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Chair: Mr. Mlynár . . . . . (Slovakia)

Contents

19-18786 (E)

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

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session (*continued*) (A/74/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XI of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

2. **Mr. Eick** (Germany), referring to the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading, said that it was commendable that the Commission had taken on board the comments made by Member States at various stages of the drafting process. Although the concept and definition of crimes against humanity were widely accepted, there was no international convention on such crimes, with the notable exception of the Rome Statute of the International Criminal Court. It was important that all States, including those that had expressed reservations with regard to the International Criminal Court as an institution, had at their disposal a legal instrument aimed at preventing and punishing crimes against humanity at the national level. The draft articles did not provide for unusual or burdensome obligations on States; they belonged within the familiar framework of international criminal cooperation. The provisions on extradition and mutual legal assistance, for example, were inspired by the United Nations Convention against Corruption, to which 186 States were parties. His delegation fully supported the Commission's recommendation that the draft articles should serve as the basis for a convention, to be negotiated preferably by an international conference of plenipotentiaries.

3. With regard to the draft conclusions on peremptory norms of general international law (*jus cogens*) as adopted on first reading, his delegation had, in previous years, made the point that adopting a list of specific norms that had acquired *jus cogens* status might lead to wrong conclusions being drawn and risked establishing a status quo that might impede the evolution of *jus cogens* in the future. While it took positive note of the "without prejudice" clause in draft conclusion 23 (Non-exhaustive list) and of the list of norms previously referred to by the Commission as having peremptory character, it remained unconvinced that the list was necessary or useful.

4. With regard to draft conclusion 21 (Procedural requirements), his delegation believed that the consequences of invoking a conflict with a *jus cogens* norm were far-reaching and could not automatically flow from the mere claim that a conflict existed. His delegation therefore welcomed the inclusion of a procedure for invocation.

5. In draft conclusion 7 (International community of States as a whole), it was stated 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. His delegation welcomed the inclusion of a further clarification in the commentary concerning the interpretation of that part of the draft conclusion. The expression "very large majority" should be interpreted, in accordance with the relevant case law of the International Court of Justice, as meaning "overwhelming majority".

6. In draft conclusion 3 (General nature of peremptory norms of general international law (*jus cogens*)), it was stated that *jus cogens* norms reflected and protected fundamental values of the international community. It should be made clear that such a statement was in no way intended to affect the definition of *jus cogens*.

7. In respect of the procedure followed by the Commission in its work, he noted that the draft conclusions had been left pending in the Drafting Committee and had not been considered by the plenary until the entire set had been concluded on first reading. That departure from regular practice made it more difficult for States to follow and comment on the Commission's work. Germany agreed with the concerns voiced by some Commission members in that regard and was in favour of retaining the usual procedure in future.

8. In view of the Commission's heavy workload, careful consideration should be given to the number and specific nature of topics selected. The long-term programme of work should not be overburdened. His delegation would be particularly interested in the topics "The settlement of international disputes to which international organizations are parties", "Evidence before international courts and tribunals" and "Universal criminal jurisdiction".

9. **Mr. Arrocha Olabuenaga** (Mexico), referring to the topic "Crimes against humanity", said that his delegation supported the Commission's recommendation for the elaboration of a convention, either by the General Assembly or by a conference of plenipotentiaries, on the basis of the draft articles on prevention and punishment of crimes against humanity as adopted on second reading. The draft articles provided for explicit obligations to prevent and prosecute crimes against humanity. States bore the

primary obligation to prosecute and punish such crimes in accordance with the law. Where States were unable or unwilling to fulfil that responsibility, international bodies with a mandate to prevent impunity could intervene. The International Criminal Court was the clearest example, but it was complementary to national jurisdictions. The Commission also referred in the text to well-established principles of customary international law, including the obligation to extradite or prosecute (*aut dedere aut judicare*), fair treatment of the alleged offender and due process, without which a future convention would be incomplete and far from conducive to justice. Furthermore, the Commission's approach to the issue of gender marked a welcome departure from more restrictive and outdated definitions of the term.

