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Chair: Ms. Anderberg (Vice-Chair) . . . . . (Sweden)

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19-18886 (E)

In the absence of Mr. Mlynár (Slovakia), Ms. Anderberg (Sweden), Vice-Chair, took the Chair.

The meeting was called to order at 10.05 a.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. Abdelaziz** (Egypt) said that, while the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading would form a significant addition to the international legal framework, it would not be appropriate for the General Assembly at its current session to adopt a resolution providing for the negotiation of an international convention based on the draft articles. Sufficient time should be allowed for all delegations to study the draft articles and commentaries thereto, which had internal constitutional implications that might, moreover, be different in common law and civil law systems.

3. Paragraph 2 of draft article 7 (Establishment of national jurisdiction), draft article 9 (Preliminary measures when an alleged offender is present) and draft article 10 (*Aut dedere aut judicare*) appeared to be based on the principle of universal criminal jurisdiction, on which the Committee had been unable to reach consensus. Paragraph 9 of draft article 13 (Extradition) rested on the legal fiction that offences covered by the draft articles could be treated, for the purposes of extradition between States, as if they had been committed not only in the place of occurrence but also in the territory of the States that had established jurisdiction over such offences. In paragraph (42) of the commentary to draft article 2 (Definition of crimes against humanity), the Commission had, for the first time, taken an approach to the interpretation of the term "gender" that conflicted with the agreed terms of reference and, in any event, ought more properly to be discussed by the Third Committee. In view of those and other issues, there was a need for further deliberations before the draft articles could serve as the basis of an international convention.

4. Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions adopted by the Commission on first reading, he said that his delegation welcomed the removal of draft conclusion 23 proposed by the Special Rapporteur in his third report (A/CN.4/714) (Irrelevance of official position and non-applicability of immunity *ratione materiae*), regarding which it had raised several concerns at the previous session of the General Assembly. The position of his delegation with regard to draft conclusion 11 (Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)) remained unchanged: there should be no exception to the rule that a treaty which, at the time of its conclusion, conflicted with a peremptory norm of general international law (*jus cogens*) was void in whole. Indeed, it was unclear in what situations the proposed exceptions would apply. In paragraph 2 of draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), it was stated that no State should recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm. That provision should apply to all breaches, and not only to serious ones.

5. It would be useful to consider how, when and by whom it could be declared that a new peremptory norm had emerged, bearing in mind that the emergence of such a norm was a cumulative process that could take decades. It was important to resolve that question in order to ensure legal certainty; as was indicated in paragraph 2 of draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), new peremptory norms could cause existing treaties to become void. The question also had implications for the means for developing and updating the non-exhaustive list in the annex to the draft conclusions, assuming the list were to be retained.

6. His delegation supported the inclusion of the topic "Prevention and repression of piracy and armed robbery at sea" in the long-term programme of work of the Commission, but believed that the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" had already been addressed in existing legal instruments. In view of its substantial workload, the Commission should focus on the topics currently before it, rather than adding new topics to its long-term or current programme of work. In particular, it would be premature to include the topic "Universal criminal jurisdiction" in the programme of work.

7. **Ms. Sekhar** (India), referring to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions adopted by the Commission on first reading, said that the existence and definition of regional peremptory norms had been debated at length by international legal scholars. It was the view of her delegation that, while peremptory norms

might be influenced by regional State practice, the idea of some norms being peremptory was precisely that they were universal in nature and in application. Whether norms that applied to some but not all States could still be considered peremptory was a question that merited careful examination.

8. With regard to the non-exhaustive and illustrative list of peremptory norms contained in the annex to the draft conclusions, her delegation considered that the Commission should tread carefully, since peremptory norms of general international law (*jus cogens*) were hierarchically superior to other norms of international law and the standard used to identify them must be clear and unambiguous. Some of the norms on the list were not well defined in international law and the interpretation of their applicability differed from State to State; the norms themselves as well as the desirability of including such a list should therefore be subject to further discussion.

9. Turning to the topic "Crimes against humanity", she said that the Commission had recommended that the draft articles on prevention and punishment of crimes against humanity adopted on second reading be used as the basis for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries. However, her delegation believed that the need for a convention devoted exclusively to crimes against humanity should be examined in greater detail, given that the topic was already being addressed by other international mechanisms and regimes, including the International Criminal Court. The Rome Statute of the International Criminal Court provided a sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity.

10. **Mr. Jiménez Piernas** (Spain) said that his delegation supported the proposal to elaborate a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading by the Commission. However, an undertaking in that regard must be based on a consensus among Member States if it was to be successful and the outcome useful.

11. His delegation appreciated the Commission's work on peremptory norms of general international law (*jus cogens*), which was extremely important, because, as stated in draft conclusion 3 of the draft conclusions adopted by the Commission on first reading, "peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable". The Commission had shown good judgment by basing that work on the 1969 Vienna Convention on the Law of Treaties and on its own work on other topics, such as international responsibility of States, reservations to treaties and identification of customary international law, and more generally on international judicial and treaty practice and doctrine.

12. His delegation understood that the aim of the draft conclusions was strictly to state international law on the topic – both conventional and customary international law – as it existed. On that basis, Spain agreed with the definition of "peremptory norm" proposed in draft conclusion 2, which was based on article 53 of the Vienna Convention. Spain also agreed with draft conclusions 3 to 9, which contained criteria for the identification of peremptory norms of general international law (*jus cogens*). It wished to highlight that, pursuant to draft conclusion 7, paragraph 2, acceptance and recognition by a very large majority of States was required for the identification of a norm, which meant that it was not necessary for all States to have accepted and recognized the peremptory norm. That was the correct interpretation of article 53 of the Vienna Convention, according to which a peremptory norm was a norm accepted and recognized by the international community of States as a whole.

13. His delegation was also generally in agreement with the non-exhaustive list of peremptory norms presented in the annex to the draft conclusions and would be in favour of including in the list norms prohibiting massive pollution of the atmosphere or of the seas.

14. Part Three of the draft conclusions (Legal consequences of peremptory norms of general international law (*jus cogens*)), however, presented some issues for his delegation. Paragraph 1 of draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)) should perhaps be amended, since the current version in Spanish was confusing, to say the least. The first sentence could be worded as follows: "En el supuesto de que la práctica internacional permita apreciar el inicio de un proceso de formación de una norma consuetudinaria, no llegará a existir una nueva norma consuetudinaria que sea contraria a una norma imperativa…" [Where international practice points to the start of a process of formation of a customary rule, a new customary rule shall not come into existence if it conflicts with a peremptory norm…]

15. Spain agreed with draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), which was based on article 41 of the articles on responsibility of

States for internationally wrongful acts. Both the draft conclusion and the article established the obligation to cooperate to bring to an end any serious breach of a peremptory norm, and the obligation not to recognize as lawful or render aid or assistance in maintaining a situation created by a serious breach of a peremptory norm. However, the draft conclusion did not specify any other consequences for serious breaches of a peremptory norm. Although paragraph 4 of the draft conclusion referred to the other consequences that a serious breach by a State of a peremptory norm might entail under international law, it contained no other details. In its commentary to the draft conclusion, the Commission did not explain what those consequences might be, based on its study of State practice. It was a highly relevant matter on which the Commission should express an opinion in the current draft conclusions, both in terms of cessation of and reparation for a wrongful act arising from a serious breach of a peremptory norm, and in terms of the application of countermeasures to bring about said cessation and reparation.

