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Chair: Mr. Muhumuza . . . . . (Uganda)
later: Mr. Gafoor (Chair) . . . . . (Singapore)

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17-19296 (E)

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-ninth session (*continued*) (A/72/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VIII to X of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

2. **Ms. McDougall** (Australia), addressing the topic of peremptory norms of general international law (jus cogens), said that the development of draft conclusions on the topic was appropriate, in order to reflect the dynamic nature of the formation, acceptance and recognition of jus cogens norms by States. Australia supported the requirement of evidence underpinning whether a norm was accepted and recognized as jus cogens; however, it also agreed that there might be methodological shortfalls with that approach. That was especially the case if there was only limited international practice to draw on to identify the degree of acceptance and recognition by States. Given the relative uncertainty as to whether a particular norm had risen to the level of jus cogens, she queried whether the inclusion of an illustrative list of such norms would be of additional benefit, and whether consensus could be reached on such a list. Moreover, it might undermine the objectives to be achieved, namely to bring clarity to, and agreement on, the criteria to be applied in identifying peremptory norms. Australia therefore recommended that a cautious approach should be taken if a decision was made to develop a list of jus cogens norms.

3. **Mr. Simonoff** (United States of America) said that while a better understanding of the nature of jus cogens might contribute to the understanding of certain areas of international law, notably human rights law, his delegation continued to have a number of concerns with the topic "Peremptory norms of general international law (jus cogens). In terms of methodology, it questioned whether sufficient international practice had been accumulated 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.

4. The criteria for the identification of peremptory norms must be based on, and be consistent with, article 53 of the 1969 Vienna Convention on the Law of Treaties. The fact that the draft conclusions provisionally adopted by the Drafting Committee at the sixty-eighth and sixty-ninth sessions (available on the Commission's website) correctly reflected the complete definition of peremptory norm set forth in article 53 was welcome. His delegation agreed with the statement in draft conclusion 5 (Bases for peremptory norms of general international law (jus cogens)) that customary international law was the most common basis for peremptory norms of general international law, but it was not aware of any examples of peremptory norms that were based on general principles of law, contrary to what was asserted in paragraph 2 of the draft conclusion. The Commission should either delete the reference to general principles of law explain in the commentary that it had not been established that such principles could ever actually be a basis for peremptory norms of international law.

5. With respect to draft conclusion 9 (Evidence of acceptance and recognition), as proposed by the Special Rapporteur in his second report (A/CN.4/706), his delegation did not believe that judgments and decisions of international courts and tribunals could serve as evidence of acceptance and recognition by States of norms as peremptory norms. Both draft conclusion 13 of the Commission's text on the identification of customary international law (A/71/10, paragraph 62) and Article 38 of the Statute of the International Court of Justice appropriately recognized judgments and decisions of international courts and tribunals as only subsidiary means for determining rules of law. That was the approach that should be taken with respect to the identification of peremptory norms as well.

6. While the Commission's work on succession of States in respect of State responsibility could lead to greater clarity in that area of the law, his delegation was not confident that the topic would enjoy broad acceptance or be of interest to States, in view of the small number of States that had ratified the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. The issues raised by the topic were complex, and careful consideration by Governments would be required as the Commission continued to develop the text; at the current, early stage, the Commission must clearly indicate when it believed it was codifying existing law as opposed to progressively developing the law.

7. With regard to draft article 3 (Relevance of the agreements to succession of States in respect of responsibility), as proposed in his first report on the topic (A/CN.4/708), the Special Rapporteur described the relevance of agreements as depending on the type of agreement involved. His delegation was uncertain whether the distinction between devolution agreements, claims agreements and other agreements was well established in State practice. Further consideration

should be given to whether the distinction provided a sound basis for general conclusions about State practice. On the other hand, draft article 3, paragraph 4, correctly recognized the central importance of the principles reflected in articles 34 to 36 of the 1969 Vienna Convention, including the general rule that a treaty did not create rights or obligations for a third State without its consent.

8. With respect to the topic "Protection of the environment in relation to armed conflicts," he said that the United States remained concerned by the attention paid to the concurrent application of branches of law other than international humanitarian law during armed conflict. International humanitarian law was the *lex specialis* in situations of armed conflict, and the extent to which rules contained in other branches of law might apply must be considered on a case-by-case basis. The United States was similarly concerned that the Commission might not be the appropriate forum to consider whether certain provisions of international humanitarian law reflected customary international law; moreover, such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*.

9. Several of the draft principles were phrased in mandatory terms, purporting to dictate what States "shall" or "must" do. Such language was only appropriate with respect to well-settled rules that constituted *lex lata*. According to the draft introductory provisions and draft principles provisionally adopted so far by the Drafting Committee (A/CN.4/L.870), the draft principles were aimed at "enhancing" the protection of the environment in relation to armed conflict — in other words, at influencing the progressive development of the law — and there was little doubt that several of the draft principles went well beyond existing legal requirements. For example, draft principle 8 provisionally adopted during the sixty-eighth session and contained in document A/CN.4/L.876 introduced new substantive legal obligations in respect of peace operations, and draft principle 16 expanded the obligations to clear, remove or destroy explosive remnants of war, as set out in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons), to include "toxic and hazardous" remnants of war.

10. **Mr. Fernández Valoni** (Argentina), referring to the second report on peremptory norms of general international law (jus cogens) (A/CN.4/706), said that the first criterion for jus cogens identified by the Special Rapporteur was that it should be a norm of general international law, and the most obvious manifestation of general international law was customary international law, as confirmed by the decisions of national and international courts and tribunals. His delegation was therefore gratified that reference was made to the jurisprudence of the Supreme Court of Argentina in that regard, and considered that the work on the topic of identification of customary international law should also be taken into account.

11. Regarding the second criterion, recognition and acceptance of a jus cogens norm as non-derogable, his delegation concurred with the Special Rapporteur that it was the recognition and acceptance of States that was relevant, but considered that the practice of non-State actors could contribute to assessing recognition and acceptance by States.

12. The report shed light on how acceptance and recognition by States needed to be shown, listing the relevant materials, such as treaties, resolutions of the General Assembly, public statements on behalf of States and decisions of international courts and tribunals. In his delegation's view, the ratification status of specific treaties and the provisions on which States had made reservations could also be seen as expressing the consent of States. Another element, which was included in draft conclusion 3 as a descriptive but not constituent element, was the fact that jus cogens norms protected the fundamental values of the international community. Although that was not one of the constituent elements in article 53 of the Vienna Convention, account should certainly be taken of additional elements that elevated a norm to the status of jus cogens, such as the values that it protected.

13. Such descriptive elements were mentioned in a number of decisions of international courts and tribunals, such as *Prosecutor v. Furundžija*, in which the International Criminal Tribunal for the Former Yugoslavia had indicated that the prohibition of torture had become a jus cogens norm because of the "importance of the values it protects." In its advisory opinion on *Reservations to the Convention on Genocide*, the International Court of Justice stated that the principles underlying the Convention were principles which were recognized by civilized nations as binding on States, even without any conventional obligation. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court alluded to the values protected by jus cogens norms in referring to rules of humanitarian law that were fundamental to the respect of the human person and elementary considerations of humanity. Regional bodies had also made express reference to that normative element: for example, the Inter-American Commission on Human Rights, in

Michael Domingues v. United States, and the European Court of Human Rights, in *Al-Adsani v. United Kingdom*.

14. The identification of jus cogens norms could have a major impact on State practice with respect to grounds for rejection of requests to extradite, requests for mutual legal assistance as part of the exercise of universal jurisdiction and obligations to extradite or prosecute in cases involving international crimes. Hence the need for a cautious approach to the topic, giving priority to an analysis that ensures legal certainty in relations among States.

15. Turning to the Commission's project on crimes against humanity, he said that, without prejudice to the comments on the draft articles that his Government might wish to make before the deadline of 1 December 2018, work on the project could go forward without risk of contradicting agreements already reached by the international community, since draft articles 1 to 15 were based on existing precedents in international instruments on international crimes, in particular the Rome Statute of the International Criminal Court. Among the positive aspects of the draft articles was the inclusion of the principle of *aut dedere aut judicare* and the fact that, for the purposes of requests for extradition, a crime against humanity could not be assimilated to a political crime. On the other hand, it was noteworthy that provisions prohibiting the granting of amnesty or pardon for such crimes had not been included.

16. While States parties to the Rome Statute were under an obligation to incorporate the crimes under the Statute into their domestic legislation, the obligations of prevention, investigatory cooperation and prosecution for such crimes fell upon all States. In that connection, Argentina, together with Belgium, Slovenia, the Netherlands and Senegal, had put forward an initiative for the adoption of a multilateral instrument, to which all States were invited to accede, on mutual legal assistance and extradition for crimes against humanity, war crimes and genocide. The initiative did not conflict with the project under way on crimes against humanity.

