms had also been made in other past works of the Commission. In his delegation's view, the main value of the Commission's work would be in explaining in more detail the criteria for identification of *jus cogens* norms and the relationship of such norms with other, in particular non-treaty, rules of international law, and in studying the effectiveness and enforcement of those norms.

59. With respect to the topic "Immunity of State officials from foreign criminal jurisdiction", paragraph l (b) and (c) of the new draft article 7 should specify the criteria used to identify crimes in respect of which immunity did not apply. The commentary should include a definition of the crime of corruption and should make it clear that the list of crimes contained in paragraph 1 was exhaustive, if that was the Commission's intention.

60. On the topic "Provisional application of treaties", his delegation supported the Commission's general position, as set out in draft guideline 7, that the provisional application of a treaty in principle produced the same legal effects as if the treaty were in force, unless the treaty provided otherwise or it was otherwise agreed. However, the nature and effects of

the provisional application should be further studied; a comparative analysis of treaty practice was needed.

61. His delegation shared the view that the interplay between provisional application and reservations should be given careful attention. In particular, it was difficult to accept that reservations could be formulated with regard to the provisional application of a treaty. In accordance with the Vienna Convention and international customary law, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. Thus, it was normal practice that a reservation did not take effect until after the expiration of a provisional application, in other words when the treaty entered into force. Any limitation on the provisional application of a treaty should be formulated in the treaty itself or in an agreement (whatever its form) on the provisional application of a treaty.

62. Moreover, the Commission should confirm, in either a conclusion or a commentary, the right of States to apply a treaty provisionally within the limits of their domestic law. Such provisional application could not be considered a reservation, since very often a provision on such an application was already included in the treaty. That case, as some members of the Commission had already noted, was often the most important and contentious aspect of provisional application. In that context, draft guideline 10 should be further considered and streamlined.

63. His delegation again stressed that it agreed with those members of the Commission who had argued that an exhaustive treatment of treaty provisions providing for provisional application was essential for a better understanding of the topic. Thus, there was a need for a more in-depth study of treaty practice, especially regarding treaties that referred to the rights of individuals.

64. **Ms. Ramly** (Malaysia), referring first to the topic "Crimes against humanity", pointed out that, pursuant to the Penal Code of Malaysia, some of the crimes enumerated in draft article 3, paragraph 1, could be prosecuted as ordinary offences. With regard to draft article 7, her delegation took note that States were required to proceed with a prompt and impartial investigation as soon as there was suspicion of a crime having been committed. In other words, a State could be considered as violating draft article 7 if its investigation failed to be prompt and impartial. In her delegation's view, it should be the State's prerogative to determine the parameters of "prompt" and "impartial".

65. In Malaysia, practice with regard to the principle of *aut dedere aut judicare* set out in draft article 9 was based on its Extradition Act of 1992 and the bilateral and multilateral treaties to which it was a party. With regard to draft article 10 and the need to ensure fair treatment of the alleged offender, her delegation believed that it was important to take into consideration the gravity of the offence.

66. Given that a number of multilateral treaties, including the Rome Statute, already addressed crimes against humanity, the time was not yet ripe for the adoption of a new international instrument on the matter. Her delegation reiterated its recommendation that the Commission should focus on drafting guidelines or articles that could be adopted or used as guidance by States in developing domestic legislation on crimes against humanity. The draft articles should be worded in such a way as to ensure that any further work complemented, and did not overlap with, existing regimes.

67. As for the draft guidelines on the protection of the atmosphere", her delegation noted that the new fourth preambular paragraph took into account the special situation and needs of developing countries. In that context, the participation of developing countries in utilizing the atmosphere on an equitable basis should not be marginalized in any way for lack of economic standing and/or technical assistance.

68. Pursuant to draft guideline 3, States had the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures to prevent atmospheric pollution and atmospheric degradation. In her delegation's view, the obligation of due diligence did not require the achievement of a certain result but only that all available efforts be made so as not to cause adverse effects. It merely implied a duty of vigilance and prevention, and did not guarantee that harm would never occur.

69. The Special Rapporteur should clarify the meaning of the phrase "exercising due diligence in taking appropriate measures", as its scope might be questionable when put into practice. Nor did draft

guideline 3 specifically provide for the burden and standard of proof to be borne by the States in meeting the obligation imposed on them. Although the third report explored possible standards, the efforts had not been successful, since it was difficult to ascertain the standard that was to be applicable in a particular circumstance or case. That, coupled with the fact that different standards might be imposed in a similar case, did not ensure coherence. The issue warranted further consideration, particularly since the precautionary principle had been deleted from the draft guidelines. A clear set of guiding principles, at least in the commentary, would be beneficial.