10. Regrettably, crimes against humanity continued to be committed around the world and presented threats to international peace and security that must be dealt with urgently. The analysis of obligations relating to the prevention, elimination and punishment of such crimes and of the applicable principles of law therefore remained of the utmost importance. His delegation hoped that the Committee would establish a process leading to the negotiation of a convention on the topic.

11. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said that, as presented by the Commission in the draft conclusions that had been adopted on first reading, *jus cogens* norms by definition could be modified only by a subsequent norm of general international law having the same character and therefore took precedence over most customary rules and all treaty law, including the Charter of the United Nations. Since the prohibition of crimes against humanity was a long-standing *jus cogens* norm, no Member State, not even a permanent member of the Security Council, could invoke treaty provisions in order to avoid its obligation to prevent and combat such crimes. The same was true of the prohibition on the use of force, which was enshrined in Article 2, paragraph 4, of the Charter. The Commission's work could help to revive the debate regarding the powers of the Security Council in respect of the maintenance of international peace and security and, in particular, the peremptory norms prohibiting crimes against humanity and other atrocities such as genocide, war crimes and ethnic cleansing, and limiting the use of force. His delegation welcomed the inclusion in the draft conclusions of an illustrative list of peremptory norms. Although the list was not and need not be exhaustive, it would serve as the basis for a more informed discussion of the topic.

12. His delegation welcomed the formulation of the draft model clauses on provisional application of treaties, which could be of great practical use to treaty negotiators, and hoped that the Commission would include the draft model clauses when it adopted the draft Guide to Provisional Application of Treaties on second reading. His delegation also welcomed the establishment of a Study Group on the topic "Sea-level rise in relation to international law". By dealing with that pressing issue, the Commission would enhance its relevance with regard to the progressive development of international law.

13. Lastly, given the number of topics whose consideration had been concluded during the current quinquennium, his delegation believed that the time had now come for the Commission to add the topic of universal criminal jurisdiction to its current programme of work.

14. **Mr. Pirez Pérez** (Cuba) said that the draft articles on prevention and punishment of crimes against humanity, as adopted on second reading, would make a significant contribution to international efforts to prevent such crimes and would provide useful guidance to States that had not yet adopted national laws criminalizing them. The draft articles should reflect the fundamental principle that primary responsibility for preventing and punishing serious international crimes, including crimes against humanity, rested with the State in whose jurisdiction the crimes had occurred. That principle should be set out in one of the draft articles, regardless of whether it was mentioned in the preamble or the commentaries. States had the sovereign prerogative to exercise, in their national courts, jurisdiction over crimes against humanity committed on their territory or by their nationals. Only when States were unable or unwilling to do so should other mechanisms for prosecution be considered.

15. The Commission should continue to solicit comments from States in order to ensure that the draft articles, and any future international convention based thereon, did not conflict with national laws on crimes against humanity. The Commission might also consider defining the prohibition on crimes against humanity as a peremptory norm of general international law, bearing in mind that such norms were also the subject of a separate topic under discussion by the Commission. The draft articles should be applied flexibly, given the differences between the Roman law and common law systems, the diversity of national legal systems and the fact that not all States were parties to the Rome Statute.

16. The draft conclusions on peremptory norms of general international law (*jus cogens*) and the annex thereto adopted on first reading could serve primarily as a methodological guide for States and international organizations in the identification of emerging norms and their legal consequences, as opposed to analysis of their content. In view of the hierarchical superiority of *jus cogens* norms in relation to other rules of international law and the legal consequences of such norms, the draft conclusions were a valuable source of guidance for the development of national governmental and judicial practice.

17. The content and scope of the draft conclusions should not be absolute or restrictive. For instance, draft conclusion 2 (Definition of a peremptory norm of general international law (*jus cogens*)) should reflect the fact that the criterion of acceptance and recognition by the international community of States as a whole for the identification of a *jus cogens* norm should not be assessed on the basis of the number of States involved but rather on the basis of national governmental and judicial practice, taking into account the variety of national legal systems.