17. Lastly, with reference to the provisional application of treaties, his delegation welcomed the fact that the draft guidelines on the topic took contemporary practice into account and made it clear that article 25 of the Vienna Convention was not an autonomous regime: on the contrary, a treaty that was applied provisionally had legal effects just as did a treaty that had entered into force, and consequently, the other provisions of the Vienna Convention were applicable mutatis mutandis.

18. **Mr. Nagy** (Slovakia) said that his Government welcomed the Special Rapporteur's approach of taking article 53 of the 1969 Vienna Convention as a point of departure in developing the criteria for the identification of peremptory norms of general international law. Several points, however, were of concern.

19. For example, with regard to the requirement for acceptance and recognition, it was vitally important to specify how so-called *opinio juris cogentis* was to be achieved in the community of States. Indeed, in the view of his delegation, draft conclusions 6 to 9, as proposed by the Special Rapporteur, created uncertainty as to how *opinio juris* was determined, which was undesirable. The Special Rapporteur should therefore elucidate more carefully the question of whether acceptance and recognition was necessarily and solely linked to non-derogability, and if so, whether States needed to express their acceptance and recognition explicitly or could do so by reference to the most fundamental values or the most significant and universal norms, for example. Moreover, as the draft conclusions employed the terms "acceptance" and "recognition" almost always inseparably, it was not clear whether the former referred to a mere passive attitude and the latter to some active statement or conduct or whether they represented two different stages of *opinio juris* that were needed. Regrettably, draft conclusion 9, dealing with evidence of acceptance and recognition, did not shed much light on those points. Stating that evidence of acceptance and recognition "can be reflected in a variety of materials" and then giving examples of treaties, resolutions, public statements and so on did not reveal whether acceptance and recognition could also take a tacit, implicit or acquiescent form.

20. Draft conclusion 7, by describing the phrase "international community of States as a whole" as referring to "a large majority of States", left open the question whether a particular uniformity among that large majority was required in order to correspond to the formulation "as a whole."

21. Lastly, Slovakia supported the inclusion of an illustrative list of norms that qualified as peremptory: without such a list, due consideration of all the essential aspects of peremptory norms of general international law would hardly be possible.

22. **Mr. Racovita** (Romania) said that his country was largely supportive of draft conclusions 4 to 9 on peremptory norms of general international law (jus cogens), which it considered to be a finely balanced and accurate account of the existing international law in the field. In relation to draft conclusion 4, Romania agreed with the two-criteria approach followed and concurred with the Special Rapporteur that modification by a subsequent norm of jus cogens, although present in the

text of the article 53 of the 1969 Vienna Convention, was not an independent criterion for the identification of a jus cogens norm.

23. Draft conclusion 5 set out the criterion to be used for identifying a norm of jus cogens (paragraph 1) and then proceeded to designate the sources of such norms (paragraphs 2 to 4). Romania contended that, conceptually, the criteria for jus cogens norms and the sources of jus cogens norms were different matters, and it would be sound and more useful to have them treated in separate provisions; also, the title of the draft conclusion should contain a specific reference to sources. In the interests of streamlining the text, draft conclusion 6 might be dispensed with, since the thesis in paragraph 1 followed from the definition set out in draft conclusion 4, while the content of paragraph 2 was essentially covered by draft conclusion 7.

24. Turning to draft conclusion 7, he said his delegation had some reservations about the statement in paragraph 3 that "acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of jus cogens." By their nature, jus cogens norms embodied peremptory obligations binding upon every State and reflected the fundamental norms shared by the community of States; such norms were accepted by the unanimity or quasi-unanimity of States. The same conclusion followed for the phrase "norm recognized by the international community as a whole" in draft conclusion 7. Romania would suggest that a more stringent wording be used instead of "large majority" and would favour adding at least the term "very."

25. Draft conclusion 8 offered some useful distinctions and clarification that would help to differentiate between acceptance and recognition as a criterion for jus cogens norms and other concepts. Finally, draft conclusion 9 was helpful in exemplifying the types of materials which might be advanced as confirmation for acceptance and recognition of a rule of international law as a jus cogens norm. Romania would support retaining draft conclusions 8 and 9 as they stood.

26. Turning to the succession of States in respect of State responsibility, he said the debate within the Commission had prompted one important conclusion, namely that there was no single normative framework of relevance for the subject matter and that State practice was limited, especially in terms of its coherence. Romania could agree with the Special Rapporteur on the immutable character of the non-succession thesis. However, there was a need to properly assess various situations pertinent to State succession in order to avoid making the opposite assertion: that the succession thesis was the general rule. Most likely, there would be a tendency to move away from the non-succession thesis in specific, well-defined situations.

27. Romania was reluctant to engage in the development of new law in that area. Several points made in the course of the Commission's debate substantiated the position that a set of draft guidelines or, at most, draft rules might be developed. The need for flexibility and the subsidiary nature of the relevant rules required a less formal instrument than a convention. The work on the succession of States in respect of State responsibility could be a helpful model to be used and modified by the States concerned. Nevertheless, Romania remained unconvinced that the Commission should pursue the topic, as it had limited practical relevance.

28. His delegation found merit in the point made by the Working Group on protection of the environment in relation to armed conflicts that other areas could be further addressed, including issues of complementarity with other relevant branches of international law, such as international environmental law or protection of the environment in situations of occupation. Also relevant, in order to make the analysis comprehensive, was complementarity with the law of the sea and the relationship with threats of piracy and unconventional sea warfare. While acknowledging the difficulty of making an inventory of rules applicable to hybrid conflicts and non-State actors, Romania firmly believed that they were of relevance to the subject.

29. Regarding the question of special vulnerable categories, he said that damage to the environment during armed conflict could have direct consequences, in any territory, for all people — those who depended on agriculture, for example — even if they were not indigenous people. Thus, the Commission might want to consider a general statement aimed at the protection of people who had a very close connection to the environment and which would encompass impoverished local populations.

30. **Ms. Egmond** (Netherlands), referring to the topic of peremptory norms of general international law (jus cogens), said that as the debates in the Commission had demonstrated, many elements of jus cogens remained contested. The Netherlands shared the concern voiced by France in the past with respect to the lack of clarity about the concept of jus cogens, and in particular its application, and hoped that the Commission would continuously evaluate its progress on the topic.

31. Her Government supported the notion that customary international law constituted the most

important basis for rules of jus cogens and shared the hesitations expressed at the Commission's sixty-ninth session about deriving jus cogens from general principles and treaty provisions. Most general principles lacked the non-derogable character of rules of jus cogens, and many treaty provisions lacked universal application; where they did apply universally, it was usually through their customary status in addition to being included in a treaty. Universal adherence to a treaty was an exception rather than a rule. Her Government supported the two-pronged test: for a rule to attain the status of jus cogens, both recognition of the rule as such (practice and *opinio juris*) and acknowledgement of its peremptory status (practice and *opinio juris cogentis*) were required.

32. The Drafting Committee had resolved the question of whether rules of jus cogens protected or reflected fundamental values by including both. However, her Government was not sure that the question itself was really relevant; what mattered was that the rule should be accepted and recognized by the international community as having the status of jus cogens and that no derogation from it was possible.

33. In the view of the Netherlands, the inclusion of a list of norms having the status of jus cogens was not desirable. The authoritative nature of any such list composed by the Commission, illustrative or otherwise, would in all likelihood prevent the emergence of State practice and *opinio juris* in support of other norms. If the inclusion of a list was nevertheless considered necessary, her Government would suggest also including a reference to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included non-limitative lists of peremptory norms.

34. The field of application of jus cogens should by no means be limited to the law of treaties: the effect of the jus cogens status of a norm in the context of jurisdiction and immunities, for instance, and the relevant rules contained in the articles on State responsibility, should also be taken into account.

35. As to the next steps, the second report on the topic (A/CN.4/706) showed that practice regarding the definition of jus cogens varied between the various courts and tribunals. However, that left open the question of what happened when a particular rule was hierarchically superior to another. Moreover, non-derogability was not merely a consequence of the status of jus cogens: it was also a characteristic, because a rule from which derogation was possible could not be a rule of jus cogens. The primary question should not be about the possibility of contracting out of a norm of jus cogens, but about how the status of jus cogens affected the assessment of responsibility for the conduct of a State and the availability of rules justifying such conduct. Her Government had noted the scarcity of State practice on that question and accordingly encouraged the Commission to conduct an analysis of how, in practice, States and their courts dealt with the weight attached to jus cogens rules in relation to other applicable rules.