70. With regard to draft guideline 4, although no comprehensive global convention regulated environmental impact assessment, the concept was not alien to most States, as it had been embodied in national legislation and was widely practised. Her delegation did not understand the argument that transparency and public participation had been omitted from the draft guideline because procedural aspects should not be dealt with. On the contrary, transparency and public participation did not constitute simple procedural aspects but were key principles and must be included. Her delegation took note of the Special Rapporteur's proposal for including an element on transparency and public participation in the draft guideline, and it would convey its position after consultations with the relevant government bodies in Malaysia.

71. In relation to draft guideline 5, on sustainable utilization of the atmosphere, her delegation agreed with the Special Rapporteur that the normative character of the concept of sustainability was vague. The concept had led to many disagreements among States on its application. Although in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* the International Court of Justice had recognized that the need to reconcile economic development with protection of the environment was aptly expressed in the concept of sustainable development, it had failed to examine the normative character and standing of the concept. The Special Rapporteur had done little to remove the ambiguity surrounding the concept, as he had simply required States to ensure a proper balance between economic development and environmental protection in their sustainable utilization of the atmosphere.

72. The Commission had departed from that formulation, since draft guideline 5, paragraph 2, provided that sustainable utilization of the atmosphere would merely include, among other things, the need to reconcile economic development with the protection of the atmosphere. Her delegation failed to see how that overcame the underlying difficulty of taking both factors into account. The proposed language avoided the issue. Her delegation urged the Special Rapporteur to conduct an in-depth analysis of the draft guideline to see how the questions raised could be addressed.

73. Similarly, draft guideline 6 did little to settle the long debate over equity; perhaps the criteria for determining the characteristics of equity should be enumerated. The concept could take various forms, such as equitable sharing in the exploitation of resources and participation of countries on an equitable basis. The Special Rapporteur should examine factors to be assessed in balancing the interests of current and future generations. That would introduce a degree of certainty and might prove to be a useful guiding principle.

74. It might not be wise to include draft guideline 7 (Intentional large-scale modification of the atmosphere), as it was closely linked to climate change, a point that was made clear in paragraph (7) of the commentary. In that connection, her delegation recalled the Commission's understanding, referred to in footnote 1231 of the report, that work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution.

75. On the topic of *jus cogens*, her delegation cautioned against expanding the principle beyond the language of article 53 of the Vienna Convention on the Law of Treaties. Given that international law was developing through consent-based instruments, it would be unwise to widen a principle whereby certain universal norms could bind States, with or without their consent.

76. Malaysia welcomed the efforts to identify and set the parameters of the scope and legal consequences of peremptory norms of general international law. However, it cautioned against moving forward with draft conclusion 2, as it was difficult to imagine or

illustrate how non-derogable peremptory norms could be modified, derogated from or abrogated.

77. In Malaysia, insofar as *jus cogens* related to State sovereignty, international law (whether general principles or treaties) must be incorporated into domestic law before it could be enforced by municipal courts. Where there was a divergence of interpretation, in some cases Malaysian judges had given due regard to the international obligations.

78. In relation to *jus cogens* and universal applicability, her delegation looked forward to the Special Rapporteur's work on the persistent objector and on the application of *jus cogens* at the regional or bilateral level.

79. **Mr. Joyini** (South Africa) said that the international community's efforts to protect the atmosphere were crucial to the world's sustainable development and well-being. The atmosphere was a common resource of global concern, and the effects of human interference in the atmosphere had impacts beyond national borders. Protection of the atmosphere should therefore be addressed in international law to the extent possible.

80. The protection of the atmosphere under international law had evolved through treaty-making and through State practice, ultimately giving rise to customary law norms. Nevertheless, such development had not always been systematic or consistent, and specialized legal instruments had been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law as a whole.

81. Although his delegation was not in favour of drafting legally binding provisions or a complete codification of international law on the topic, it believed that the work on the subject was very timely and important, especially considering the imminent entry into force of the Paris Agreement. However, it remained concerned about the blanket exclusion of many rules and principles that, in its view, were an integral part of the law on the protection of the atmosphere. It was not clear how the Commission could possibly study the international law on the topic while ignoring critical rules and principles, such as the precautionary principle, the preventive principle and the polluter-pays principle. South Africa was particularly concerned about the exclusion of the principle of common but differentiated responsibility, the importance of which was recognized in the Paris Agreement. While his delegation welcomed the introduction of the new fourth preambular paragraph, precise operative language was required in the text of the draft guidelines to address the specific situation faced by developing States in relation to the protection of the atmosphere.

82. Despite the exclusion from the scope of the project of several concepts relating to responsibility for atmospheric degradation, his delegation stressed the need for the draft guidelines to deal with the issue of responsibility in an appropriate manner, possibly drawing on the body of international law on State responsibility to identify principles on responsibility that would be particularly helpful in guiding States in the field of atmospheric pollution and degradation. That said, his delegation supported the continuation of the project.