18. With regard to draft conclusion 7 (International community of States as a whole), his delegation believed that, while the positions of non-State actors could be taken into consideration as supplementary and non-decisive factors in the process of identifying peremptory norms, they could not conflict with the basic principles of international law enshrined in the Charter of the United Nations, such as the sovereign equality of States and non-interference in their internal affairs.

19. In line with his delegation's comments on draft conclusion 2, and given that the draft conclusions were intended as a guide for States and international organizations, the forms of evidence of acceptance and recognition set out in paragraph 2 of draft conclusion 8 should not be regarded as a restrictive list, precisely because such evidence could take different forms in different legal systems.

20. His delegation welcomed the fact that the means for the determination of the peremptory character of norms of general international law set out in draft conclusion 9 were referred to as "subsidiary": the decisions of international courts and tribunals, the works of expert bodies and the teachings of publicists should not replace the practice of States or international organizations in the identification of *jus cogens* norms. The practice of international courts and tribunals showed that they took a cautious approach to *jus cogens* norms: without naming them as such, they recognized their existence. That approach was confusing and ambiguous, particularly with regard to obligations *erga omnes* arising from peremptory norms of general international law, to which reference was made in draft conclusion 17.

21. Draft conclusion 15 (Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)) and draft conclusion 16 (Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)) reflected the international consensus that widespread compliance with principles and norms of general international law was required for a *jus cogens* norm to emerge, while draft conclusion 19 reflected the international consensus that serious breaches of such norms entailed the international responsibility of States and particular consequences. The latter draft conclusion consolidated the articles on responsibility of States for internationally wrongful acts.

22. In draft conclusion 21 (Procedural requirements), reference was made to dispute settlement mechanisms to which States might have recourse when invoking a peremptory norm as a ground for the invalidity or termination of a rule of international law. His delegation was pleased to note that priority was given to the application of Article 33 of the Charter, the procedural requirements set forth in the 1969 Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, and other applicable dispute settlement provisions agreed by the States concerned. The non-exhaustive list of norms set forth in the annex would provide a valuable guide for States when determining whether a norm had acquired a peremptory character.

23. His delegation welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the Commission's programme of work. Cuba was already seeing the effects of sea-level rise, a problem that his Government had been raising in international forums for decades. In 2017, Cuba had adopted a plan to address climate change, which included measures to counteract or mitigate the impact of sea-level rise, such as strengthening certain areas of coastline and relocating the coastal population. The Commission would need to address the practical implications of sea-level rise, particularly for the safety of navigation. However, modifying baselines and maritime boundaries or devoting resources to the preservation of baseline points and certain geographic features would give rise to legal uncertainty, not to mention affecting small island developing States, which had done the

least to contribute to climate change. His delegation hoped that the Commission would take into consideration the letter and the spirit of existing international law, including the United Nations Convention on the Law of the Sea, in order to maintain its stability and predictability as far as possible.

24. **Ms. Escobar Pacas** (El Salvador) said that the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading would help to elucidate issues relating to the establishment of national jurisdiction over such crimes. Her delegation welcomed the new wording of paragraph 3 of draft article 2 (Definition of crimes against humanity), which made the draft article compatible with any other source of law that might provide for a broader definition of such crimes. The term "enforced disappearance of persons" in paragraph 2 (i) could be interpreted more broadly in the light of other relevant international instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance. That would allow for greater harmonization with national laws, such as those of El Salvador, where a proposal to amend the law to introduce a broader definition of "enforced disappearance" was currently under consideration.

25. Her delegation supported the recommendation that the draft articles should form the basis of a convention; such an instrument would increase legal certainty and help to ensure compliance with obligations relating to the prevention of crimes against humanity.

26. Referring to the topic "Peremptory norms of general international law (*jus cogens*)", she said that, from a methodological standpoint, it was important for the Commission's work to be informed by the comments and legislative, judicial and executive practices of States and international organizations, including regional integration organizations. Such an approach would also be useful for consistency with other topics such as "General principles of law".