36. Addressing the topic of succession of States in respect of State responsibility, she said that the Netherlands was not convinced that the outcome should take the form of draft articles with commentaries: it would be more appropriate to develop a set of principles or guidelines, to be based on the leading principle underlying State succession and responsibility, namely that no vacuum in State responsibility should emerge in cases of dissolution or unification, where the original State had disappeared, or in cases of secession, where the predecessor State remained. Whether or not rights or obligations were transferred in specific situations should be assessed on a case-by-case basis and addressed in a succession agreement. Her Government therefore welcomed the Special Rapporteur's suggestion that the conclusion of agreements between States should be emphasized. State practice as well as case law suggested that successor States were generally aware of the need to avoid creating a vacuum in terms of State responsibility, through the conclusion of agreements among them. Given the sensitive nature of succession of States and the need to give States the flexibility to negotiate the conditions of succession, any principles or guidelines should be of a subsidiary nature and serve as a model for the conclusion of agreements.

37. Concerning the topic of the protection of the environment in relation to armed conflicts, although her Government took note of the statement by the Working Group that it was important to complete work on the topic, it wished to reiterate its assessment, expressed in 2014 after the consideration of the preliminary report of the Special Rapporteur, that the overall purpose of the study was only to clarify existing rules and principles of international environmental law in relation to armed conflicts. The Commission should refrain from redefining the recognized rules of international humanitarian law. Noting the reference made by the Working Group to issue of complementarity, she said that while it would be useful to explore the issue, the Netherlands cautioned against any further broadening of the topic.

38. **Ms. Ben David Gerstman** (Israel) said that while the notion of jus cogens had existed for centuries, the process of attaining that status was still unclear. In light

of that uncertainty, the Commission should continue to refine the exercise, without immediately expanding its scope, by further developing the existing draft conclusions and creating a corresponding commentary. Regarding the compilation of a list of jus cogens norms, either illustrative or comprehensive, Israel was of the view that it would be premature to do so before completing the work regarding the criteria for and implications of jus cogens, as it was likely to produce confusion as opposed to clarity and consensus.

39. Due to the fundamental interrelationship between customary norms and jus cogens, Israel recommended holding a continuous dialogue on the work on jus cogens and that on the identification of customary international law in order to ensure consistency and harmony, both in conceptual approach and in the categories and terminology used for each of the topics. There were currently considerable discrepancies between the principles and terminology used in the draft conclusions on jus cogens and those used to address similar areas in the context of the work on the identification of customary international law.

40. Referring to the draft conclusions proposed by the Special Rapporteur, she said that clarification was required regarding the distinction between the criteria for jus cogens as stipulated in draft conclusion 4 and the descriptive elements specified in draft conclusion 3; the current formulation of the two draft conclusions left room for debate regarding the significance of draft conclusion 3. It was questionable whether it was appropriate to include descriptive elements that were not of a normative nature and whose legal ramifications were unclear in conclusions of a legal nature. On the other hand, Israel supported the clear distinction in draft conclusion 5 between sources of law that could serve as a basis for jus cogens norms, like customary international law, and sources that could only reflect such norms, like treaty law.

41. Regarding the level of acceptance and recognition required for the identification of a norm as jus cogens, as addressed in draft conclusion 7, her delegation agreed that the present wording was unbalanced and did not reflect current methodology for such identification; moreover, acceptance should be by “virtually all” rather than “a large majority” of States.

42. Her earlier comment regarding the need for consistency with the project on the identification of customary international law was of particular importance when discussing draft conclusion 9. The standard of evidence required to substantiate jus cogens was significantly higher than the standard necessary to substantiate customary law, which itself was rigorous. When treaties were used as evidence of the existence of peremptory norms, only those with virtually universal adherence could provide evidence of acceptance. It was inappropriate to look to political resolutions of international organizations or judgments of national courts as evidence, and Israel would recommend deleting that element from the draft conclusions.

43. Given the reality of contemporary States, Israel questioned the need for a study of the topic of succession of States in respect of State responsibility. Although the project was in its infancy, and it was too early to determine its final form, any final product would be subsidiary in character to agreements between States in the context of a specific succession.

44. As for the draft articles, her delegation shared the concern of some members of the Commission that draft articles 3, paragraph 4, and 4, paragraph 3, might be redundant, simply restating the fact that existing agreements were subject to the accepted principles of international law. Israel agreed with those who advocated referring only draft articles 1 and 2 to the Drafting Committee at the current juncture, retaining draft articles 3 and 4 for future discussion.

45. **Ms. Mousavinejad** (Islamic Republic of Iran) said that while the second report on jus cogens (A/CN.4/706) indicated that the cumulative criteria for the identification of jus cogens norms were derived from article 53 of the 1969 Vienna Convention, it was silent on the question of who determined whether the criteria had been met. To fill that lacuna, one solution might come from article 66 (a) of the 1969 Vienna Convention, in which the International Court of Justice was recognized as the main competent body for resolving disputes on the application or interpretation of jus cogens. In paragraph 125 of its judgment of February 2006 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, the Court stated that the rules contained in article 66 of the Vienna Convention did not have the nature of customary international law. Furthermore, a number of countries had made reservations to that article when they had become parties to the Convention.

46. According to paragraph 31 of the report, the criteria for the identification of jus cogens norms referred to the elements that should be present before a rule could be qualified as a norm of jus cogens. Hence, non-derogability could not be considered as a criterion, as it was a consequence of the emergence of a jus cogens norm. As had been reaffirmed by the Human Rights Committee in its general comment No. 29, the enumeration of non-derogable provisions was related to

but not identical with the question whether certain human rights obligations bore the nature of peremptory norm of general international law. Furthermore, the category of peremptory norm extended beyond the non-derogable provisions given in article 4, paragraph 2, of the International Covenant on Civil and Political Rights.

47. Her delegation endorsed the new title of the topic, as it was derived from the 1969 Vienna Convention. It continued to believe that the idea of developing a list of jus cogens norms needed further consideration. If such a list was going to be eventually developed, the reference in article 52 of the 1969 Vienna Convention to the prohibition of the threat or use of force as voiding a treaty should be at the top of the list. Article 52 should be read in conjunction with article 53 in terms of the ab initio nullity of a treaty concluded in contradiction with jus cogens.

48. Her delegation was of the conviction that in the event of a conflict between norms of jus cogens and obligations under the Charter of the United Nations, jus cogens norms remained superior. The obligations under the Charter would only prevail if the conflict was between those obligations and obligations under any other international agreement, as stipulated in Article 103 of the Charter.

49. Reference had been made to the specification by some courts of certain rules as constituting regional jus cogens, in order to preserve public order in a given geographical region. Nevertheless, according to article 53 of 1969 Vienna Convention, the main reason for recognizing a peremptory norm of general international law was that it was a norm that had been accepted and recognized by the international community of States as a whole. It was evident that the notion of regional jus cogens could hardly be inferred from that criterion.

50. With respect to the draft conclusions proposed by the Special Rapporteur, she said that draft conclusion 7, paragraph 2, on the requirement of acceptance and recognition by a large majority of States, her delegation endorsed the reference to "a very large majority" of States, representing the main forms of civilization and principal legal systems of the world. It likewise agreed with the combination of draft conclusions 6 and 8, since draft conclusion 8 was a reformulation of draft conclusion 6.

51. Considering draft conclusion 4, the term "*démontrer*" in the French text was not a proper equivalent of the term "establish," as they did not denote the same threshold; therefore, she proposed the term "*établir*" to resolve the discrepancy between the two versions.

52. As to the topic "Succession of States in respect of State responsibility," she said that due to the rarity of State practice and the limited number of relevant cases, the conclusion that the rule of non-succession in respect of State responsibility had changed seemed far from convincing. If the Special Rapporteur believed otherwise, he ought to provide richer source materials and reasoning.

53. Her delegation concurred with the Special Rapporteur's argument that in principle an agreement between States should have priority over subsidiary general rules on succession. For the purposes of the topic, only those agreements that were concluded between States under the applicable rules of international law on treaties and after the date of succession should be considered. Rules governing succession of States should not affect the rights and obligations of liberation movements in States under foreign occupation, whose situation after independence was comparable to countries formed from tabula rasa. In case of illegal protracted foreign occupation, any responsibility arising from the wrongful act of an occupying Power would be continuously borne by the occupier and not by the successor State, even after termination of the occupation. That was to be inferred from a recognized principle of international law, namely *ex injuria jus non oritur*.