83. The topic of *jus cogens* required further clarification. Given its sensitive nature, the Special Rapporteur should provide the Sixth Committee with comments by States and members of the Commission as cited in the official summary records. The Drafting Committee had delivered an interim report which had been presented for information purposes only, and his delegation was generally in agreement with its draft conclusions, but it cautioned against the Special Rapporteur's intention to retain all the texts in the Drafting Committee until the draft conclusions were ready for adoption on first reading, because such an approach might have the effect of reducing transparency.

84. Reiterating the views expressed at the sixty-ninth session of the Sixth Committee (A/C.6/69/SR.20), his delegation supported the inclusion of *jus cogens* in the Commission's long-term programme of work and expressed the need for greater clarity on its functioning, content and consequences. Such a study would help identify the requirements for a norm to reach the status of *jus cogens* and the effects of *jus cogens* norms on international obligations. That would bring much-needed certainty to the field. While clarity would be invaluable at the international level, it would also be important in relation to domestic matters. In

South Africa, *jus cogens* had been raised in domestic court cases, but with limited discussion.

85. An illustrative list would soon be outdated, and although it might be instructive, it would not assist international lawyers in providing tools to determine for themselves whether norms had achieved the status of *jus cogens* or not. His delegation was therefore pleased that the Commission was debating the issue and hoped that a decision would be taken that considered all factors.

86. Caution should be exercised about regional *jus cogens*, which could create challenges to the universal nature of *jus cogens* and raise concerns in instances where the two were in conflict. His delegation noted that the Special Rapporteur intended to study the question of persistent objector in the future. It agreed with his preliminary observation that there could be no objection to *jus cogens* norms, and it would find it disconcerting if the Commission were to conclude otherwise.

87. His delegation looked forward to seeing the final result of the Drafting Committee on the three draft conclusions. It was disappointed that the Commission had not been able to agree on what South Africa believed were basic and uncontroversial characteristics. It was generally accepted that *jus cogens* norms were universally binding, reflected fundamental values and interests and were hierarchically superior. As the Special Rapporteur's report suggested, the Commission itself had recognized those elements in its previous work, and it was to be hoped that the Drafting Committee would adopt them quickly.

88. South Africa supported the continuing work of the Special Rapporteur and looked forward to the future work envisaged. His delegation would be particularly interested in an analysis of the relationship between customary international law and *jus cogens*.

89. **Mr. Galindo** (Brazil), commenting on the topic "Crimes against humanity", said that his delegation agreed with the importance of including such crimes in domestic legislation and of promoting the harmonization of national legislation on the question. A future convention could facilitate much-needed judicial cooperation in that area, since a number of legal systems, such as his own country's, generally allowed an exception to the principle of territoriality in the application of criminal rules when there was a conventional basis. As one of the founders of the International Criminal Court, Brazil believed that prominence should be given to the language already contained in the Rome Statute, including in relation to responsibility for a crime committed pursuant to a superior order.

90. Regarding the topic "Protection of the atmosphere", his delegation noted that the phrase "aware of the special situation and needs of developing countries" in the fourth preambular paragraph was based on that used in the seventh preambular paragraph of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses and suggested that the Commission should give consideration to the language in the 2015 Paris Agreement, including the phrase "common concern of humankind". At a later stage, the Commission should also examine the applicability of the concept of "common heritage of mankind" to the atmosphere.

91. Turning to the topic of *jus cogens*, he said his delegation appreciated that the Commission would first focus on identifying the general nature of *jus cogens* and the process for its creation. The reference in draft conclusion 3, paragraph 2, to the "fundamental values of the international community" was very important, as was the recognition that such norms were hierarchically superior to others and that they were universally accepted and applicable. It was to be hoped that, at a later stage, the Commission would be able to present an indicative list of *jus cogens* rules.

92. In relation to the topic "Provisional application of treaties", the Commission must continue to bear in mind that some States were not in a legal position to provisionally apply any treaty because of constitutional regulations relating to the separation of powers. That was the case in Brazil, which had therefore formulated a reservation to article 25 of the Vienna Convention. Constitutional differences must be taken into account when the Commission drafted the guideline regarding the relationship with internal law.

93. **Mr. Varankov** (Belarus), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said with regard to the question of the possibility of limiting immunity *ratione materiae* in the event of the commission of a crime against humanity that the relationship with immunity *ratione*

personae, which was of an absolute nature, was particularly important. Subjectively understood values, doctrinal considerations and the practice of individual States were not a sufficient foundation for codification, and certainly not for the progressive development of international law on such an important matter. Moreover, it must be clearly understood that, within the context of the approach proposed by the Special Rapporteur, jurisdiction was not based on guilt, but on the suspicion of the commission of an offence. The attempt to implement such jurisdiction could lead to inter-State conflict and might constitute a violation of the principle of the sovereign equality of States. His delegation did not see grounds for enlarging the approach to include criminal offences of a general nature, such as corruption.