27. With regard to the draft conclusions as adopted on first reading, her delegation welcomed the reference in paragraph 2 of draft conclusion 5 to treaty provisions and general principles of law as bases for peremptory norms. Legal norms could emerge from a variety of sources and had a variety of consequences. The continuous and universal application of an international treaty, even without formal ratification, could amount to or generate a customary norm; conversely, a customary norm could lead to the elaboration of a treaty. Accordingly, and bearing in mind the nature of *jus cogens* norms, it was important to retain a reference to other sources of law, such as general principles of law, on which there was a high degree of consensus.

28. The list of forms of evidence of acceptance and recognition set out in paragraph 2 of draft conclusion 8, which was in any event not exhaustive, should include resolutions adopted by regional integration organizations, since they could provide evidence of acceptance and recognition by the international community as a whole.

29. With regard to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) and the debate as to whether non-derogability was a criterion for the identification of a *jus cogens* norm or, rather, a legal consequence of such a norm, the negotiating history of articles 53 and 66 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was instructive. In that connection, it should be borne in mind that the Commission had indicated in 1966 that it was not the form of a general rule of international law but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*. Furthermore, in accordance with article 53 of the 1969 Vienna Convention, the norms capable of causing the invalidity of a treaty were accepted and recognized by the international community of States as a whole. It could therefore be concluded that non-derogability was a legal effect of *jus cogens* norms. Her delegation consequently believed that it was appropriate to address the question under draft conclusion 10.

30. The phrase "not of *jus cogens* character" should be included in paragraph 1 of draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), to highlight the fact that a non-*jus cogens* customary international law rule could not arise if it conflicted with a *jus cogens* norm. That change would also be consistent with paragraph 2 of the draft conclusion.

31. In the commentary to draft conclusion 21 (Procedural requirements), it was stated that the possibility that an objecting State might offer to submit a matter to the International Court of Justice did not in any sense establish the compulsory jurisdiction of the Court. Paragraph 4 of draft conclusion 21 should therefore be redrafted, perhaps along the lines of article 66 of the 1969 Vienna Convention, in order to

state that, instead of submitting the dispute to the International Court of Justice, the parties could by common consent agree to submit it to arbitration or set in motion a dispute settlement procedure similar to that specified in the annex to the Convention.

32. Her delegation shared the concern that the concept of regional *jus cogens*, referred to in the fourth report of the Special Rapporteur (A/CN.4/727), could cause confusion because the nature of *jus cogens* norms was that they were universally applicable, based on fundamental values and hierarchically superior to other rules of international law. Accordingly, *jus cogens* norms applied to all parts of the world and covered all branches of international law, including regional integration law. It followed that the notion of regional *jus cogens* did not accurately reflect the true legal character of *jus cogens* norms.

33. Her delegation welcomed the draft model clauses on provisional application of treaties. It also supported the addition to the long-term programme of work of the topics "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea", which reflected the needs of States and on which there was sufficient material for an analysis of State practice and for the progressive development of the law.

34. **Mr. Mahnič** (Slovenia) said that Slovenia supported the elaboration of a convention based on the draft articles on prevention and punishment of crimes against humanity adopted on second reading, which would help to fill the existing lacunae in international law. It was pleased to note that a number of changes had been made to the draft articles to reflect the views expressed by States, international organizations and non-governmental organizations.

35. Slovenia shared the view that the definition of "gender" provided in article 7, paragraph 3, of the Rome Statute was outdated. It therefore supported the decision not to include it in draft article 2 (Definition of crimes against humanity), thereby allowing the term to be applied for the purposes of the draft articles on the basis of an evolving understanding as to its meaning. His delegation agreed with the Special Rapporteur's recommendation that a new paragraph 1 should be added to draft article 13 (Extradition) providing that States should endeavour to expedite their extradition procedures. It also welcomed the addition of the new paragraph 9 to draft article 14 (Mutual legal assistance), which would allow for cooperation through recently established international mechanisms such as the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 and the mechanism for Myanmar. That paragraph also complemented draft article 4 (Obligation of prevention), which provided for cooperation between States and international organizations in the context of prevention. Slovenia maintained, however, that paragraph 9 of draft article 14 should include a reference to international criminal courts and tribunals. Just as some States required statutory authority or a formal framework in order to cooperate with international mechanisms, a similar framework might be required for some States to cooperate with international criminal courts and tribunals. The reasoning given for excluding such a reference was unconvincing.