16. Spain considered draft conclusion 21 (Procedural requirements) to be insufficient and somewhat vague. It was based on the 1969 Vienna Convention, in that it prescribed the procedure to be followed in the event of claims of invalidity or termination of a treaty because of a conflict with a peremptory norm. The wording of paragraph 1 of the draft conclusion was very vague; it merely provided that a State invoking a peremptory norm was to indicate "the measure proposed to be taken with respect to the rule of international law in question". The Commission should specify what kind of measures could be taken in such cases, drawing on the international practice of recent decades, which was not mentioned at all in the commentary. The same omission was evident in relation to draft conclusion 22, which simply referred to the consequences that specific peremptory norms "may otherwise entail" under international law. Furthermore, the two time frames proposed by the Commission in draft conclusion 21 were questionable, and insufficiently supported in the commentary: the three-month period, "except in cases of special urgency", following which the State invoking a peremptory norm as a ground for invalidity or termination of a treaty might carry out the measure it had proposed, if no objection had been raised; and the period of 12 months to resolve the dispute before submitting the matter to the International Court of Justice.

17. His delegation considered that the Commission should deepen its consideration of the topic, as part of its work to progressively develop international law. Even though the Commission's output on the topic consisted of draft conclusions, it should take the opportunity to encourage all States to resolve their differences through peaceful means of dispute settlement, including recourse to international arbitration and the International Court of Justice. The Commission should propose clearly and firmly to Member States that any dispute over the interpretation and application of a peremptory norm should be settled by a dispute settlement body with the power to issue a binding decision, including the authority to issue provisional measures with which the parties must comply.

18. As in the case of other topics under consideration by the Commission, Spain strongly supported the development and consolidation of tertiary rules of international law, dedicated to dispute settlement mechanisms, as the best means of consolidating the rule of law in international relations. That was especially important in the current context involving the determination of the existence and legal consequences of peremptory norms, since the protection of the fundamental values of the international community was at stake.

19. Lastly, Spain supported the inclusion in the long-term programme of work of the topics "Prevention and repression of piracy and armed robbery at sea", and "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law". Both were of great interest and the topic of reparation to victims would allow for further development of the guidelines already adopted by the General Assembly.

20. **Mr. Kessel** (Canada) said that, as the makers of international law, States should all engage and collaborate with the Commission to shape and influence its work, whether or not it aligned with their respective positions. States could not leave it to the academic world to develop the thinking on the topics on the Commission's programme of work; they must give those issues the attention they deserved, by evaluating the Commission's work, commenting on it and, when appropriate, using it as a starting point in their negotiations. The Commission should also consider the utility of producing a range of outputs, such as guidelines and principles, in addition to draft articles, to enable States to take full advantage of its expertise.

21. Regarding the topic "Crimes against humanity", Canada was pleased to see that the definition of "gender" had been removed from the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading. While the definition had been taken from the Rome Statute of the International Criminal Court, the international community's understanding of "gender" had evolved

since 1998. The term “sex” was now used to refer to biological attributes, while “gender” was used more broadly in recognition of the variety of gender identities and expressions, which might or might not be aligned with the gender typically or socially associated with a person’s sex.

22. The draft articles presented a number of other issues that would require further consideration by the Government of Canada, should the decision be made to negotiate a convention on crimes against humanity. Some of those issues stemmed from the same concern that had been expressed regarding the treatment of gender. For instance, the definition of “forced pregnancy” would need to be re-examined, to ensure that it included transgender persons. Canada would also view the negotiation of a convention as an opportunity to clarify the definition of “sexual violence”, in order to reflect recent discussions within the international community. In addition, if negotiations were to proceed, Canada would want to ensure that the Commission’s concerted efforts to draw on existing international obligations under other instruments when preparing the draft articles had not inadvertently created inconsistencies with those texts.

23. **Mr. Fintakpa Lamega** (Togo), referring to the topic “Crimes against humanity”, said that his delegation took note of the change in name of the Commission’s output from “draft articles on crimes against humanity” to “draft articles on prevention and punishment of crimes against humanity”, which it considered to be more meaningful. As the Government of Togo had not yet taken a position regarding the elaboration of a convention on the basis of the draft articles, the observations of his delegation at the current juncture were preliminary in nature.

24. It was regrettable that the Commission had decided not to include a definition of the term “gender” in the draft articles on the ground that gender was a social rather than a biological construction, an approach that had apparently been taken by various other international authorities and by international courts and tribunals. However, given that its members were independent, the Commission should have adopted a different approach. Togo understood the term “gender” to refer to the two sexes, male and female, pursuant to the Togolese Persons and Family Code, which did not indicate any other meaning.

25. Acts considered to be crimes against humanity were defined and severely punished under the Togolese Criminal Code, whether committed inside or outside the country, whatever the nationality of the perpetrator or accomplice. That reflected his country’s firm commitment to one of the fundamental principles of international criminal law, namely, that States had a sovereign prerogative to exercise their jurisdiction before their courts over crimes against humanity committed in their territory or by their nationals. That principle was compatible with the idea that the State having territorial jurisdiction was generally best placed to initiate criminal proceedings and that it was in the interests of justice for the local courts with clear jurisdictional links to take precedence, with due consideration for the interests of the victims and the rights of the defendant.

26. Should the draft articles serve as the basis for a convention, safeguards would need to be included that reflected and promoted that fundamental principle. Adequate safeguards should also be adopted to prevent the initiation of inappropriate, unjustified or ineffective judicial proceedings in which standard procedural rules might not be followed. Such safeguards could include the requirement that judicial proceedings only be initiated with the agreement of the competent authorities; the establishment of a court of last resort; and adherence to the principle of subsidiarity.

27. Regarding the topic “Peremptory norms of general international law (*jus cogens*)” and the draft conclusions adopted by the Commission on first reading, Togo supported draft conclusion 3, because it believed that peremptory norms of general international law reflected and protected fundamental values of the international community, were hierarchically superior to other rules of international law and should be universally applicable. It should be stated clearly in draft conclusion 16 and in the commentary thereto that even Security Council resolutions and decisions must be in compliance with peremptory norms of general international law (*jus cogens*).