54. Her delegation supported the deletion of draft article 2 (e), on the definition of international responsibility, since neither the articles on State responsibility nor the articles on the responsibility of international organizations contained such a provision.

55. Concerning draft article 4, paragraph 2, on unilateral declarations, she noted that it did not include all of the legal requirements of unilateral declarations: the Special Rapporteur should refer to the guiding principles adopted by the Commission in 2006.

56. On the final form of the Commission's work on the topic, her delegation was not convinced that draft articles were a good choice. In the past, States had preferred to settle their disputes about succession through bilateral agreements. Thus, she was inclined to agree with some members of the Commission that draft guidelines would be more appropriate.

57. Regarding the materials prepared by non-governmental organizations such as the *Institut de Droit International* and the International Law Association with regard to succession of States in respect of State responsibility, she said that the Commission appeared to have two options: either to stick to the rules that reflected *lex lata* in the work already done, which raised the question as to the richness and novelty of the final

product, or to opt for taking the work done as a point of departure.

58. **Mr. Thathong** (Thailand), speaking on the topic of peremptory norms of general international law (jus cogens), said that while the fact that the Special Rapporteur had taken the definition of jus cogens in article 53 of the Vienna Convention as the basis for his analysis was welcome, especially given that it was the most commonly used definition of jus cogens, that definition was only "for the purposes of the present Convention," and it was part of a treaty. The interpretation of the definition should therefore follow the steps laid down in articles 31 and 32 of the Vienna Convention.

59. Regarding the question of whether or not there should be an illustrative list of jus cogens norms, Thailand was of the view that establishing such a list would hinder the development of jus cogens, which was dynamic and evolving in nature. On the meaning of the "international community of States as a whole", draft conclusion 7, paragraph 3, suggested that, for the purpose of identifying jus cogens, acceptance and recognition by a large majority of States was sufficient, and recognition by all States was not required. However, during the negotiation of article 53 of the Vienna Convention, there had been some uncertainty surrounding the phrase "as a whole." Some States had voted against article 53 precisely because the phrase was unclear. In his delegation's view, draft conclusion 7, paragraph 3, did not accurately reflect what the negotiators of article 53 had intended, and the term "as a whole" required a much higher threshold than simply a "large majority." More concrete evidence based on State practice should be provided by the Special Rapporteur in support of his conclusions. It was most important not to rush to conclusions in areas where State practice was unclear or limited. At the same time, the Commission should continue to identify and assess developments pertaining to jus cogens that had taken place in international law after the adoption of the Vienna Convention, in order to ascertain the understanding of jus cogens that most clearly reflected the current intention and practices of all States.

60. On the topic "Protection of the environment in relation to armed conflicts," he said that the damage caused by armed conflicts to the environment could have devastating long-term effects on both the Earth's ecological well-being and on people's livelihood, potentially reversing years of hard-earned developmental gains. Yet little attention had been given to the prevention and mitigation of such damage. Therefore, Thailand was following with great interest how the interrelationship between international environmental law and international humanitarian law would be further developed in that regard. Active engagement with international organizations that had relevant experience and expertise, such as the United Nations Environment Programme, the United Nations Educational, Scientific and Cultural Organization and the International Committee of the Red Cross, would enhance the understanding of the environmental consequences of armed conflicts and the appropriate preventive and remedial measures that could be taken. Thailand encouraged the Commission to continue refining the draft principles and elaborating the draft commentaries in an expeditious manner.

61. **Mr. Varankov** (Belarus), speaking on the topic of peremptory norms of general international law (jus cogens), said that the consideration of such norms was long overdue. The enhancement of legal certainty would minimize the danger of abuse in the face of a disturbing tendency by various judicial bodies, in their interpretation of international treaties, to claim that rules contained in treaties that had not gained wide adherence, or rules not underpinned by State practice, constituted jus cogens. That sort of reasoning, whether by judicial institutions or by States, was tendentious and devoid of any legal foundation.

62. The work on the topic of jus cogens must go hand in hand with that on the identification of customary international law. To that end, the development of a working definition of general international law would be desirable. Based on the criteria set out in article 53 of the Vienna Convention, his delegation considered that the notion of regional jus cogens norms could come into play only for States that had agreed to the application of such norms; accordingly, such norms could not be of universal application. Nevertheless, it would be useful to look at examples of norms of regional jus cogens and to work out a methodology for identifying peremptory norms in general.

63. Turning to the draft conclusions themselves, he said that the idea of incorporating in draft conclusion 3 the wording found in the articles on State responsibility was promising, as it would avoid the "fundamental values-based" approach. Even if a single listing of fundamental values could be envisaged, such values would differ greatly, both in individual content and in relative significance. While not disputing the statement that jus cogens norms reflected and protected fundamental values, he strongly endorsed the Special Rapporteur's view that those were descriptive and not constituent elements of jus cogens. The danger, however, was that the introduction of those elements would complicate the identification of jus cogens norms because of diverging views about what constituted

"fundamental values". To avoid such undesirable ambiguity, while still including the descriptive elements, a very clear, tangible distinction must be drawn between the constituent and descriptive elements.

64. Concerning draft conclusion 7, he recalled that a number of delegations, including his own, had pointed during the previous session to the problematic relationship between persistent objection and jus cogens norms. While jus cogens norms were indisputably applicable to all States without exception, the role of the persistent objector in the formation of such norms was not entirely clear. Logically, a norm could not be universally applicable if it was the subject of persistent objection, yet according to draft conclusion 7, paragraph 2, acceptance and recognition by all States was not required for a norm to be identified as jus cogens.

65. Perhaps the Commission had chosen to use the approach of the Drafting Committee at the Vienna Conference on the Law of Treaties, which had included in article 53 the reference to acceptance and recognition by the international community "as a whole" "to indicate that no individual State should have the right of veto." That would seem to exclude persistent objectors from the formation of jus cogens norms. However, even that point required elucidation, for if the persistent objection of a State did not obstruct the emergence of a jus cogens norm, then that State would end up being bound by a norm that had emerged, not only without its agreement, but also against its clearly expressed will. That state of affairs went against the very nature of international law, and in particular, against the principle of sovereign equality of States, and it called for very close and circumspect consideration by the Commission.

66. The wording of paragraph 4 of draft conclusion 5 (Jus cogens norms as norms of general international law) simplified and distorted the role of international treaties as a source of jus cogens. In his second report (A/CN.4/706), the Special Rapporteur had carefully traced the relationship between customary international law and treaty law. It was true that an international treaty could reflect, help crystallize and be the basis for the formation of a rule of customary international law. Paragraph 4, however, covered only one aspect of that relationship: that a treaty could reflect a norm of general international law capable of rising to the level of a jus cogens norm. While the Commission often insisted on the need to read the texts it produced in conjunction with the commentaries thereto, an important relationship like the one between customary international law and treaty law should be clearly delineated in the text itself.

67. Concerning draft conclusion 8, he suggested that the use of the terms "acceptance and recognition" should be harmonized, and the relationship between acceptance and recognition clarified. That was all the more important in view of the Commission's indication, under the topic of identification of customary international law, that the subjective element of customary international law referred to legal conviction and not to formal consent. The idea of "formal consent" was best conveyed by "acceptance," whereas "legal conviction" could best be rendered by "recognition." The translation into Russian of "acceptance" and "recognition" did not correspond to the sense in which they were used in the English and French language versions.

68. On draft conclusion 9, he agreed that the consistent condemnation of certain acts and the unanimous adoption of resolutions in international organizations could serve as evidence of the existence of jus cogens norms. On the other hand, the resolutions of and statements in international organizations could not be sources of rules of law, including jus cogens, although they could be useful for identifying such rules. In that connection, he endorsed the views of some members of the Commission that it was incorrect to assert that decisions of courts and tribunals were evidence of jus cogens as they existed as a subsidiary means for identifying norms of jus cogens. The wording of paragraphs 3 and 4 of the draft conclusion should be adjusted accordingly. Lastly, it was important to include in the draft conclusions some specific characteristics of jus cogens norms which would facilitate their identification, including the fact that they were not susceptible to modification, except by another jus cogens norm.

69. Turning to the topic of succession of States in respect of State responsibility, he said his delegation endorsed the basic aim of the Commission's work, namely to identify rules of international law governing both the transfer of obligations and the transfer of rights arising from the responsibility of States for internationally wrongful acts. The format of draft articles with commentaries would be the best way of ensuring consistency in the Commission's work. In terms of methodology, maximum emphasis should be placed on the analysis of existing practice.