36. As noted by the Special Rapporteur, there was some overlap between the draft articles and the initiative for a new multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes. However, there were important differences between the two projects. The mutual legal assistance initiative was broader in scope than the draft articles because it covered war crimes and genocide as well as crimes against humanity; there was also a possibility that it could be extended to cover other serious crimes. Furthermore, the mutual legal assistance initiative was focused on the practical usability of mutual legal assistance and extradition procedures. The draft treaty therefore included considerably more extensive procedural provisions than those included in the draft articles; its main objective was to establish a framework for efficient inter-State cooperation and to respond to the needs of practitioners. His delegation considered the two projects to be complementary in nature but shared the view that care must be taken to avoid diverging substantive treaty provisions. Indeed, the mutual legal assistance initiative was aimed at achieving the greatest degree of complementarity, including with the provisions of the Rome Statute.

37. With regard to the topic "Provisional application of treaties", Slovenia supported the inclusion of draft model clauses in the draft Guide to Provisional Application of Treaties. Commentaries should be added to the draft model clauses to facilitate their interpretation. With regard to draft model clause 1, Slovenia planned to provide a written proposal for a mechanism that would cover situations in which States needed to complete relevant internal procedures before

provisionally applying a treaty. Such a mechanism was applied by the member States of the European Union in the field of air transport agreements.

38. **Ms. Melikbekyan** (Russian Federation) said that her country attached great importance to the Commission's output. It therefore continued to be concerned that the Commission's programme of work had become increasingly overloaded in recent years and that the Commission was producing draft documents at a pace that exceeded all expectations. The purpose of the Commission was not to resolve all questions of international law as quickly as possible, but to respond to the needs of States and to give them the opportunity to react to and participate in the elaboration of its drafts. The Commission might wish to wait before moving any more topics from its long-term programme of work to its current one.

39. Turning to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, she commended the Special Rapporteur for including a detailed analysis of the positions of States, international organizations and other bodies in his fourth report. Such an approach was crucial for the work of the Commission, as the only organ embodying legal thought from all the legal systems of the world. The degree to which the Commission took the views and practices of States into account also directly affected the relevance of its output and the maintenance of its authority, which derived from an objective and impartial approach to a wide variety of topics. The Commission's recommendation to the General Assembly that a convention be elaborated on the basis of the draft articles would need to be considered carefully; such an endeavour would take time.

40. With regard to the mutual legal assistance initiative, under which a convention on international cooperation in the investigation and prosecution of genocide, crimes against humanity and war crimes was being drafted, her delegation shared the Special Rapporteur's concern that the pursuit of two similar instruments simultaneously might be problematic and that there was a risk that neither initiative would succeed. Since it seemed that a diplomatic conference was already planned for the following year with a view to adopting the proposed convention on mutual legal assistance, more thought needed to be given to the future form of the draft articles.

41. It was unnecessary to state in the preamble that crimes against humanity threatened the peace, security and well-being of the world, as doing so could make it necessary to clarify that nothing in the draft articles could be interpreted as giving any State the right to use force or intervene in the internal affairs of another State. Her delegation was also not convinced that it was appropriate in the preamble to characterize the prohibition of crimes against humanity as a peremptory norm of general international law. To her delegation's knowledge, there was no practice of including such statements in international conventions, and it seemed that no detailed analysis had been conducted on that score. The inclusion of such a statement in the preamble could be interpreted as making the draft articles as a whole conditional upon the prohibition of crimes against humanity having the status of a peremptory norm. It was also not advisable to include a reference in the preamble to the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court. There was a separate draft article containing a definition of crimes against humanity, and it was explained in the commentary thereto that the provision was based on the relevant provisions of the Rome Statute.

42. The main purpose of a future convention would be to ensure effective intergovernmental cooperation in preventing crimes against humanity and to enable the prosecution of perpetrators by domestic courts. That goal could be achieved only if States parties were obligated to criminalize crimes against humanity under their national laws to the extent required under such a convention. However, under paragraph 3 of draft article 2, the draft article was without prejudice to any broader definition of crimes against humanity provided for in any international instrument, in customary international law or in national law. If it was stated that the prohibition of crimes against humanity had the status of a peremptory norm, it was unclear what the implications of such a statement would be with respect to acts that were not listed in the draft article but were referred to in bilateral or regional agreements or in individual countries' national laws. The issue required further reflection.