28. His delegation agreed with the Special Rapporteur that the adjective “serious” should be deleted from draft conclusion 19, since States were required to cooperate to bring to an end, through lawful means, any breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), whether or not the breach was “serious”. It supported draft conclusion 23 and the non-exhaustive list of peremptory norms previously referred to by the Commission as having peremptory status.

29. Given that, as stated in annex B of the Commission’s report (A/74/10), “the availability of international and domestic forums to address violations of individual rights has existed in various forms since the early 1900s”, his delegation wondered about the scope of the new topic added to the long-term

programme of work, namely “Reparations to individuals for gross violations of international human rights law and serious violations of international humanitarian law”. At a time when several related outcomes of the Commission were still under consideration in the Sixth Committee, including the articles on responsibility of States for internationally wrongful acts, his delegation doubted that the proposed topic met the needs of States regarding the progressive development and codification of international law.

30. As a coastal State, however, Togo considered that maritime piracy was a major concern of the international community as a whole, as acts of piracy were committed in all maritime zones and affected, to varying degrees, the interests of all States, whether coastal or landlocked. In light of its relevance, therefore, the topic “Prevention and repression of piracy and armed robbery at sea” met the criteria for inclusion in the Commission’s long-term programme of work, and his delegation hoped that it would be moved to the current programme of work as soon as possible.

31. **Mr. Azimov** (Uzbekistan) said that the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading could facilitate the adoption and harmonization of national laws in that regard, thereby paving the way for more effective cooperation between States in the prevention, investigation and prosecution of such crimes.

32. His delegation could not, however, support the Commission’s approach to the definition of “gender”, as outlined in paragraph (41) of its commentary to draft article 2 (Definition of crimes against humanity). Given the sensitivity of the issue, it would have been advisable to retain the internationally agreed language enshrined in the Rome Statute of the International Criminal Court. Moreover, none of the sources cited in the commentary in support of the current understanding as to the meaning of “gender” reflected the collective position of States, which were the main subjects of international law.

33. Draft article 5 was an important provision in that it restated the well-established and universal principle of non-refoulement. His delegation also welcomed the expanded provisions on mutual legal assistance: considering that crimes against humanity often transcended borders, upholding the principle of the inevitability of punishment could depend on effective cooperation between States. It further welcomed the clarification, in paragraph (31) of the commentary to draft article 6 (Criminalization under national law), that paragraph 5 of the draft article had no effect on any procedural immunity that a foreign State official might enjoy before a national criminal jurisdiction, which continued to be governed by conventional and customary international law.

34. Turning to the topic of peremptory norms of general international law (*jus cogens*) and the draft conclusions adopted by the Commission on first reading, he said that the phrase “a very large majority of States”, in paragraph 2 of draft conclusion 7 (International community of States as a whole), required fleshing out, if only in the commentary to the draft conclusion, since there were no established criteria for determining when that threshold had been reached and that, in turn, could give rise to differing interpretations of the phrase in the application of international law by relevant bodies. His delegation therefore requested the Commission to provide some criteria in order to facilitate greater convergence of approaches by States and international bodies.

35. Careful study was required of each of the norms included in the non-exhaustive list annexed to the draft conclusions, to confirm whether they did indeed constitute *jus cogens* norms, first and foremost in the light of general State practice. His delegation welcomed the removal of draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) of the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714). His delegation had proposed that change because immunity of State officials was already the subject of a separate study by the Commission and there was no need to duplicate that work.

36. The outcome of the work on *jus cogens* norms would ensure legal certainty regarding the hierarchy of the rules of international law. It could also prove helpful for bodies that applied international law.

37. Lastly, with regard to new topics being proposed for inclusion in the Commission’s programme of work, he said that the excessive expansion of the number of subjects studied by the Commission could have a negative impact on the effectiveness of its work.

38. **Mr. Hamamoto** (Japan) said that the Commission’s outputs had become voluminous. Given that States and international courts referred to the Commission’s work when interpreting international law, it was important for States to have the opportunity to examine them thoroughly, which was not necessarily the case currently. Moreover, the Commission’s outputs were increasingly taking the form of draft conclusions or draft guidelines, which, unlike draft articles which could form the basis of a treaty, would not be subject to diplomatic negotiations.

39. The object of the Commission was the progressive development of international law, on the one hand, and its codification, on the other. The Committee should bear that distinction in mind when discussing the Commission's work.

40. As that work and the discussions in the Committee would eventually lead to the unification of international norms, such outcomes should continue to be broadly reflected in State practice. However, a State might derogate from a unified standard through bilateral or multilateral agreements. If such derogation were not permitted, States might hesitate to commit to codification treaties and might find it difficult to adapt treaties to subsequent developments in the international community. That applied to treaties in the field of consular relations, for instance. Instruments drafted by the Commission and adopted by States should be sufficiently flexible as to allow States to change their rights and obligations by concluding other treaties bilaterally or with a limited number of parties, if necessary.

41. The Commission would be completing its work on many topics by 2021, and consideration should be given to what might be useful for the Commission to examine in the future. Nevertheless, States also needed time to digest the Commission's important work. Japan was opposed to the inclusion of the topics "Reparations 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" in the long-term programme of work, on the basis that many other topics had already been or were being considered by the Commission. However, his delegation welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the programme of work and appreciated that the Commission had responded expeditiously to the requests from Member States in that regard. Inclusion of the topic "Evidence before international courts and tribunals" in the programme of work might be useful for Member States.

42. Turning to the topic "Crimes against humanity", he said that his delegation considered the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading as legislative work aimed at the elaboration of a treaty, rather than as the codification of existing law. In order for the draft articles to be adopted as a treaty and receive broad support from States, national criminal law must be taken into account. That was the case in draft article 2, which contained a definition of crimes against humanity, as well as in draft article 6 (Criminalization under national law). Paragraph 1 of the draft article required States to criminalize such acts under national law, which might pose some technical difficulties, making it beneficial for States to be granted some discretion regarding the criminalization process. Paragraphs 2 and 3 stipulated that States must ensure that not only the perpetration of crimes against humanity but also other types of criminal acts were punishable under domestic criminal law. Since States had differing provisions regarding modes of criminal responsibility, they should be allowed some discretion in that regard.

43. Paragraph 5 stipulated that a person's official position was not a ground for excluding criminal responsibility. While noting that, in the commentary to draft article 6, the Commission made a distinction between criminal responsibility and immunity from foreign criminal jurisdiction, Japan was concerned about possible confusion in practice. According to paragraph 6 of the draft article, States must ensure that crimes against humanity were not subject to any statute of limitations. Crimes against humanity concerned various types of conduct and might be subject to a range of penalties, depending on the conduct in question and the mode of criminal responsibility. Implementation of that paragraph might therefore pose difficulties.