94. On draft article 6, paragraph 3, his delegation's position on the temporal aspect of immunity was unchanged. Needless to say, immunity *ratione personae* ended when the official left office, but at the same time, the personal activities of an official that had been covered by immunity should continue to be covered after the official left office.

95. With regard to the provisional application of treaties, his delegation considered that article 46 of the Vienna Convention was fully applicable to the topic. However, the sentence "This rule is without prejudice to article 46 of the 1969 Vienna Convention" should be replaced with "This rule takes article 46 of the 1969 Vienna Convention into account". The Vienna Convention covered the issue of provisional application of treaties, *mutatis mutandis*, and it would be useful to add that rule to the draft guidelines.

96. On the question of reservations to provisions relating to provisional application, it would be preferable to include a provision in an international treaty granting States the right to declare, when signing the agreement, that they would not temporarily apply the treaty in full or in part.

97. **Mr. Pham** Ba Viet (Viet Nam), referring to the topic "Crimes against humanity", said that his delegation supported the drafting of a convention on the subject to fill the gap in international criminal, humanitarian and human rights law and thereby address the issue of impunity.

98. Many of the provisions contained in draft articles 5 to 10 were modelled after those contained in the statutes of international criminal courts and tribunals, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the Convention on the Prevention and Punishment of the Crime of Genocide, and were reflective of customary international law.

99. However, the obligation to establish the liability of legal persons for the offences referred to in the draft articles deviated from such norms and practices; the concept had yet to gain wide acceptance in international law. As for the legal instruments cited in the commentary, States had formulated reservations to provisions on the liability of legal persons, citing the lack of relevant national legislation. That suggested that the provision did not reflect customary norms. Consequently, sanctions for the acts of legal persons should be addressed in the domestic law of States, and the matter should be removed from the draft articles.

100. Viet Nam welcomed the Commission's work on the topic "Protection of the atmosphere". As a developing country, Viet Nam stressed the need to address the question of equity. The special situation and needs of developing countries should be taken into account in the text, consistent with other international instruments on the subject, including the Stockholm Declaration, the Rio Declaration on Environment and Development and the Paris Agreement.

101. His delegation endorsed the important obligation to protect the atmosphere through the effective prevention, reduction and control of atmospheric pollution and degradation, as set out in draft guideline 3, and it underlined the significance of the inclusion of environmental impact assessments in the domestic legislation of States, which helped ensure that proposed activities under their jurisdiction were in conformity with international standards. For its part, Viet Nam had adopted the Environmental Protection Act in June 2014, which required State-owned and private enterprises to undertake environmental impact assessments prior to launching their projects so as to ensure that all environmental factors were taken into account, based on the best available scientific data.

102. Given that effective protection of the atmosphere relied heavily on scientific knowledge, his delegation welcomed and encouraged collaboration among scientists

in that field as well as the elaboration of regional and international mechanisms to support developing countries in terms of enhancing exchange of information and joint monitoring. It was pleased to see that point reflected in draft guideline 8 [5].

103. On the topic of *jus cogens*, his delegation noted that peremptory norms played an important role in international law and were recognized under the Vienna Convention and the domestic legislation of many States. The Vietnamese Treaties Act, which had been adopted earlier in 2016, recognized *jus cogens* as a principle to be adhered to when Viet Nam negotiated and acceded to international treaties. However, the definition, constituent elements and development of such norms remained unclear, and his delegation commended the Commission's efforts to address those issues.

104. His delegation was concerned about the inconsistencies in draft conclusion 2, paragraph 2, and draft conclusion 3, paragraph 2. The former stated that peremptory norms were the exception to rules of international law that might be modified, derogated from or abrogated by the agreement of States (*jus dispositivum*), whereas, according to the latter paragraph, *jus cogens* was considered hierarchically superior to other norms of international law. That caused confusion about the relationship between the two types of norms in question. Further study was needed to clarify that matter, as well as the issue of regional *jus cogens* and the effect of persistent objection on *jus cogens*.

105. **Mr. Mahnič** (Slovenia), referring to the topic "Crimes against humanity", welcomed the six new draft articles with commentaries thereto. Concerning draft article 5, his delegation agreed with the inclusion of a number of obligations for the domestic prosecution and punishment of crimes against humanity, including the duty of criminalization, the prohibition of the statute of limitations and the requirement for penalties to be commensurate with the gravity of the crime. The draft articles should also reflect the fact that article 77 of the Rome Statute did not include the death penalty. Given the number of States parties to the Rome Statute, work on the topic should proceed in a manner that complemented that instrument.