70. His delegation was inclined to endorse the Special Rapporteur's conclusion that modern international law did not support the general thesis of non-succession in respect of State responsibility. That thesis might have held in the context of decolonization (tabula rasa), but not today. The rejection by a successor State of any responsibility arising from the internationally wrongful

acts of a predecessor State was not in line with the rule of law in international relations and could entail the rejection by other States, particularly the injured States, of their responsibility with regard to the successor State. The rights and benefits gained by the successor State as part of succession should be accompanied by international responsibility.

71. His delegation was in favour of studying how succession of States related to international organizations and the responsibility of States in connection with acts of an international organization that no longer existed. The identification of a trend in that area would be difficult and would largely entail the progressive development of international law. The Commission's output should be rules to be applied and adjusted by the States concerned in the absence of a special agreement between the predecessor State and the successor State.

72. In addition to studying international practice, it would also be useful to look into how analogies from national law might apply — for example, cession, debts, liability for injury, and so forth. It was important to recall that, in the absence of universal rules in that area, whether or not a successor State was prepared to assume the obligations of the predecessor State was taken into account when considering the question of its recognition. What was also needed at the present stage of the work was a classification of internationally wrongful acts.

73. As to the draft articles proposed by the Special Rapporteur, he agreed with the members of the Commission who had proposed the addition in draft article 1 (Scope) of a reference to succession "in respect of rights and obligations arising out of an internationally wrongful acts", as it would help to focus the scope of the topic. It would also facilitate further work on the text. As to the possible examination of succession of governments, including lawful or unlawful succession under international law, he said that even though that would be a complex and sensitive task, his delegation was entirety in favour, because it was currently of central importance.

74. In draft article 2 (Use of terms), all the terms to be used in the draft articles should be defined.

75. Concerning draft article 3 (Relevance of the agreements to succession of States in respect of responsibility), he would like to know the logic behind the inclusion of paragraphs 1 and 2. Agreements on succession were the most appropriate and desirable options for the States concerned, and they should be covered by the rules in section 4 (Treaties and third States) of the Vienna Convention. At the very least, paragraph 1 of draft article 3 needed to be revised on the understanding that, in the absence of objections by third States that were the beneficiaries of the rights concerned, the obligations of the predecessor State devolved upon the successor State through their agreement on succession. Paragraph 4 should indicate that agreements between States on succession were governed by articles 34 to 36 of the Vienna Convention, with due regard for the specific features of their respective legal systems and their status as subjects of law.

76. Belarus supported draft article 4 (Unilateral declaration by a successor State), although the wording of paragraph 2 could perhaps be simplified. A reference in the commentary to the Commission's work on unilateral acts of States would be conducive to a systemic approach to and acceptance of the draft article.

77. **Ms. Puerschel** (Germany), referring to the topic of peremptory norms of general international law (jus cogens), said that her delegation shared the concerns expressed by other States on the lack of relevant State practice. Germany favoured a cautious approach.

78. On the draft conclusions as provisionally adopted by the Drafting Committee, Germany agreed with the general reasoning of draft conclusion 5: it primarily must be customary international law, and not treaty law or other sources, that qualified as general international law and thus formed the basis for jus cogens. Treaty rules only exceptionally reflected peremptory norms of general international law, but that was not sufficiently well conveyed in the draft conclusion; it should be clarified in the wording of the conclusion or in the accompanying commentary.

79. As to the other criterion for jus cogens, namely acceptance and recognition by the international community of States as a whole that a norm was non-derogable, she said that in view of the serious implications of the identification of a jus cogens norm, the highest standards had to be applied. Germany welcomed the specification in draft conclusion 7 that "acceptance and recognition by a very large majority of States was required for the identification of a norm as a peremptory norm of general international law." However, that phrase still left too much scope for interpretation, and further clarification in the commentary was advisable. As Germany had stated during the discussion of the Commission's work on identification of customary international law, the absence of a specific reaction by States to the proclamation of a jus cogens norm by others should only indicate the acceptance of a norm if circumstances called for a reaction.

80. As for the question whether regional jus cogens should be mentioned in the draft conclusions, Germany did not deem it necessary for the Commission to deal with that question as part of the project at the present stage.

81. Commenting on draft conclusion 9, she said that Germany attached great importance to the Commission's contribution to the determination and progressive development of international law and valued the outstanding quality of its work. Nevertheless, the explicit mention of the Commission's work in the draft conclusion appeared questionable. It was also in contrast to the Commission's conclusions on the topic "Identification of customary international law," in which the Commission's work had been mentioned only in the commentary.

82. Finally, Germany did not consider it necessary for the Commission to undertake the enormously difficult task of adopting an enumerative list of norms that had acquired jus cogens status. Even if such a list was only illustrative, it might lead to wrong conclusions being drawn and risked establishing a status quo that might impede the evolution of jus cogens in the future.

83. *Mr. Gafoor (Singapore) took the Chair.*

84. **Ms. Hořňáčková** (Czechia) said that norms of jus cogens emerged only on the basis of State consent and when they were identified by the international community of States as a whole as peremptory norms. Czechia therefore supported paragraph 1 of draft conclusion 5, as provisionally adopted by the Drafting Committee, which indicated that "the most common basis" for the formation of jus cogens was customary international law; however, it had doubts whether treaty provisions and general principles of law could also serve as the basis for peremptory norms of general international law, as was stated in paragraph 2.

85. Turning to the topic "Succession of States in respect of State responsibility," she said that it was now time to subject to scrutiny the old dogma according to which the possibility to invoke responsibility for an internationally wrongful act committed either by or against a predecessor State stopped at the door of State succession. That view, common in traditional literature, and which some still advocated, was largely based on an understanding of State responsibility that was very different from the concept underlying the Commission's articles on responsibility of States for internationally wrongful acts. Furthermore, for some time now, it had been generally accepted that the succession of States did not necessarily produce a clean slate in terms of treaty relations and debts. The question then arose why State succession should wipe out the consequences of an internationally wrongful act.

86. Her delegation agreed with the Special Rapporteur that contemporary international law did not preclude succession in respect of secondary rights and obligations arising from an internationally wrongful act of the State and encouraged him to consider formulating a general provision encapsulating that thesis. That, of course, would be only a starting point in the more complex exercise aimed at answering the questions whether specific rules of international law were emerging that supported the devolution of secondary obligations or rights arising from internationally wrongful acts of States in situations of State succession and whether there were any prospects for their progressive development and codification.

87. Concerning draft article 1 (Scope), as proposed by the Special Rapporteur, she said that her delegation was satisfied with its content. In view of the relationship between the present topic and the Commission's previous work on State succession and State responsibility, Czechia also agreed on the need to use substantively identical definitions. That was vital for a proper understanding of the different instruments and their interaction, and it was also a precondition for preserving harmony between the outcome of Commission's work on the present topic and its previous work on related topics.

88. She noted with satisfaction that draft article 2 (Use of terms) incorporated verbatim the most relevant definitions in the 1978 and 1983 Vienna Conventions on succession of States. Unlike those Conventions, the Commission's articles on State responsibility did not contain a provision on use of terms, and accordingly, did not provide a technical definition of the terms "international responsibility" and "State responsibility." Therefore, the decision to omit a definition of the term "international responsibility" in draft article 2 was the right one. The Commission could simply work on the basis of an understanding that the responsibility of States for internationally wrongful acts was already covered in its 2001 articles on State responsibility.

89. Concerning the orientation of the future work, she said that while account should be taken of the particularities of various types of State succession, such as the transfer of a part of a territory, secession, dissolution, unification and the creation of a newly independent State, the structure of the draft articles did not need to faithfully follow the structure of the 1978 and 1983 Vienna Conventions. Rather, it should revolve around specific elements of State responsibility: for instance, how the State responsibility provisions on

restitution, compensation and satisfaction would translate into the context of State succession; how they would operate in relation to a successor State or States; and how they would operate if the predecessor State continued to exist, but means for restitution were available only to the successor State or would require the joint action of the predecessor State and the successor State or of two or several successor States. The Commission should also examine whether, or in which circumstances, there was a role for compensation between successor States or between the predecessor and the successor State or States, in situations when one of them honoured in full a secondary obligation (e.g. restitution) towards the injured State. A similar range of questions arose in situations when the predecessor State was the victim of an internationally wrongful act of another State.

90. Finally, concerning the topic "Protection of the environment in relation to armed conflicts", she noted that the Commission had not inscribed it in its agenda with a view to its progressive development and codification and had never indicated an intention to work on a legally binding instrument. Should there be a need for the amendment of existing instruments, such a task would have to be undertaken, in appropriate instances, by the State parties to those instruments, not by the Commission. Assuming that the Commission intended to continue working on a set of principles or rules already contained in existing legal instruments that dealt with the protection of the environment and were applicable in armed conflicts, it should explain what was the value of such an exercise, and in particular how a mere compilation of provisions of existing legal instruments could "enhance" environmental protection in the context of armed conflicts, as purported in draft principle 2. The risks arising from a selective or incomplete compilation should also be duly considered.