44. Paragraph 8 provided for the liability of legal persons and gave States discretion with regard to national legislation. However, as stated in the commentary to draft article 6, "criminal liability of legal persons has not featured significantly to date in international courts and tribunals". The definition of "legal persons" could also be controversial. Care should be taken to avoid a situation in which a firm found itself in difficulty due to remote capital relations with another firm that had existed several decades prior.

45. The topic "Peremptory norms of general international law (*jus cogens*)" was important for all States. However, it was only upon completion of the first reading of the draft conclusions on the topic had all the commentaries had been made available. States should be able to examine the Commission's work thoroughly.

46. The Special Rapporteur had originally proposed draft conclusion 22, on the duty to exercise domestic criminal jurisdiction over crimes prohibited by peremptory norms of general international law, and draft conclusion 23, on the irrelevance of official position and non-applicability of immunity *ratione materiae*. However, the Commission had wisely decided to only adopt a new draft conclusion 22, entitled "Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail", bearing in mind that the scope of the topic was limited to the identification and legal consequences of *jus cogens*.

47. Draft conclusion 8 (Evidence of acceptance and recognition) was very similar to draft conclusion 10 of the conclusions on identification of customary international law. It was questionable whether the same evidence could be used to identify both general international law and *jus cogens*.

48. Lastly, the Commission had adopted a non-exhaustive list of peremptory norms as an annex to the draft conclusions on peremptory norms of general international law (*jus cogens*). It would be helpful if the list was accompanied by reasons and evidence. The list contained norms previously recognized by the Commission as having peremptory status, but it was questionable whether there was consensus among States that the listed norms enjoyed a status different from other norms. Japan considered it advisable to delete the list during the second reading, to avoid controversy.

49. **Ms. Le** Duc Hanh (Viet Nam) said that the General Assembly and the Sixth Committee should carefully consider the need for a convention on crimes against humanity. Her Government supported the repression and punishment of crimes against humanity, bearing in mind respect for national sovereignty and non-interference in the internal affairs of other States. However, Viet Nam was not convinced that consensus existed regarding an international convention, given that the Commission's analysis was based on the practice of the International Criminal Court, which did not enjoy broad consensus within the international community with respect to the investigation and prosecution of serious international crimes.

50. In order to address the differences between national criminal legal systems, States should have the possibility to enter reservations to any future convention, as long as such reservations did not contravene its object and purpose. Disputes on the interpretation and implementation of the convention should be referred to the International Court of Justice only with the consent of the parties, rather than unilaterally. In addition, the criminal liability of legal persons had yet to gain wide acceptance in international law, and accordingly, sanctions for the acts of legal persons should be addressed in the domestic law of States and the matter should be removed from the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading.

51. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she said that peremptory norms played an important role in international law. They were recognized by the 1969 Vienna Convention on the Law of Treaties and in the domestic legislation and legal doctrine of many States. Her country's law on treaties recognized peremptory norms of international law as a principle to be adhered to when negotiating and entering into international treaties. However, the identification of such norms remained unclear. Her delegation commended the Commission's efforts to address the issue and encouraged it to continue its research on the topic.

52. With regard to the provisions on acceptance and recognition of *jus cogens* norms contained in the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading, she said that States with limited resources could be prevented from participating fully in the creation of materials to serve as evidence of such acceptance and recognition. The notion of "a very large majority of States" contained in those provisions should therefore be carefully interpreted to ensure that the community of States as a whole was represented in the acceptance and recognition of *jus cogens*.

53. Her delegation took note of the Special Rapporteur's success in producing a non-exhaustive list of peremptory norms of general international law (*jus cogens*) contained in the annex to the draft conclusions. However, concerns had been raised that some unlisted principles might not be considered as *jus cogens* despite their international recognition and acceptance as general principles of law and as norms from which no derogation was permitted. They included the seven principles codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV).

54. Lastly, Viet Nam was committed to the promotion of the rule of law at the international level based on the fundamental principles of international law, in particular those enshrined in the Charter, including respect for the sovereignty, political independence and territorial integrity of States, non-interference in the internal affairs of States, and the pacific settlement of disputes.

55. **Ms. Jang** Ju Yeong (Republic of Korea) said that her delegation supported the overall content of the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading, which could form a basis for strengthening law enforcement cooperation among States, particularly in the absence of bilateral treaties on extradition or mutual legal assistance.

56. However, in order to maintain coherence and stability in the international justice system, the draft articles should be aligned as closely as possible with the Rome Statute of the International Criminal Court. While

the Commission had striven to take account of the evolving nature of national law enforcement and international cooperation, it should ensure that the draft articles would strengthen, rather than erode, the system under the Rome Statute. It should also give careful consideration to the relationship between the draft articles and other relevant international instruments, such as the initiative for a new multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes.

57. The draft articles on jurisdiction, extradition, non-refoulement, victims and witnesses, and mutual legal assistance, should be closely aligned with the standards established under existing treaties. The draft article on *aut dedere aut judicare* should follow the Hague formula, upon which many treaties had already been based.

58. While her delegation agreed, in principle, with the recommendation for the elaboration of a convention based on the draft articles by the General Assembly or a diplomatic conference, it believed that further discussions among States about consultation methods and procedures were needed and that the opinions of States should be fully heard throughout those discussions.

59. Regarding the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions adopted by the Commission on first reading, her delegation understood that many discussions had taken place on whether the Commission should provide an illustrative list of peremptory norms, and if so, how that should be done. As a compromise, the Commission had decided to set out the peremptory norms it had already recognized in an annex. However, further discussion was needed on whether the illustrative list should be included in the draft conclusions. Her delegation urged the Commission to take a prudent approach and to revisit the subject on second reading.

60. The topic "Reparations to individuals for gross violations of international human rights law and serious violations of international humanitarian law" could be useful in identifying State practice regarding such reparations, while the topic "Prevention and repression of piracy and armed robbery at sea" had important implications for seafaring nations. The Government of Korea hoped that work on that topic would ultimately provide clarification on addressing piracy and armed robbery at sea under the United Nations Convention on the Law of the Sea, as well as practical information on its implementation by States.

61. Lastly, as the Commission's main purpose was the progressive development of international law and its codification, it should endeavour to reflect the views of States more fully when considering topics.