43. With regard to draft article 6 (Criminalization under national law), her delegation supported the flexible wording of paragraph 8, which provided for the criminal liability of legal persons, subject to the provisions of a State's national law. However, even with that wording, the provision might keep certain States from becoming parties to a future convention if, as was the case in the Russian Federation, the concept of criminal liability of legal persons did not exist in their legal systems.

44. Her delegation was not convinced that cooperation by States, particularly with international organizations, should be considered part of the

obligation of prevention under draft article 4. Preventive measures did not need to be spelled out in such detail.

45. With regard to draft article 8 (Investigation), the expression "prompt, thorough and impartial investigation" could be erroneously understood to mean that investigations of crimes against humanity must be held to particular standards of promptness, thoroughness and impartiality. Similarly, the provisions set out in draft article 11 (Fair treatment of the alleged offender) did not seem to be specific to perpetrators of crimes against humanity.

46. The purpose of the draft articles was to enhance cooperation among States in the prevention and suppression of crimes against humanity. Cooperation with international criminal courts must be undertaken on the basis of special agreements or, in certain cases, Security Council resolutions. Draft article 10 (*Aut dedere aut judicare*) therefore should not include a reference to a "competent international criminal court or tribunal".

47. Under draft article 14 (Mutual legal assistance), States could consider entering into arrangements with international mechanisms that had a mandate to collect evidence with respect to crimes against humanity. That provision was redundant. States already possessed such a right, along with the right to choose whether or not to recognize the jurisdiction of such mechanisms, by virtue of their sovereignty, and no separate reaffirmation of those rights was needed. Furthermore, organs of international criminal justice, including the International Criminal Court, had proven to be highly ineffectual and politicized. Their activities often did not meet the high standards of justice, raised numerous legitimate questions and did much to discredit the very idea of international criminal justice.

48. Turning to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading, she welcomed the Commission's decision not to include separate draft conclusions on matters relating to criminal responsibility and the immunities of State officials, which clearly fell outside of the scope of the topic, and also not to include a separate draft conclusion on regional *jus cogens*. She welcomed the fact that there was no reference to the Security Council in draft conclusion 16 (Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)) but noted the statement in the commentary that the draft conclusion applied equally to binding resolutions of the Security Council. That statement was unnecessary because it could lead to misinterpretation of the draft conclusion. Furthermore, the question of whether Security Council resolutions were consistent with *jus cogens* norms remained primarily a theoretical one, as no relevant practice existed. That understanding was also reflected in the material presented by the Special Rapporteur.

49. Her delegation continued to view as problematic the inclusion in draft conclusion 21 (Procedural requirements) of a dispute settlement mechanism that allowed for the dispute to be submitted to the International Court of Justice, despite the fact that improvements had been made to the wording. In the commentary, the Commission indicated that the provision was based on article 66 (Procedures for judicial settlement, arbitration and conciliation) of the 1969 Vienna Convention on the Law of Treaties. Her delegation disagreed with that assertion. The draft conclusion provided for recourse to a dispute settlement procedure not only with respect to a treaty provision but also with respect to a rule of international law in general. It also provided that any State "concerned" could initiate such a procedure. Her delegation could see no basis for such conclusions in contemporary international law.

50. Her delegation also continued to see no need to specify in a separate draft conclusion additional characteristics of peremptory norms, such as the fact that they reflected and protected fundamental values of the international community, were hierarchically superior to other rules of international law and were universally applicable. Those characteristics were descriptive rather than legal in nature. The commentary to the draft conclusion in question contained no references to any judicial or State practice that clarified the legal content of those characteristics or enabled the formulation of a normative definition thereof.