106. His delegation was pleased that the Rome Statute framework had been followed in elaborating draft article 5, paragraphs 2 and 3, while noting that other substantially similar concepts used to describe aspects of an individual's involvement in a crime against humanity might already exist in domestic criminal law. Given the close reliance on the provisions of the Rome Statute for those paragraphs, his delegation would welcome an examination of the relationship between the topic and the concept of State responsibility, bearing in mind the special nature of article 25, paragraph 4, of the Rome Statute and taking into account the judgment of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

107. Slovenia welcomed the progressive approach taken by the Commission in including liability of legal persons for the commission of crimes against humanity in article 5, paragraph 7. As rightly noted by the Special Rapporteur, the criminal liability of legal persons had become a feature of several national jurisdictions. Legal persons could have significant involvement in the suffering of victims of crimes against humanity. While recognizing the need to address that aspect, his delegation supported the inclusion of paragraph 7, which was progressive in nature but allowed States considerable flexibility in its implementation. That paragraph could constitute a notable novelty and an important contribution to the ongoing work.

108. His delegation attached importance to the emphasis placed on the fair treatment of the alleged offender. The draft articles should also contain an appropriately broad basis for the establishment of national jurisdiction, including universal jurisdiction.

109. Slovenia welcomed the report prepared by the Secretariat on treaty-based monitoring mechanisms that might be of relevance in the Commission's future work on the topic. It would be necessary to assess the compatibility and the relationship of any future monitoring mechanism with existing ones.

110. His delegation recognized the importance of addressing the topic "Protection of the atmosphere" and welcomed the progress made with a view to adopting globally accepted guiding principles. Bearing

in mind the important milestone reached with the signing of the Paris Agreement and the international community's recognition of the need for sustainable development with regard to the atmosphere, his delegation supported the Commission's approach to the topic, which did not interfere with the relevant political negotiations of existing treaty regimes but at the same time reflected the current stage of international law and developments in that regard.

111. Concerning draft guideline 4, on environmental impact assessment, greater clarity of the scope and meaning of the threshold for a "significant adverse impact on the atmosphere" was required. The commentary focused mainly on the idea of an activity that was likely to have a significant adverse impact, whereas it would be useful to consider situations where the impact was caused by several activities.

112. With respect to the question of transparency and public participation in the context of environmental impact assessment, his delegation took note of the decision not to include procedural aspects in the draft guideline. However, the commentary did not give reasons for that decision. As the topic included the intentional large-scale modification of the atmosphere, which could have unexpected, far-reaching consequences, the decision not to take procedural aspects into account should be reconsidered.

113. Paragraph (5) of the commentary to draft guideline 4 merited further explanation. It currently stated that the impact of the potential harm must be significant for both atmospheric pollution and atmospheric degradation, which could be seen as implying that the threshold was reached only when both atmospheric pollution and atmospheric degradation cumulatively were affected.

114. Concerning the topic of *jus cogens*, his delegation took note of the thorough consideration of the characteristics inherent in a *jus cogens* norm and agreed with the enunciation of *jus cogens* norms as being of a special and exceptional nature, reflecting the common and overarching values adhered to by the international community. For that reason, his delegation reaffirmed its view that the persistent objector was incompatible with the nature of *jus cogens*. Allowing the concept of the persistent objector to extend from norms of customary international law to *jus cogens* norms would be contrary to the inherent nature of the latter, from which no modification, derogation or abrogation was permitted. Similarly, Slovenia did not believe that the concept of regional *jus cogens* was compatible with the nature of *jus cogens*.

115. As to the advisability of establishing an indicative list of norms that had acquired the status of *jus cogens*, his delegation shared the view that citing such examples would be consistent with the scope of the topic and would be a useful contribution.

116. **Mr. Momtaz** (Islamic Republic of Iran) said that a "mystery" had persisted for decades about *jus cogens*, in terms of the imprecision of its definition in article 53 of the Vienna Convention and the Commission's recognition early on that there was no simple criterion for determining that a given rule of international law was a *jus cogens* norm; that a good solution would be to state in general terms that a treaty was null and void if it was incompatible with such a norm; and that it was necessary to await State practice and the case law of international courts before deciding on its scope. In the meantime, the Commission had established an indicative list of rules that might be considered *jus cogens* norms, which it had used during the elaboration of its draft articles on responsibility of States for internationally wrongful acts. Since then, international and regional jurisdictions had confirmed the peremptory nature of those norms and had added others, such as the prohibition of torture, but neither the International Court of Justice nor regional courts had established simple criteria for determining that a rule was a *jus cogens* norm.

117. His delegation had some suggestions to help the Special Rapporteur in the elaboration of criteria for determining the peremptory nature of a *jus cogens* norm. It would not be wise for the Commission to draft a list of such norms because such a list would be approximate and could be modified at any time "if a new peremptory norm of general international law emerges", as stated in article 64 of the Vienna Convention. On the other hand, the identification of criteria based on which the existence of such a norm might be determined could serve as a guide to international jurisdictions in their work and avoid a plethora of such norms, which might undermine the

stability of treaty relations and the integrity of the fundamental principles of international law.

118. The aim of the Commission's work on the topic was not to contest the two criteria established under article 53 of the Vienna Convention, namely a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation was permitted and which could be modified only by a subsequent norm of general international law having the same character. On the contrary, the goal was to elucidate the meaning and scope of the two criteria, which were widely accepted by States and were simultaneously applied.