91. **Mr. Hitti** (Lebanon) said that for nearly 70 years, the Commission had been clarifying aspects of international law, and some of its output had provided valuable guidance for many States. Attention should be paid to not overburdening the Commission with more issues than it could handle.

92. Regarding the protection of the environment in relation to armed conflicts, he recalled his delegation's position that the following subjects should be studied: responsibility and the obligation to provide reparation; application of the principles of proportionality and due diligence in the context of the environment; the humanitarian consequences of the impact of armed conflicts on the environment; and protection of the environment in situations of occupation.

93. **Mr. Shin** Seoung Ho (Republic of Korea), commenting on the succession of States in respect of State responsibility, said that his delegation recognized the need for harmony between that topic and the previous work of the Commission on related fields of responsibility and succession, while anticipating that the current topic would be able to fill some of the gaps that remained in those fields. Regarding the draft articles proposed by the Special Rapporteur, his delegation supported the Commission's decision to exclude the issues of international liability for injurious consequences arising out of acts not prohibited by international law from draft article 1 (Scope), and to limit the topic to succession of responsibility for obligations and rights with regard to internationally wrongful acts.

94. Regarding draft article 2 on the use of terms, his delegation had noted its consistency with the 1978 and 1983 Vienna Conventions on succession of States. The definitions of the terms set out in draft article 2 (a) to (d), namely "succession of States", "predecessor States", "successor State" and "date of succession of States," were the same as those used in articles 2 (b) to (e) of the 1978 Vienna Convention.

95. For future work on the topic, the key issue was to determine whether general rules on the succession of States existed or not, particularly when the types of succession of States were different. There could be two possible approaches. The first was to identify, based on the traditional rule of non-succession, a case where, exceptionally, the obligations and rights of a predecessor State devolved upon the successor State. The second was to depart from the traditional rule of non-succession and try to find a general rule suitable to various types of succession of States. The Commission should examine the matter in detail at its next session.

96. Categorizing State succession was not an easy task. The 1978 and 1983 Vienna Conventions on succession of States had referred to the "uniting of States," while the draft articles on the nationality of natural persons in relation to the succession of States, adopted by the Commission in 1999, had renamed the category "unification of States." His delegation had also noted that the draft resolution on the same issue adopted by the *Institut de Droit International* in 2015 had referred to the merger of States and the incorporation of a State into another existing State, instead of using the comprehensive formulation of unification of States.

97. **Mr. Şen** (Turkey), referring to the subject of peremptory norms of general international law, said that his Government was still hesitant about whether there was a need for codification or progressive development

of the concept. The Special Rapporteur had revised the title to "Peremptory norms of general international law (jus cogens)," which was more consistent with article 53 of the 1969 Vienna Convention. Turkey did not see any benefit in developing a list of jus cogens norms, even if the list was illustrative and non-exhaustive. It would be a time-consuming task for the Commission, which should instead work on developing a methodology for their identification.

98. On the six draft conclusions proposed by the Special Rapporteur, his delegation considered that the criteria for jus cogens stipulated in draft conclusion 4 were in line with article 53 of 1969 Vienna Convention. Draft conclusion 6 simply reiterated draft conclusion 4, in the sense that there had to be acceptance and recognition by the international community as a whole, and it should be deleted or be further elaborated. Draft conclusion 7, paragraph 2, should also be deleted, in order to maintain the clarity of paragraph 1. As set out in paragraph 1, it was the acceptance and recognition of the community of States as a whole that was relevant in the identification of norms of jus cogens.

99. On the topic of succession of States in respect of State responsibility, he said that the divergent comments and observations set out by the Special Rapporteur in his first report on the topic as well as in the Commission's report to the General Assembly had confirmed his Government's concerns and hesitations because of the complexity and immaturity of the subject matter. The complexity arose from the fact that the topic consisted of two components, both of which had not yet been completely settled in the legal and political contexts. Moreover, it was not clear which proportion of the subject matter was or should be the subject of international law, or was political. Thus, the topic did not lend itself to being generalized or regulated in a certain way. Theoretical divergences between the views of the Special Rapporteur and those of some States confirmed the inherent vagueness about the political and legal nature of the topic.

100. Concerning the reference made in the first report to the Commission's earlier work on State succession and State responsibility, he recalled that the outcome of the Commission's work on State succession had found limited support among States. Indeed, due to the prolonged reluctance of States to espouse the articles on the nationality of natural persons in relation to the succession of States, the adoption of the relevant text had had to be postponed indefinitely. Similarly, the 1978 Vienna Convention was binding upon only a limited number of States, and the 1983 Vienna Convention had not yet come into force. Therefore, those rules were far from being accepted as customary law or as general international norms. Although the Special Rapporteur referred to the lack of universal rules concerning State succession and argued that there were only several legal areas to which the succession of States applied, he preferred to fall back on the main terms and definitions used in the two Conventions, which he justified on the ground that the adoption of certain terms and definitions did not imply that all or most of the rules in the two Vienna Conventions were applicable to the present topic.

101. The initial picture drawn in the first report implied a lack of the concerted State practice which was necessary for codification. His delegation was therefore doubtful whether the Special Rapporteur's stated goal, including both progressive development of new norms and codification, could be achieved.

102. Uncertainty also prevailed in respect of the second component of the topic, namely State responsibility for internationally wrongful acts, the fundamental concepts of which had not been pinned down in international law. The 2001 articles on State responsibility could not be taken as the sole basis for codification in a new area. Consequently, if the Special Rapporteur wished to use some of those articles selectively under the topic, he needed to demonstrate that their content reflected the broad acceptance of States in the particular cases of State succession.

103. Regarding the Special Rapporteur's proposal on default rules, he said that taking into account States' lingering disinclination towards the 2001 articles on State responsibility, his delegation was not fully convinced that it could gain broad support.

104. Turning to the topic of protection of the environment in relation to armed conflicts, he drew attention to the importance of coherence between the work undertaken so far on the topic and the future work to be embarked upon by the new Special Rapporteur. His delegation wished her every success in the completion of the work on that important aspect of international law.

105. **Mr. Smith** (United Kingdom) said that the Commission's work on the topic of peremptory norms of general international law(jus cogens) was an opportunity to provide clarity and assistance to practitioners, in particular domestic courts faced with the task of identifying and determining the legal effects of jus cogens norms. The focus of the work should be on identifying the rules dealing with the formation, operation and legal effects of jus cogens norms. The complexity and controversy lay in determining the process for the identification of such norms and their significance once identified. While commentators were united as to the existence of jus cogens, in many respects

that was where the unity ended. The Commission's work on the topic thus had the potential to influence the way in which the international community regulated its conduct, but also to divide States. It was against that background that the United Kingdom reaffirmed its support for the Commission's work on the topic, while urging it to proceed with great caution.

106. Turning to the draft conclusions, he said that his delegation did not consider draft conclusion 2 to be helpful, for a number of reasons. It was unrealistic to attempt to capture accurately, within the draft conclusions, the rationale that underpinned jus cogens. It was a controversial and essentially theoretical matter which did not need to be addressed, even in the introductory manner that was now proposed. While norms of jus cogens could well reflect and protect fundamental values of the international community and possess a hierarchically superior status, draft conclusion 2 did not help to provide the clarity and technical assistance which would be of the most practical value to States and practitioners. Moreover, it was necessary to maintain a clear distinction between descriptive elements on the one hand, and the criteria for identification and the consequences of identification, on the other. Conflating the two could be taken as an intention by States to alter the meaning and effect of the definition set forth in article 53 of the 1969 Vienna Convention.

107. That point was illustrated by the subjective term "fundamental values" and the associated terminology. The Special Rapporteur contended in paragraph 22 of his second report that whether jus cogens "reflected" fundamental values or "protected" them was irrelevant. Also immaterial was the distinction found in the literature between "fundamental interests" and "fundamental values". The general theme, noted the Special Rapporteur, was the same. The United Kingdom accepted that argument, but what was needed was not a mere "general theme" but precise analysis reflecting the practice of States. In addition, the term "fundamental values" might either water down the constituent elements of jus cogens or introduce an additional element, making the identification of jus cogens norms more difficult. Either eventuality could undermine the place of jus cogens in the international legal order or leave it open to abuse.