51. With respect to draft conclusion 23 (Non-exhaustive list), her delegation considered that, overall, the inclusion of a list of *jus cogens* norms was inadvisable. The topic had originally been presented as methodological in nature, with the primary aim of determining a process for the identification of *jus cogens* norms. The majority of the norms listed in the annex to the draft conclusions had not previously been studied or analysed by the Commission. The Commission indicated in the commentary to draft conclusion 23 that they were all derived from the commentaries to the articles on responsibility of States for internationally wrongful acts. It was doubtful, however, whether a mere reference by the Commission to the possible peremptory status of the norms was sufficient grounds for including them in the list. In its

commentaries to the draft articles on the law of treaties, the Commission had characterized the prohibition of the use of force, the principle of the sovereign equality of States and other principles of international law as *jus cogens* norms.

52. In any event, neither the commentaries nor the list would enable the Commission to achieve its main goal: an understanding of how to determine the peremptory status of each of the listed norms. Moreover, the Commission's elaboration of such a list could have far-reaching consequences and negate the value of the rest of its work on the topic, since the draft conclusions would likely be used not to identify peremptory norms, but as evidence that the norms listed had peremptory status, whereas those that were not listed did not. Her delegation also did not support the approach taken to determining which norms should be included in the list. The Commission should begin by analysing the special role of the Charter of the United Nations and the purposes and principles set out therein. Although the Commission stated in the commentary to draft conclusion 23 that it had previously referred to the important role of the Charter and the purposes and principles of the United Nations for the development of peremptory norms of general international law, that issue deserved more in-depth analysis or a mention in the draft conclusions themselves.

53. **Ms. Mesarek** (Croatia) said that her Government supported the Commission's recommendation with regard to the draft articles on prevention and punishment of crimes against humanity adopted on second reading.

54. In connection with the topic "Succession of States in respect of State responsibility" and the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), she noted that Croatia had been a victim of crimes committed during and after the process of dissolution of a predecessor State. It therefore endorsed the application of a general rule of non-succession with some well-defined exceptions. The Commission's work on the topic should be consistent, from the point of view of both terminology and substance, with its previous work on the articles on State responsibility. Under draft article 14 (Dissolution of States), a successor State was entitled to claim reparation from the responsible State, taking into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors. Those other relevant factors should be specified and defined in the draft article. In its future work on the topic, the Commission should consider situations in which one or more parts of the predecessor State that became successor States might bear responsibility for internationally wrongful acts not only towards third States, but also towards the other successor States.

55. The fourth report of the Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)" contained an accurate overview of the current state of international law. With regard to the draft conclusions adopted by the Commission on first reading, she pointed out that paragraph 3 of draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)) contradicted paragraph (11) of the commentary to the draft conclusion and should therefore be reformulated to match the commentary. Paragraph 2 of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) should be amended to read as follows: "Treaty provisions and general principles of law may also reflect and serve as bases for development of peremptory norms of general international law (*jus cogens*)."

56. Although her delegation generally supported the inclusion of an illustrative list of *jus cogens* norms in an annex to the draft conclusions, the content of the list should be given further consideration. The norm of prohibition of aggression was too narrow and should be replaced with the prohibition of the threat or use of force against the territorial integrity or political independence of any State, in line with Article 2 of the Charter of the United Nations. Furthermore, items (e), (f) and (g) should be merged to read as follows: "The fundamental human rights, including prohibition of slavery, torture and racial discrimination". The right to self-determination should be excluded from the list, since the definition of that right, and who was entitled to it, could not be clearly determined on the basis of existing general international law and practice. The prohibition of terrorism, on the other hand, should be included in the list, in view of the growing threat that it posed.

57. With regard to the topic "General principles of law" and the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732), Croatia was of the view that the distinction between general principles of law and customary international law had not been explained clearly enough by the Special Rapporteur. In particular, the category of general principles of law formed within the international legal system should be explained in greater detail in future reports. Draft conclusion 2 (Requirement of recognition), according to which, for a general

principle of law to exist, it must be generally recognized by States, was too narrow; all actors involved in the formation of general principles of law, especially international organizations, should be included. Croatia also agreed with the view that the term "civilized nations" should be avoided in the draft conclusions in favour of the term "community of nations".