62. **Mr. Sarvarian** (Armenia), referring to the topic of crimes against humanity and the draft articles on prevention and punishment of crimes against humanity adopted by the Commission, said that the question of priority of jurisdiction needed to be addressed with respect to the three types of jurisdiction prescribed in draft article 7, paragraph 1, namely territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction. There were different arguments for prioritizing one over the other, but it was important to ensure legal clarity, especially since a substantial number of Member States participated in other treaty regimes that contained obligations for the surrender of suspects of crimes against humanity. The potential for conflicts of jurisdiction arising from the current version of the draft articles was not eliminated by the addition of draft article 13, paragraph 12, which required that the State where the alleged offender was present "give due consideration" to the request of the State in the territory under whose jurisdiction the alleged offence occurred, an issue that was exacerbated by the frailty of the dispute settlement mechanism proposed in draft article 15.

63. Armenia was in favour of holding a diplomatic conference to negotiate a future convention based on the draft articles, rather than the immediate adoption of the draft articles by the General Assembly. In light of the substantive concerns raised by his delegation, full details of which could be found in its written statement, available on the PaperSmart portal, the conference should be held in three to five years' time, to give States the opportunity to study the draft articles and formulate their positions.

64. Armenia considered the topic "Peremptory norms of general international law (*jus cogens*)", which concerned a fundamental field of general international law, to be a useful one. However, it had some concerns. Referring to the draft conclusions adopted by the Commission on first reading, he said that in draft conclusion 4, the criteria for the identification of a "super custom" or peremptory norm were ostensibly based on positive law (*jus dispositivum*). Armenia would have preferred them to be based on natural law (*jus naturale*), with a cross-reference to draft conclusion 3 and the commentary to the draft conclusion and the case law cited therein, such as the advisory opinion of the International Court of Justice in *Reservations to the Convention on the Prevention and Punishment of Genocide*, in which the Court had made reference to "the universal character of the condemnation of genocide". Rather confusingly, in scholarly writings, both State practice and moral considerations were cited as *jus*

cogens norms. Armenia disagreed with the notion that State consent had historically been required for the recognition of a *jus cogens* norm.

65. Against that backdrop, it would be useful for the Commission to consider further how *jus cogens* norms could be identified based on natural law, and what degree of commonality or universality was required for their identification. It would also be useful for the Commission to examine the issue of the relationship between a peremptory norm of substantive character and a positive rule of procedural character, even though it appeared that the International Court of Justice had definitively pronounced on it in the case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*.

66. His delegation also questioned whether it was possible to quantify acceptance by "a very large majority of States" (draft conclusion 7, paragraph 2). The Commission might as well adopt the phrase "total acceptance", since the difference between the two was so slight as to be negligible.

67. On draft conclusions 8 (Evidence of acceptance and recognition) and 9 (Subsidiary means for the determination of the peremptory character of norms of general international law), the phrase "subsidiary means" inverted the process by which peremptory norms had been recognized in practice. Courts, not States, had led the process, as had the Commission itself, for example in the case of articles 53 and 64 of the 1969 Vienna Convention.

68. Armenia supported the fusion of the concepts *of jus cogens* and *erga omnes* in draft conclusion 17. They were two sides of the same coin, yet much time and effort were spent on debating their theoretical relationship.

69. The non-exhaustive list of peremptory norms contained in the annex to the draft conclusions presented some methodological problems. The right of self-determination was included in the list, yet a small minority of States contested its status as a peremptory norm. In its advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice had affirmed that the right to self-determination had an *erga omnes* character, but did not address its peremptory status, perhaps in part owing to the open questions concerning the identification of peremptory norms, particularly in light of the historical time periods examined during those proceedings. Yet some 62 States had expressly asserted its peremptory status in their pleadings, and no State had expressly denied it.

70. While Armenia believed that the right to self-determination had both customary and peremptory status, it concurred with those States that had criticized the list for want of methodological coherence. Based on the Commission's stringent "super-custom" approach, the peremptory norms on the list would not have been recognized as such at the time of their historical recognition. However, Armenia considered that moral law was the foundation for their historical recognition, not State practice. The Commission's task was to identify a methodological basis for that.

71. **Mr. Sunel** (Turkey), speaking on the topic "Crimes against humanity" and the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading, said that his delegation needed more time to consider the Commission's recommendation that a convention be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

72. Turning to the draft articles themselves, he said that the Rome Statute stipulated that "persons" were responsible for the crime of genocide. Similarly, article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide stated that only persons could commit genocide or any of the other acts prohibited under the Convention. Yet according to draft article 3, paragraph 1, "States" had the obligation not to engage in acts that constituted crimes against humanity. If States could not be perpetrators of the crime of genocide, they could not be perpetrators of crimes against humanity either. The commentary to draft article 3 was not sufficient or convincing, and the paragraph should be deleted. On the other hand, his delegation considered that a reference to the principle of non-retroactivity should be included in the draft articles, consistent with the applicable rules of international law.

73. With regard to the topic "Peremptory norms of general international law (*jus cogens*)", Turkey continued to have misgivings about the need for progressive development of the concept of *jus cogens*, since practice and case law were insufficient and clear and specific rules of international law had yet to be formed on the topic. Turkey also had concerns about the non-exhaustive list of peremptory norms contained in the annex to the draft conclusions adopted by the Commission on first reading.

74. Turning to the topic "Provisional application of treaties", he said that Turkey attached importance to the consent of States and international organizations in relation to provisional application and wished to

reiterate that the rules should not create legally binding obligations.

75. His delegation had some concerns about the scope of the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" proposed for inclusion in the Commission's long-term programme of work, as there was insufficient practice and case law regarding serious violations of international humanitarian law. Furthermore, in the current multilateral environment, the likelihood of reaching consensus was very small, especially regarding certain political aspects of the topic. The Commission should therefore take a cautious and balanced approach. Its work on the topic, "Prevention and repression of piracy and armed robbery at sea", however, could be very beneficial.

76. More detailed comments reflecting his delegation's position could be found in his written statement, available on the PaperSmart portal.

77. **Ms. Veski** (Estonia) said that her delegation welcomed the Commission's adoption of the draft articles on prevention and punishment of crimes against humanity, and the transparent and inclusive process adopted by the Commission in their preparation, with States, civil society organizations and others contributing to the exercise.

78. Estonia was pleased that the draft articles reflected recent developments in international law. In that connection, it welcomed the ample references to applicable international law contained in the draft preamble, including the statement that the prohibition of crimes against humanity was a peremptory norm of general international law (*jus cogens*). It also welcomed the decision to delete the definition of "gender" from draft article 2, in keeping with the principles of human rights and equal treatment, and to include, in paragraph 8 of draft article 6, a provision that States must take measures to establish the liability of legal persons for crimes against humanity.

79. Her delegation supported the recommendation for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. Such a convention would fill the current gap in international law and strengthen the international criminal law system by complementing the relevant international treaties on genocide and war crimes. While her delegation was flexible as to the choice of forum for the elaboration of the convention, it had a preference for an international conference.

80. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she said that her delegation supported draft conclusion 3, where the Commission stated correctly that *jus cogens* norms protected fundamental values of the international community. In paragraph (2) of its commentary to draft conclusion 4, the Commission tried to explain what it meant by "it is necessary to establish" that a norm met the criteria it had set out to qualify as a peremptory norm of international law. However, the expression "it is necessary to establish" remained rather ambiguous; the Commission might need to clarify it further or provide examples based on case law or State practice.

81. While her delegation supported draft conclusion 6, where a distinction was made between acceptance and recognition as a criterion for identifying a peremptory norm of general international law (*jus cogens*) and acceptance and recognition as a norm of general international law, the words "(*opinio juris*)" should be added to the end of paragraph 1 in order to make that distinction clearer. In paragraph (6) of its commentary to draft conclusion 7, the Commission pointed out that "the international community of States" should be taken to mean the "overwhelming majority of States", "virtually all States", "substantially all States" or "the entire international community of States as a whole". That assertion should be backed up with additional examples from international case law.

82. Her delegation welcomed the revised versions of draft conclusions 10 and 11, which consolidated the legal consequences of the legality of treaties and the consequences for the parties if a treaty or some provisions of the treaty were in conflict with a *jus cogens* norm. However, it was important to analyse the effects of the draft conclusions not only on States but also on international organizations. Estonia was pleased that the wording of draft conclusion 12 was drawn from article 71 of the Vienna Convention on the Law of Treaties.

83. Her delegation welcomed the amendments made to draft conclusion 14, paragraph 1, and the analysis contained in paragraph (5) of the commentary thereto, reflecting the suggestion made in the past that the Commission should further consider customary international law as the main basis for the emergence of a *jus cogens* norm. However, the Commission had failed to address, in the commentary, the suggestions concerning the assertion that the elements required for the development of customary international law, namely State practice and *opinio juris*, could not give rise to a *jus cogens* norm. Estonia was pleased that the Commission made a clear distinction between *jus cogens* norms and obligations *erga omnes* in paragraphs (2) and (3) of its commentary to draft conclusion 17, indicating that although all peremptory norms of general international law gave rise to obligations *erga omnes*,

not all obligations *erga omnes* arose from peremptory norms of general international law.

84. Estonia supported draft conclusion 21 (Procedural requirements), which had been brought into line with articles 65 and 67 of the Vienna Convention. However, the Commission should approach the issue of procedural requirements with caution, because, as it acknowledged in paragraph (4) of its commentary to the draft conclusion, it had to ensure, on the one hand, that it did not purport to impose treaty rules on States that were not bound by such rules while, on the other hand, ensuring that the concerns regarding the need to avoid unilateral invalidation of rules was taken account of. Her delegation welcomed the inclusion in an annex of a non-exhaustive list of norms previously referred to by the Commission as having peremptory character, which would be vital for further discussions on *jus cogens* and the evaluation of further developments in international law.

85. Estonia welcomed the Commission's decision to include in its long-term programme of work 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", as both satisfied the conditions for the selection of new topics in the long-term programme of work.

86. **Ms. Rush** (New Zealand) said that her delegation welcomed the Commission's decision to place the topic of sea-level rise in relation to international law on its current programme of work and to form a Study Group. There had been significant support for such a move and her delegation was pleased that the Commission had responded to the calls of Member States to that effect. Sea-level rise was a matter of pressing concern to the international community and its legal implications were complex.

87. New Zealand was concerned about the implications of sea-level rise for maritime zones delineated under the United Nations Convention on the Law of the Sea and was committed to working with partners to ensure that, in the face of changing coastlines, the maritime zones of coastal States were protected. In that connection, her delegation was pleased that the Study Group was expected to begin considering the subtopic "Issues related to the law of the sea" in 2020.

88. Sea-level rise was an issue that was close to home for New Zealand and its Pacific island neighbours, some of which were experiencing sea-level rise nine times the global average. Maritime zones were of critical importance to Pacific countries. For many, their ocean spaces and rights under the Convention on the Law of the Sea were their pathway to sustainable development. It would be inequitable for those countries to have their rights to maritime zones eroded because of a phenomenon that they had done little to cause and that the drafters of the Convention had had no knowledge of. At a meeting of the Pacific Islands Forum in August 2019, the leaders of the Forum had committed to a collective effort, including to develop international law, with the aim of ensuring that once the maritime zones of a State member of the Forum had been delineated in accordance with the Convention, they could not be challenged or reduced as a result of sea-level rise and climate change.

89. The legal implications of sea-level rise raised questions of global significance. All States had an interest in preserving the balance of rights and responsibilities under the Convention. It was also in the interests of all States to ensure that there was certainty regarding maritime zones, to avoid potential disputes. Such matters deserved serious consideration by the international community.

90. Turning to the topic "Crimes against humanity", she said that her delegation was pleased that the Commission had decided to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. New Zealand welcomed the fact that the obligation of States not to engage in acts that constituted crimes against humanity had been made explicit in draft article 3; such clarity left no room for doubt or obfuscation.

91. The deletion of the definition of "gender" from draft article 2 was a positive development that reflected the fact that there were diverse concepts of gender identity throughout the world. The deletion also removed the risk of such a definition being at odds with national laws. The elaboration of a convention based on the draft articles would complete the codification of the most serious crimes of international concern.

92. As to the topic of "Protection of the environment in relation to armed conflicts" and in response to the Commission's call for information on State practice, she said that in New Zealand, attacks on the natural environment were prohibited in the Manual of Armed Forces Law. The obligations New Zealand operated under for an international armed conflict also applied to non-international armed conflicts, including the prohibition on using methods or means of warfare that were intended or might be expected to cause widespread, long-term and severe damage to the natural environment.

93. **Ms. Cerrato** (Honduras) said that her delegation welcomed the Commission's adoption on first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*) and the draft principles on

protection of the environment in relation to armed conflicts. It also welcomed the adoption on second reading of the draft articles on prevention and punishment of crimes against humanity and supported the recommendation for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. Such a convention would complement international human rights law, international criminal law and international humanitarian law. The new Penal Code of Honduras criminalized crimes against the international community, including crimes against humanity, and established extraterritorial jurisdiction over such offences.

94. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation welcomed the Commission's decision to include the topic in its programme of work and to establish a Study Group. Honduras was pleased that the Study Group had already met to discuss the its composition, methods of work and proposed calendar and programme of work, based on the three subtopics identified in the syllabus.

95. As a coastal developing country with a number of islands, Honduras was particularly vulnerable to climate change. The issue of sea-level rise was critical for the survival of its coastal and island communities. The topic should be considered in relation to the United Nations Convention on the Law of the Sea, the Paris Agreement under the United Nations Framework Convention on Climate Change and other relevant instruments in the fields of environmental law, international human rights law and international humanitarian law.