119. In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated that "[t]he question whether a norm is part of the *jus cogens* relates to the legal character of the norm". In his delegation's view, it was its importance for the international community that conferred upon it that character. Norms likely to ensure and consolidate the international public order were clearly of such importance. In other words, it was the imperatives of the survival of international society, and not the law itself, which permitted a norm to be termed peremptory. All States had an interest in those norms' being respected. The rapidity, intensity and broadness of their response to violations thereof were clearly criteria to be taken into account when determining the peremptory nature of such norms.

120. The general principles of law to which article 38 of the Statute of the International Court of Justice referred were the best normative foundation for norms of *jus cogens*. Above and beyond the importance of such principles as sources of *jus cogens* norms, article 38 provided that they might be classified by an international court as norms of *jus cogens* in the international public order. The fact that a norm of international law was accepted as a general principle of law could serve as a criterion for determining its peremptory nature in the international order.

121. In the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the Court had stated that: "[a] *jus cogens* rule is one from which no derogation is permitted". A few years previously, in the above-mentioned advisory opinion, the Court had found that certain norms of international humanitarian law, including the distinction between combatants and non-combatants and the prohibition of unnecessary suffering, constituted intransgressible principles of international customary law. According to the doctrine, that was an indirect allusion to *jus cogens*. Notwithstanding the importance of that criterion, his delegation pointed out that not every norm from which no derogation was permitted was necessarily peremptory. Every rule of international law was by nature non-derogable. For example, the norms of international humanitarian law must be respected in all circumstances, and no derogation was permitted, but that did not mean that they were all peremptory. For instance, protected persons could not waive the rights conferred upon them by the 1949 Geneva Convention, but those rights could not all be termed "peremptory". In that context, the term "intangible" was preferable to "non-derogable".

122. His delegation agreed with the Special Rapporteur that there could be no such thing as a peremptory norm at the regional level. *Jus cogens* was automatically universal, because by definition it must be accepted by the international community of States as a whole. Some regional human rights courts had qualified certain rules as *jus cogens* norms, but that was probably to preserve the public order in a given geographic region and safeguard the unity and integrity of that order by preventing its fragmentation through contradictory national legislation. To accept the existence of a regional *jus cogens* would be to fail to recognize the criterion in article 53 of the Vienna Convention, namely the recognition of such a norm by the international community of States as a whole.

123. The Special Rapporteur should focus on the consequences of the peremptory nature of a norm and not limit himself to the law of treaties or State responsibility. However, it was important to be careful to avoid the destructive effects that an uncontrolled application of *jus cogens* might have on well-established institutions of international law, such as the immunity of States and the principle of the consent of parties to a dispute to compulsory dispute settlement procedures. On the other hand, as respect for fundamental norms of human rights had acquired the status of *jus cogens*, States and international organizations must exercise strict vigilance. In other words, the unilateral acts of States and international organizations should be treated equally and should not

conflict with a peremptory norm of general international law. In both cases, the peremptory nature of the unrecognized norm would make the treaty or unilateral act null and void.

124. **Mr. Simonoff** (United States of America), referring to the topic "Crimes against humanity", said that the development of the concept had played a critical role in the pursuit of accountability. The widespread adoption of a number of multilateral treaties regarding serious international crimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, had been a valuable contribution to international law. The development of draft articles for a convention on the topic could also prove valuable. The topic's importance was matched by the difficulty of the legal issues involved. The United States was studying the Commission's 10 draft articles and commentary thereto, as they presented several complex issues on which it was still developing its views.

125. With respect to *jus cogens*, his delegation appreciated that the topic was of considerable intellectual interest and recognized that a better understanding of the nature of *jus cogens* might contribute to an understanding of other issues of international law, especially human rights law. However, it continued to have some concerns. On a methodological point, his delegation noted that limited international practice existed on important questions, such as how a norm attained *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law. That limited precedent might make it difficult to draw valid conclusions.

126. His delegation also had questions about draft conclusion 3, paragraph 2, as proposed by the Special Rapporteur, which had not yet been adopted by the Drafting Committee. The meaning and purpose of the paragraph were unclear, and describing *jus cogens* norms as protecting "fundamental values" and as "universally applicable" would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by States.

127. His delegation remained concerned about the direction that the Commission appeared to be taking with respect to the topic of protection of the atmosphere. It opposed the inclusion of the topic in the Commission's programme of work, since various long-standing instruments already provided general guidance to States on the development, refinement and implementation of treaty regimes, including very specific guidance tailored to discrete problems relating to atmospheric protection. Any exercise aimed at extracting broad legal rules from specific environmental agreements would not be feasible and might potentially undermine carefully negotiated differences among regimes. Moreover, such an exercise would most likely complicate, not facilitate, ongoing and future negotiations and thus might inhibit State progress in the environmental area.