58. With respect to the Commission's request for examples of relevant State practice relating to the topic "Sea-level rise in relation to international law", her delegation would provide information in writing on articles 7 and 18 of her country's Maritime Code.

59. **Ms. Vaz Patto** (Portugal), referring to the topic "Provisional application of treaties", said that her Government would submit written comments in due course on the draft model clauses proposed by the Special Rapporteur. Her delegation supported the inclusion in the Commission's long-term programme of work of the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", which would advance the status of the individual under international law and allow for the progressive development of a humanistic perspective in international law. Portugal also welcomed the inclusion in the long-term programme of work of the topic "Prevention and repression of piracy and armed robbery at sea", which would provide an opportunity to reflect on relevant legal issues, including the law of the sea, international human rights law and international humanitarian law, and also the detention, prosecution, extradition and transfer of pirates and armed robbers.

60. In recent years, the Committee had not fulfilled its role in the codification and progressive development of international law, which was conferred upon the General Assembly under the Charter of the United Nations. Unless the Committee made a greater effort to favourably consider the Commission's recommendations, interested States would seek other frameworks for negotiating and adopting international conventions.

61. Her delegation supported the Commission's recommendation that the General Assembly elaborate a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. An international conference should be convened for that purpose. The convention being drafted under the mutual legal assistance initiative was complementary to the draft articles in that it was aimed at enhancing international cooperation in the investigation and prosecution not only of crimes against humanity but also of other serious international crimes. Both projects therefore deserved to be taken forward.

62. The discussion of the topic "Peremptory norms of general international law (*jus cogens*)" would help States to better identify such norms and to comply with them, thus upholding the stability of the international legal system. Her Government would submit written comments, as requested by the Commission, in due course. With regard to the draft conclusions adopted on first reading, Portugal continued to be of the view that the study of regional *jus cogens* should not jeopardize the integrity of peremptory norms of general international law as norms that were universally recognizable and applicable. It was also important to avoid confusion between the concepts of *jus cogens* and regional customary law. Portugal agreed with the Special Rapporteur's conclusion that regional *jus cogens* was not recognized under international law and welcomed his decision not to include a draft conclusion relating to regional *jus cogens* but to address the matter in the commentary instead.

63. Portugal continued to be in favour of including an illustrative list of *jus cogens* norms. However, the Commission had omitted some widely recognized norms and could have been more ambitious in terms of both the number of norms included and their content, particularly with regard to norms that it had identified during its consideration of other topics such as "Law of treaties" and "Responsibility of States for internationally wrongful acts". A reference to peremptory environmental norms, such as the obligation to protect the environment, would also have been welcome. On the whole, however, Portugal was pleased that in its work on the topic the Commission had not simply repeated the provisions of article 53 of the 1969 Vienna Convention on the Law of Treaties or limited itself to questions traditionally discussed in relation to *jus cogens*.

64. **Ms. Cicéron Bühler** (Switzerland) said that her Government fully supported the Commission's recommendation to elaborate a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. Such a convention would fill a gap in the existing international legal framework, establish a definition of crimes against humanity and provide for obligations regarding the punishment and prevention of such crimes at the national level, thereby contributing to the fight against impunity for the most serious crimes. A future convention must not have the effect of weakening existing obligations under international law and should complement, rather than conflict with, a

possible general convention on mutual legal assistance in the prosecution of international crimes.

65. With regard to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, she reiterated her Government's view that the illustrative list of such norms, while useful, was too restrictive. Switzerland had accumulated significant practice with regard to *jus cogens*: it was stated explicitly in the country's Constitution that amendments to it must not conflict with *jus cogens* norms. Her country's understanding of what constituted the core of *jus cogens* went beyond the content of the illustrative list; it included the principle of the equality of States, the prohibition of piracy, the prohibition of collective punishment, the prohibition of unequal treatment and the principle of personal and individual criminal responsibility. The Commission should therefore carefully analyse State practice, including that of Switzerland, with a view to broadening the illustrative list. At the very least, a general provision to the effect that the illustrative list did not preclude a broader understanding of *jus cogens* should be included.

The meeting rose at 4.45 p.m.