96. Her delegation welcomed the Commission's decision to include in its long-term programme of work 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".

97. More detailed comments could be found in her delegation's written statement, available on the PaperSmart portal.

98. **Ms. Heyvaert** (Belgium) said that her delegation welcomed the Commission's adoption of the draft articles on prevention and punishment of crimes against humanity. Belgium attached great importance to ending impunity for the most serious crimes of international concern and supported the elaboration of a convention on the basis of the draft articles, as recommended by the Commission. Her delegation was pleased that the definition of "gender" found in article 7 of the Rome Statute had not been retained in draft article 2, because, as noted in paragraph (41) of the commentary to that article, since the adoption of the Rome Statute, several developments in international human rights law and international criminal law had occurred, reflecting the current understanding as to the meaning of the term "gender".

99. The initiative for a new multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes was intended to offer a modern, detailed framework for the domestic prosecution of genocide, crimes against humanity and war crimes. The initiative and the draft articles shared the same objective, namely ending impunity for the most serious crimes, but they were different in terms of their scope *ratione materiae* and approach. The draft articles were comprehensive and sought to cover a wide range of concepts, including mutual legal assistance, extradition, prevention, responsibility of States and reparations for victims in respect of crimes against humanity. Nonetheless, both efforts were therefore complementary and should continue to be developed in parallel.

100. **Ms. Che Meh** (Malaysia) said that her delegation had taken note of the decision of the Commission to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly and supported the elaboration of a convention on the basis of the draft articles, whether by the Assembly or by an international conference of plenipotentiaries.

101. Referring to the topic of peremptory norms of general international law (*jus cogens*), she said that it was noteworthy that the discussions had progressed from the identification of criteria for norms of *jus cogens* to the consideration of the validity of international instruments that were in conflict with such norms. As to whether a non-State party to a treaty could invalidate a treaty on the ground that the treaty was in conflict with a *jus cogens* norm, Malaysia was of the view that, in the broader context of treaty law, only States parties to a treaty should be able to determine that the treaty was invalid on the basis of its conflict with norms of *jus cogens*.

102. While the Special Rapporteur was to be commended for the quality of his report, many of his draft conclusions he proposed were rooted in doctrine rather than international practice. Malaysia would welcome further analysis of the methodology used for the identification of peremptory norms and would welcome in particular an example of a peremptory norm of general international law that had been modified by a subsequent norm of general international law having the same character, as envisaged in article 53 of the Vienna Convention on the Law of Treaties.

103. **Ms. Dramova** (Bulgaria) said that her delegation was committed to ending impunity and strengthening the international legal framework for the prevention, prosecution and punishment of international crimes. It therefore welcomed the Commission's adoption of the draft articles on prevention and punishment of crimes against humanity and was pleased that the Commission had made an effort to remain consistent with the existing legal framework by incorporating the definition of crimes against humanity set forth in the Rome Statute of the International Criminal Court into the draft articles, and by drawing inspiration from multilateral and bilateral treaties, particularly with regard to mutual legal assistance.

104. Her delegation was also pleased that the Commission made it clear in the draft articles that the human rights of alleged offenders must be upheld. Through the extensive mutual legal assistance and *aut dedere aut judicare* provisions in the draft articles, it also offered the reassurance that there was no safe haven for perpetrators of the most serious crimes of international concern. As a participant in the initiative for a new multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes, Bulgaria believed the draft articles and the initiative were different but complementary projects that would bring added value to the international legal framework. Her delegation supported the elaboration of a comprehensive convention on the basis of the draft articles, preferably by an international conference of plenipotentiaries.

105. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she said that her delegation welcomed the constructive approach taken by the Special Rapporteur and his efforts to strike a balance between State practice and theory. The Commission should ensure that the draft conclusions adopted on the topic were consistent with its previous practice and the wording used in its previous outputs, in particular with regard to the responsibility of States for internationally wrongful acts. In the draft conclusions adopted on first reading, it made clear the distinction between peremptory norms of general international law (*jus cogens*), rules of customary international law and obligations created by unilateral acts of States, as well as their respective hierarchical positions in the event of conflict among them. With regard to the illustrative list of norms of *jus cogens* annexed to the draft conclusions, her delegation felt that more detailed analysis of the character of the norms was needed. Bulgaria welcomed the Commission's efforts to clarify the theoretical controversy surrounding the concept of regional *jus cogens*.

106. **Ms. Durney** (Chile), speaking on the topic "Crimes against humanity", said that her delegation welcomed the draft articles on the prevention and punishment of crimes against humanity adopted by the Commission on second reading. In preparing the draft articles, the Commission had aimed to achieve two objectives: to help to effectively prevent the commission of and impunity for crimes against humanity, and to draft provisions that would be both effective and likely acceptable to States, as a basis for a possible future convention. Indeed, the draft articles would ultimately oblige States to take specific measures to prevent and punish such crimes. They struck a good balance between codification and progressive development of international law and accurately reflected the basic obligations derived from the customary prohibition of crimes against humanity, including the duty of all States to prevent and punish such crimes.

107. The definition of "crime against humanity" set forth in draft article 2 replicated almost in its entirety the definition contained in the Rome Statute, a definition that had been widely accepted by States and international tribunals. The draft articles also created new obligations, which were largely aimed at promoting horizontal cooperation among States for the investigation and punishment of such crimes. A case in point was the obligation for States that would be parties to a future treaty on the subject to establish universal jurisdiction over crimes against humanity in cases where the alleged offender was present in their territory and to facilitate the extradition of such offender.

108. Although the draft articles would in no way affect the obligations of States parties to the Rome Statute, they contained obligations that would help to strengthen the ability of States to prosecute alleged perpetrators of crimes against humanity. That would foster the application of the principle of complementarity, one of the factors governing the exercise of jurisdiction by the International Criminal Court. Appropriate application of the draft articles would reduce the number of situations that would likely require the intervention of the Court.

109. With regard to the definition set forth in draft article 2, paragraph 2 (i), on the enforced disappearance of persons, the phrase "with the intention of removing them from the protection of the law for a prolonged period of time" should have been reworded. A detailed explanation of her delegation's reasoning, as well as more detailed comments on other issues, could be found in her written statement, available on the PaperSmart portal. While the wording of draft article 10, on *aut dedere aut judicare*, was reasonably satisfactory, it should be made clearer that the obligation would not be considered fulfilled when a person was extradited for an

offence other than a crime against humanity, such as theft.

110. Draft article 12 (Victims, witnesses and others) was balanced and appropriate in scope. Her delegation welcomed the inclusion of paragraph 3 thereof, which addressed the right of a victim of a crime against humanity to obtain reparation, thus ensuring the restoration of the rule of law and preventing the recurrence of such acts. Chile also welcomed the clarification brought to the text on second reading as to which States had an obligation to provide reparation.