128. Those concerns had been somewhat allayed by the Commission's 2013 understanding, which his delegation had hoped might prevent the work from straying into areas where it could do affirmative harm. However, the first, second and third reports of the Special Rapporteur had evinced a desire to re-characterize the understanding and take an expansive view of the topic. Especially worrying was the purported identification of "obligations" or "requirements", in contravention of the 2013 understanding that work on the topic would not impose new legal rules or principles on current treaty regimes. If the Special Rapporteur's proposed long-term plan of work on the topic was followed, the work would continue to stray outside the scope of the 2013 understanding and into unproductive and even counterproductive areas. His delegation therefore called upon the Commission to suspend or discontinue its work on the topic.

129. **Mr. Chia-Cheng** (Tuvalu), referring to the important topic "Protection of the atmosphere", said that, as a small island country, Tuvalu was very vulnerable to the effects of climate change and to degradation of the atmosphere, which entailed the risk of a rise in sea levels and more frequent extreme weather. His delegation therefore welcomed the provisional adoption by the Commission in 2016 of five draft guidelines and a preambular paragraph.

130. As a small and low-lying archipelago, Tuvalu had continued to draw attention to the existential threat posed by a rise in sea level, the erosion of its coastal land area and the inundation of its food crops by sea water. The threat to its economy and people were of an existential nature, and Tuvalu had been one the first countries to ratify the Paris Agreement. It was very

encouraged by the status of the ratification commitments under the Paris Agreement, which would expedite efforts to reduce greenhouse gas emissions and limit the global average temperature rise to 1.5 degrees Celsius above pre-industrial levels; ensure that funding pledges were honoured, co-leveraged through domestic resources, official development assistance, the Global Environment Facility and the Green Climate Fund for climate change mitigation and adaptations; and ensure that persons displaced by climate factors were afforded their legal rights in the same way as other migrants fleeing war or conflicts and looking for work.

131. His delegation fully endorsed draft guideline 5, on sustainable utilization of the atmosphere, and draft guideline 6, on equitable and reasonable utilization of the atmosphere. It looked forward to the fourth report and hoped it would provide information on the interrelationship and interlinkage with other fields of international law, such as the law of the sea and human rights law. The protection of the atmosphere was inseparable from the protection of the population.

132. **Mr. Mangisi** (Tonga), referring to the topic "Protection of the atmosphere", said that his delegation was in favour of the adoption of an all-encompassing regime on the subject, thereby avoiding a fragmented approach. There was a pressing need to continue to identify, develop and codify existing and emerging rules and principles of international law. His delegation therefore welcomed the Commission's work on the topic and supported the further elaboration of the draft guidelines.

133. Tonga echoed the concerns voiced by others about the risks to the atmosphere posed by air pollution, ozone depletion and climate change, and it welcomed efforts to identify specific obligations, in particular those under draft guidelines 2, 3 and 4, which had been derived from existing legal rules and principles.

134. His delegation welcomed the further elaboration of draft guideline 2, which set out the scope of the guidelines. Tonga also endorsed the wording of draft guideline 3 and the commentary thereto, and it took note of the reference to due diligence in taking appropriate measures so as to protect the atmosphere. It encouraged further elaboration on the nature of those measures and the activities to which they applied.

135. On draft guideline 4, his delegation took note of the importance of environmental impact assessments and agreed that they should be undertaken only in respect of activities that were likely to have a significant adverse impact on the atmosphere. However, the Commission should also consider minor activities under the control of States that might have a cumulative impact on the atmosphere and specify what it deemed to be the threshold for determining their presence.

136. Tonga agreed with the Special Rapporteur that contemporary challenges to the atmosphere included the areas of tropospheric transboundary air pollution, stratospheric ozone depletion and climate change. The disruptions to the atmosphere caused by anthropogenic activities had a significant detrimental impact on the planet. Urgent and concerted efforts were needed to protect against the depletion of the ozone layer and to reduce organic pollutants. The release of greenhouse gases was detrimental to the atmosphere and caused severe atmospheric changes, leading to rising sea levels and unsettled weather patterns.

137. As a small island developing State, Tonga was particularly susceptible to the loss of land as a result of a rising sea level and to extreme weather patterns brought about by climate change, as seen by the devastating effects of cyclones that had struck the islands in recent years. Tonga therefore supported work on identifying existing and emerging rules of international law in order to provide a framework for the protection of the atmosphere.

138. Recognizing that the atmosphere was a natural and finite resource shared by humankind, Tonga strongly agreed that such a resource required careful planning in its use in order to safeguard and protect it for future generations. Draft guidelines 5 and 6 took on importance in that regard. The Commission and Member States should continue to consider what action States might take to meet their obligation to protect the atmosphere.