108. Thus, the inclusion of a descriptive paragraph such as draft conclusion 2 risked taking the project into the territory of pure policy, at the risk of not securing consensus among States on matters of practical concern. An exposition of the "descriptive and characteristic elements" of jus cogens might have its place in the commentary to the draft conclusions, but there was no practical value, and instead there were dangers, in its featuring in the draft conclusions themselves.

109. In relation to draft conclusion 5, he said that his delegation took note of the fact that the wording of that draft conclusion mirrored article 53 of the 1969 Vienna Convention, in particular with the use of the words "norm" and "general international law". It therefore welcomed the inclusion in the Commission's long-term programme of work of the topic "General principles of law", which was a further reason to proceed cautiously on the jus cogens topic, since there was some overlap between the two and there might be a need to ensure consistency.

110. Draft conclusions 6 and 7 concerning the process for acceptance and recognition of jus cogens left a number of matters unresolved. While customary international law must be evidenced by State practice as well as *opinio juris*, there was no corresponding requirement in the draft conclusions for identifying the hierarchically superior norms of jus cogens. It was strange that the higher legal order of jus cogens should be formed on the basis of a lower threshold.

111. Similarly, the criterion of acceptance and recognition by the "international community of States as a whole" under article 53 of the Vienna Convention appeared to have been watered down to an undefined "very large majority" of States. While capturing the precise meaning of the term "international community of States as a whole" was certainly difficult, the use of the word "majority," however qualified, seemed to imply something less than the whole. The Special Rapporteur referred in his reports to article 53 being a point of departure for the work; however, the United Kingdom had always considered that the work should not depart in any way from the definition in that article and should be consistent with the rule it contained.

112. Turning to the succession of States in respect of State responsibility, he pointed out that there was very little by way of State practice to guide the Commission in that area. The State practice identified by the Special Rapporteur in his report was highly context-specific and sensitive, and must be viewed in its historical, political and cultural context. Rather than revealing any discernible trends of universal application, the practice identified tended to demonstrate the contrary. The succession of State responsibility involved policy — indeed political — decisions which went to the heart of the identity of the States involved. Many of the Special Rapporteur's contentions went clearly into the territory of substantive policy-making, or *lex ferenda*. The Commission needed to be absolutely clear whether it was setting out *lex lata* or engaging in *lex ferenda*.

113. The United Kingdom retained an open mind as to the utility of the work on the topic. One option could be to produce model clauses which States in a succession situation could use as a starting point for determining where State responsibility lay. Anything more prescriptive might risk not securing the endorsement of States.

114. On the topic of protection of the environment in relation to armed conflicts, the United Kingdom wished to recall the three points it had made during the Committee's consideration of the topic in 2016: the Commission should not seek to modify the law of armed conflict; while the preparation of non-binding guidelines or principles could be useful, it was not clear whether there was a need for new treaty provisions; and international humanitarian law was the *lex specialis* in the area of protection of the environment in relation to armed conflicts.

115. **Ms. Ahamad** (Malaysia) said that while Malaysia supported the Special Rapporteur's efforts to clarify the topic of peremptory norms of general international law (jus cogens), it encouraged him to conduct a thorough analysis of article 53 of the 1969 Vienna Convention, on which the draft conclusions were based, as the element of modification which existed under that provision had not been covered in his second report. In relation to draft conclusion 5, Malaysia was of the view that further clarifications were needed about the use of Article 38, paragraph 1, of the Statute of the International Court of Justice as a basis for determining jus cogens norms and whether recognition of the whole international community of States was required. With regard to draft conclusion 9, Malaysia would like to stress that the work of expert bodies and scholarly writings as secondary means in identifying a norm of general international law as a norm of jus cogens must be subject to the recognition of the whole international community of States. Malaysia looked forward to the work of the Special Rapporteur in relation to the doctrine of the persistent objector and the application of jus cogens norms on a regional or bilateral basis.

116. Malaysia supported the inclusion of the new topic of succession of States in respect of State responsibility in the Commission's programme of work, as it would fill the gaps in the law concerning succession of States and State responsibility that had been left for future development after the Commission's efforts leading to the adoption of the 1978 and 1983 Vienna Conventions on succession of States. Malaysia welcomed the Commission's having restricted the scope of the topic to the transfer of rights and obligations arising from internationally wrongful acts, excluding any issues of international liability for injurious consequences arising out of acts not prohibited under international law and of responsibility of international organizations.

117. In his first report (A/CN.4/708), the Special Rapporteur had made a preliminary survey of State practice and had discussed quite substantively the issue of whether there was a general rule of non-succession or of succession, but he had not provided any concrete answer on the matter. Therefore, it was essential to address clearly whether there was such a general rule applicable to different types of State succession in respect of rights and obligations arising from State responsibility. That work should be done prior to exploring any possible exceptions or saving clauses, such as those set out in draft articles 3 and 4. Furthermore, in deliberating the issue of the general principle governing the succession of States in respect of State responsibility, the Special Rapporteur had placed more emphasis on State practice in European countries rather than other regions. As such, the analysis on that key issue seemed to be disproportionate. In order to address the issue comprehensively, it was necessary to analyse State practice in regions outside Europe for inclusion in future reports on the topic.

118. Draft article 1 clarified the fact that the scope of the draft articles covered rights and obligations arising from internationally wrongful acts in the case of succession of States. Hence, the future work to formulate draft articles on the topic should be confined within that framework. In relation to the scope, she recalled that, acting under Chapter VII of the Charter of the United Nations, the Security Council had established the International Criminal Tribunal for the Former Yugoslavia, under its resolutions 808 (1993) and 827 (1993), and the International Criminal Tribunal for Rwanda, under its resolution 955 (1994). In that light, Malaysia recommended that the Commission and the Special Rapporteur should undertake a comprehensive study on the role of the Security Council in addressing internationally wrongful acts in accordance with its powers to maintain international peace and security under the Charter, in order to ensure that there was no overlap between the Commission's work and the Security Council's statutory role.

119. The importance of the topic of protection of the environment in relation to armed conflicts was demonstrated by the continued interest in the topic of Member States as well as international bodies such as the United Nations Environment Programme and the International Committee of the Red Cross. Substantial work had already been done, but the question of the final form of the draft principles on the topic was to be subjected to further consideration at a later stage. In that connection, she recalled her country's position as to the

structure, scope, use of terms and methodology for the topic, as well as the rights of indigenous peoples, as expressed during the Committee's consideration of the topic at the seventy-first session of the General Assembly.

120. Malaysia looked forward to further efforts to address gaps in the draft principles. The protection of the environment in armed conflicts should not be viewed exclusively through the lens of the laws of warfare. The protective elements envisioned for the draft principles should provide clarification on the applicability of and the relationship between international humanitarian law, international criminal law, international environmental law, human rights law and treaty law. To that end, in the drafting process, reference must continue to be made to issues of complementarity with other relevant branches of international law.

121. **Mr. Nguyen** Nam Duong (Viet Nam), addressing the topic of peremptory norms of general international law, said that such norms were recognized both in the 1969 Vienna Convention and in the domestic legislation of many States. Although his country's legislation on treaties, adopted in 2016, recognized peremptory norms of international law that were to be adhered to in the course of negotiating and entering into international treaties, the identification of such norms remained unclear. Viet Nam therefore encouraged the Commission to continue its research into matters related to jus cogens and was generally in agreement with draft conclusions 4 and 5 as presented in the Commission's report on the topic (A/72/10).

122. Turning next to the topic of succession of States in respect of State responsibility, he said that it was a complicated issue on which actual practice within the international community was lacking. In tackling such a topic, a wide range of matters needed to be taken into account, such as responsibility towards international organizations, responsibility for wrongful acts that were not necessarily in breach of international law, for example expropriation, requisition and confiscation, and cases when the predecessor State and the successor State both existed at the same time. In his Government's view, the principle of non-succession was the predominantly applicable one, as there was insufficient State practice and case law to conclude otherwise, and the rule of State succession to responsibility could be considered an exception.

123. On the topic of protection of the environment in relation to armed conflicts, he said that regardless of the intentions of the belligerents, armed conflicts had grave and lasting impacts not only on the population, but also on the land, air, water and ecosystem. Despite the intervening decades, the effects of war on the environment were still very clearly felt in Viet Nam, and the same was true for all armed conflicts that occurred throughout the world. His country was therefore very supportive of the continuation of work on the topic in order to establish State responsibility in dealing with remnants of war, particularly those that had damaged the environment. The research of the Commission should be complementary to existing international law on the protection of the environment and laws governing armed conflicts, particularly the Geneva Conventions and the Additional Protocols thereto.

124. **Mr. Celarie Landaverde** (El Salvador), referring to the topic of peremptory norms of general international law (jus cogens), said that the historical analysis under way since the start of work on the topic was facilitating the development of criteria for the identification of jus cogens norms, taking the 1969 Vienna Convention as a starting point. Referring to the draft conclusions proposed by the Special Rapporteur, he said that such criteria as those proposed in draft conclusions 5 and 6 were not based solely on consent; the very existence of jus cogens norms presupposed significant limitations on the validity of consent under international law, since such norms were supposed to reflect essential collective interests whose protection entailed the imperative of hierarchical superiority, resulting in their non-derogability. Further study was needed concerning the reference to general principles of law in draft conclusion 5, paragraph 3: while they were certainly instrumental to the fulfilment of international obligations, and the possibility that they were constituent elements of jus cogens norms should not be excluded, there was a wide range of views about their functioning. In draft conclusion 7, paragraph 2, the term "attitudes" should be replaced by "convictions", which better conveyed the fact that one of the bases for jus cogens was customary international law. As to draft conclusion 8, his delegation agreed that the Special Rapporteur should consider the issue of acquiescence as a form of acceptance and recognition of the peremptory nature of jus cogens norms. Lastly, the development of an illustrative list of norms would be of great use in the future study of the topic.

125. On the succession of States in respect of State responsibility, a complex topic on which finding solutions acceptable to all States would be difficult, he said that one of the difficulties was the traditional doctrine of non-succession, under which responsibility could never be transferred to a successor State. It was therefore be useful to conduct a critical analysis so as to clarify the effects of State succession in respect of the responsibility of States for internationally wrongful

acts. It would also be useful to develop draft articles on the topic, as had been done for succession of States in respect of treaties and in the economic domain. In order to provide a clear explanation of the legal effects that might result from succession, specifically whether the international legal personality of the States concerned was retained or lost, the various forms of State succession should be taken into account.

126. Regarding the draft articles proposed by the Special Rapporteur in his first report, the definition of "succession of States" in draft article 2 (a) did not include legal means through which one State replaced another as responsible for the international relations of a territory. Such modification by legal and peaceful means was an integral part of State succession and should at least be mentioned in the commentary. In order to preserve consistency with the Commission's previous work, draft article 2 (e), or the commentary thereto, should list the elements that constituted an internationally wrongful act of a State, namely that conduct consisting of an action or omission should be attributable to the State under international law and should constitute a breach of an international obligation of the State. New definitions should also be included in the text, such as the elements that constituted a unilateral declaration of a successor State.

127. He agreed with some members of the Commission that draft articles 3 and 4 should not yet be referred to the Drafting Committee, so that the Special Rapporteur could include additional material on such matters as the various categories of succession of States and how their regulation could affect the agreements on succession referred to in draft article 3.

128. On the topic of protection of the environment in relation to armed conflicts, he said that his delegation maintained its position that the distinction between international and non-international armed conflicts should be abandoned, since both could cause irreversible damage to the environment. El Salvador continued to support the division of the draft principles into temporal phases, but cautioned against drawing definitive dividing lines, since there would always be obligations which must be complied with at all times.

129. Referring to the draft principles provisionally adopted by the Commission, he said that paragraph 2 of draft principle 9 established a triple obligation to take care to protect the natural environment against widespread, long-term and severe damage, but the word "and" should be replaced with "or". That way, States would not need to wait for damage to meet the triple cumulative standard; one of the three would be sufficient. With regard to paragraph 3, the fact that the environment was public, transnational and universal in nature, and that its protection must entail the same particularities, must be kept in mind. It was a continued source of concern that the paragraph accepted that the natural environment could be attacked if it was a military objective: the wording of the paragraph should be changed, because it appeared to echo automatically the terminology of civilian and military property. Moreover, there was a contradiction between draft principle 5 and draft principle, paragraph 3, since States could designate areas of major environmental and cultural importance as protected zones, whereas at the same time, draft principle 9 admitted that the environment could be attacked when it had become a military objective, without specifying any exceptions.

130. **Mr. Hirotani** (Japan), addressing the topic "Peremptory norms of general international law (jus cogens)," said that his delegation supported the Special Rapporteur's approach of treating the elements of article 53 of the 1969 Vienna Convention as the basis for the criteria for the identification of jus cogens and of relying on State practice and the decisions of international courts and tribunals to give content and meaning to the article. However, because jus cogens norms were norms of general international law and not confined to the context of treaty law, the scope of the topic did not need to be limited to treaty law. Due consideration should be given to issues relating to other fields of law, such as State responsibility, not only in the context of effects or consequences of jus cogens but also with respect to its definition, criteria and content.

131. With regard to the question of whether the Commission should prepare an illustrative list of jus cogens norms, Japan was of the view that it could be quite useful in practice if it included the grounds and evidence based on which the Commission considered that the listed norms had acquired the status of jus cogens. However, proper care should be taken to avoid any misperceptions that the listed norms might have a special legal status distinct from other norms that might also be identified as jus cogens but had not been included. It was important to make it clear that the list was illustrative but not exhaustive and that it was without prejudice to the legal status of norms not included.

132. Regarding the consideration of regional jus cogens, Japan was not fully convinced of the need to study non-universal jus cogens. The purpose and significance of pursuing any discussion on that issue should be clarified and the relationship between jus cogens norms and regional jus cogens norms should be considered in detail.

133. Turning to the topic of succession of States in respect of State responsibility, he said Japan understood that the analysis was of a preliminary nature and hoped that in-depth deliberations would continue at the Commission's next session. It noted the potential difficulties surrounding the topic, given the limited number of relevant cases and questions about whether there was sufficient State practice in that area. There were several types of succession of States and it was crucial to study State practice in each of those areas.

134. The Special Rapporteur analysed the relevance of agreements to succession of States in respect of State responsibility in draft article 3 and the effect of a unilateral declaration by a successor State in draft article 4. However, the structure of those texts was complicated by a lack of clear orientation regarding the general principles of succession of States in respect of State responsibility. If the theory of non-succession was to be used as the basis, draft articles 3 and 4 should focus on exceptional conditions where agreements to succession and unilateral declarations could result in the succession of responsibility. In his first report (A/CN.4/708), the Special Rapporteur indicated that the theory of non-succession was no longer dominant. However, as pointed out by several members of the Commission, the cases presented in the report were not sufficient to support that argument. Therefore, Japan expected further analysis to be carried out on the general principles guiding succession in respect of State responsibility. At the present stage, issues such as liability arising out of activities not prohibited by international law, responsibility of international organizations and succession of Governments should not be touched upon, in order to avoid increasing the workload on the topic.

135. **Mr. Mhura** (Malawi), speaking on crimes against humanity, said that the Commission should further study the references in the draft articles to the right of victims to receive reparations. The issue that merited further consideration under draft article 12 (Victims, witnesses and others) was the extent to which States would bear the burden of reparations, in view of the difficulties that might be associated with the discharge of that burden.

136. On immunity of State officials from foreign criminal jurisdiction, his delegation noted with concern a departure from the Commission's established procedure of adopting its work by consensus. Draft article 7 listed exceptions to immunity, in the form of crimes to which immunity did not apply. The fact that it had been adopted by a recorded vote was a sign that the issue merited further study. The Commission should exercise caution not to conflate the topic as a whole with the scope and application of the principle of universal jurisdiction.

137. On other decisions and conclusions of the Commission, his delegation welcomed the inclusion of the topic of general principles of international law, because the identification of such principles and the methods of their identification would give guidance to States. On the other hand, Malawi doubted whether the topic of evidence before international courts and tribunals merited consideration by the Commission. Each international tribunal had its own rules on evidence, and it would be difficult to harmonize them. The Commission should choose topics that would help to settle contemporary issues in international law and focus its resources thereon, especially since its workload was continuing to grow.

138. **Mr. Nolte** (Chairman of the International Law Commission) said that the debate in the Sixth Committee had been particularly rich. The individual Special Rapporteurs had systematically taken note of the various remarks made, and the Secretariat had undertaken to ensure that the summary of the debate on the individual topics would be extremely detailed. The views expressed by delegations would help the Commission not only to refine certain specific points but also to take fresh approaches with respect to matters that had raised general questions or difficulties.

139. At the next session, the Commission was to mark its seventieth anniversary. It would be an excellent opportunity to look at the positive aspects of the interaction between the Committee and the Commission and ways of improving that interaction. In contrast to 10 years ago, when he had first joined the Commission, the problem was no longer one of insufficient topics for the Commission to address, but perhaps of too many. Ways of striking the right balance would need to be considered. On behalf of the Commission, he expressed thanks for the debate held by the Sixth Committee, which would be appropriately translated into the Commission's work in the future.

The meeting rose at 1.10 p.m.