139. **Mr. Špaček** (Slovakia), referring to the topic "Crimes against humanity", welcomed the provisional adoption of another six draft articles and the commentary thereto and thanked the Secretariat for the memorandum providing information on existing treaty-based monitoring mechanisms, which would be of relevance for the future work of the Commission.

140. His delegation was pleased that draft article 5 was based largely on article 7 of the Rome Statute; it was well-balanced and included a contemporary perception of the responsibility of superiors and subordinates. The idea of criminal liability of legal persons, especially with respect to crimes against humanity, was challenging. His delegation would closely follow how such liability developed in further work. As noted in the commentary, such liability was unknown in many countries, not even for crimes against humanity. Slovakia had adopted new legislation on the criminal liability of legal persons earlier in 2016, but crimes against humanity had not been included in the scope, although his delegation understood the merits of doing so.

141. His delegation fully endorsed all the other draft articles, in particular draft articles 9 and 10. Draft article 9, together with article 6, paragraph 2, would appear to prevent safe havens, as States must either prosecute or extradite or surrender the accused person to another State or international criminal tribunal for criminal proceedings, and thus perpetrators did not escape accountability. Draft article 10 set out fundamental principles of criminal procedure on fair treatment, which constituted an essential pillar of modern criminal law. In certain cases, it might be argued that those principles, together with the principle of *aut dedere aut judicare*, reflected customary international law.

142. His delegation hoped that future reports would follow the same approach as in the past, and it reiterated its view that the Special Rapporteur's decision to approach the topic with a view to drafting a future convention on the prevention and punishment of crimes against humanity was a wise one.

143. Although the Commission had further developed the concept of the protection of the atmosphere on the basis of draft guidelines, his delegation continued to be concerned about whether the topic was suitable for a final outcome. At the 2016 session of the Commission, steps had been taken to adapt existing and established concepts and principles of international environmental law to the topic, for example the due diligence principle or the obligation to conduct environmental impact assessments. In that sense, his delegation was pleased that the draft guideline on the common concern of humankind had been dropped and that the draft guideline on the obligation to protect the atmosphere had been substantially redrafted through the introduction of a specific obligation to exercise due diligence.

144. On the other hand, his delegation was not convinced by the approach taken in draft guidelines 5, 6 and 7. Although sustainable utilization, equitable and reasonable utilization and even large-scale modification of the atmosphere might seem pertinent, it was premature to draft guidelines on those specific aspects, since the scope of the guidelines itself lacked clarity.

145. The topic of *jus cogens* was of great importance to the international community, and it therefore required a careful and sensitive approach. His delegation welcomed the primary focus of the Commission's work on the methodological aspects of the question. An indicative list consisting only of those peremptory norms which had been explicitly identified in the practice of international courts and States would be of significant assistance in promoting greater legal clarity.

146. His delegation doubted that the concept of regional *jus cogens* norms had any legal basis in international law or State practice. The introduction of such norms would cause problems in determining their application and interpretation and in defining their relationship with multilateral treaty rules and customary rules.

147. Slovakia endorsed the Special Rapporteur's intention to consider the criteria for *jus cogens* and their consequences. In its view, peremptory norms reflected and enshrined fundamental values of the international community, but so did principles of international law. His delegation encouraged the Special Rapporteur to examine the relationship between principles of international law and *jus cogens* and their possible interplay. The Special Rapporteur's intention to consider the relationship between *jus cogens* norms and *erga omnes* obligations, including within the context of treaty-based *jus cogens*, was useful.

148. **Mr. Válek** (Czechia), speaking in exercise of the right of reply, referred to the statement made by a delegation at the morning meeting which did not correctly describe the role of the Tokyo and Nuremberg Tribunals. Czechoslovakia had been a member of the

United Nations War Crimes Commission and a State party to the London Agreement establishing the Nuremberg Tribunal, and it had contributed to the prosecution of the main criminals of the Axis. The international justice rendered by the two tribunals constituted one of the pillars on which the United Nations had been established. The archives of the United Nations War Crimes Commission remained in the custody of the Secretary-General and provided vivid testimony of war crimes, crimes against humanity and genocide, the repetition of which the founders of the Organization had resolutely decided to prevent. His delegation reiterated its full support of the Commission in its work on the draft convention on the prevention and prosecution of crimes against humanity.

149. **Mr. Ahmed** (Sudan), speaking in exercise of the right of reply, and responding to the comment of the previous speaker, said that in its statement in the morning, his delegation had referred to what the Special Rapporteur's report had stated with regard to crimes against humanity. The Special Rapporteur said that he had taken some of the text from the heritage and archives of the Nuremberg and Tokyo Tribunals. As everyone knew, those tribunals had been set up by the victorious powers. The Sudan fully respected the principles agreed upon by the international community and also the principle of fighting impunity, but it hoped that the Commission's project on crimes against humanity would be flawless. His delegation had made its statement in order to draw attention to the need to exercise caution when citing that heritage.

The meeting rose at 5.55 p.m.