111. Her delegation supported the Commission's recommendation for the elaboration of a convention on the basis of the draft articles, since such a convention would play an important role in strengthening international criminal law and establishing individual accountability for crimes against humanity. While international criminal tribunals had been established to prosecute certain crimes, such as war crimes and genocide, no such treaty yet existed relating to crimes against humanity. The elaboration of a convention would help States to adopt adequate measures to prevent and punish such crimes. Given that such a convention would only be binding on the States parties thereto, she hoped that those States that did not wish to become parties to the convention would not prevent consensus from being reached on a resolution on the topic.

112. The draft articles and the initiative to elaborate a multilateral treaty for mutual legal assistance and extradition should be complementary undertakings. The initiative should only contain obligations arising from a mutual legal assistance treaty, which provided a solid procedural framework for the investigation and prosecution of the most serious crimes of international concern. That would ensure that the respective scopes of the two undertakings were distinct, to avoid the risks of fragmentation and contradiction.

113. Turning to the topic of peremptory norms of general international law (*jus cogens*) and the draft conclusions adopted by the Commission on first reading, she said that the inclusion of the illustrative and non-exhaustive list of peremptory norms in the annex to the draft conclusions could be helpful in identifying which types of norms met the criteria set forth in draft conclusion 4. However, such a list must be compatible with the methodological nature of the draft conclusions, Part Two of which dealt with the identification of peremptory norms of general international (*jus cogens*).

114. The Commission stated in draft conclusion 23 that the non-exhaustive list comprised norms that it had previously referred to as having the status of peremptory norms of general international law, but it did not specify how those norms met the criteria that it had established to justify that assertion. To avoid that contradiction and to be able to keep the list, the introductory paragraph to the annex should be redrafted to ensure that the Commission was not required to examine each of the criteria listed in Part Two individually. To that end, it would be preferable for the introductory paragraph to start with one of the sentences used in paragraph 374 of the report of the Study Group on fragmentation of international law (A/CN.4/L.682): "Overall, the most frequently cited candidates for the status of *jus cogens* include:".

115. Lastly, her delegation had noted in the past that when a rule of customary international law conflicted with a peremptory norm of general international law (*jus cogens*), the rule of customary international law should be invalidated; that if all the parties agreed, it was possible to amend the provisions of a treaty that was void *ab initio*, to bring it into line with a *jus cogens* norm; and that the emergence of a new rule of *jus cogens* did not have retroactive effects on the validity of a treaty, something which was now correctly acknowledged in the commentary to draft conclusion 10.

116. With regard to the topic of provisional application of treaties and the draft guidelines on provisional application of treaties adopted by the Drafting Committee on first reading at the seventieth session of the Commission, she said that it would be useful to clarify whether an act carried out by a State during the provisional application of a treaty might be considered a type of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", as stated in article 31, paragraph 3, of the Vienna Convention on the Law of Treaties. Although there could be no talk of "parties" to an agreement during provisional application, States that opted for such a regime might indicate clearly, through their conduct, what meaning they ascribed to the provisions of the treaty, thereby contributing to its interpretation.

117. Draft guideline 4, paragraph (b), indicated that provisional application could be agreed through a resolution adopted by an international organization or an intergovernmental conference. Her delegation agreed that such types of resolutions could be a means of agreeing on provisional application, but only if a prior treaty or other agreement between the parties involved recognized the use of such resolutions for that purpose.

118. With regard to the draft model clauses on provisional application of treaties proposed by the Special Rapporteur, her delegation felt that the wording of draft model clause 1, paragraph 1, could be improved.

It stated that: “this Treaty [article (s)…] shall apply provisionally from the date of signature [or from X date], unless a State [an international organization] notifies the other State [international organization] [Depository] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application”. The word “unless” seemed to imply that if one State did not consent to be bound by such provisional application, the treaty would not be provisionally applied between any of the subjects concerned. To overcome that hurdle, an additional paragraph could be inserted into the model clause, which could read as follows: “The provisions of paragraph 1 shall not apply to a State [international organization] that notifies the other State [international organization [Depositary] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application”. A similar insertion could be added to the text of paragraph 2 the draft model clause.

119. With regard to draft model clause 2, which indicated that a treaty could be provisionally applied in accordance with the provisions of a separate agreement to that effect, it might be useful to anticipate cases where the States parties to the separate agreement were not the same as the signatories to the treaty that was to be provisionally applied. Her delegation welcomed draft model clause 5, which allowed a State to notify other States on possible limitations to the provisional application of a treaty deriving from its internal law. The inclusion of such a clause was a pragmatic way to address the diversity of legal systems around the world. However, such notification would only be effective where there had been agreement to provisional application subject to limitations deriving from internal law, a possibility contemplated in draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations). In all other cases, the notification set out in draft model clause 5 would not be admissible and the provisions of draft guidelines 8 and 10 would apply.

120. Her delegation welcomed the inclusion of the topic “Sea-level rise in relation to international law” in the Commission’s programme of work. In addition, Chile was pleased that the Commission had decided to include in its long-term programme of work the topic “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, since the Commission had decided not to cover the topic in its articles on responsibility of States for internationally wrongful acts, and to only include a “without prejudice” clause to that effect in article 33, paragraph 2, of the articles. Her delegation hoped that both that topic and the topic “Universal criminal jurisdiction” would be placed on the Commission’s current programme of work in the near future.

121. **Mr. Rabe** (Côte d’Ivoire) said that his delegation welcomed all the topics addressed by the Commission at its seventy-first session, which all represented common and current concerns of the international community and should be addressed in a satisfactory manner. It was also pleased that the Commission had decided to include in its long-term programme of work the topic “Prevention and repression of piracy and armed robbery at sea”, given the impact of such crime on national, regional and international peace and security, the development of States, national economic interests and human life. Piracy was resurging in Africa, particularly off the coast of Somalia and in the Gulf of Guinea and the Gulf of Aden. The legal, political, diplomatic, military and strategic dimensions of piracy must be examined in depth in order to maintain maritime peace and security.

122. Côte d’Ivoire, a coastal State with several major ports, had experienced acts of piracy and armed robbery in its own waters. To prevent further attacks, the Government had revised the Maritime Code to bring it into line with the United Nations Convention on the Law of the Sea, in particular the provisions relating to piracy. The new Code, adopted in 2017, drew heavily on the definitions set forth in the Convention. The Government had also improved the legislative and policy framework, strengthened the capacity of the country’s naval force and spearheaded the adoption and implementation of an integrated maritime strategy by the Economic Community of West African States. The strategy was intended to enable those States to better combat piracy by pooling their resources and strengthening cooperation.

123. **Ms. Zolotarova** (Ukraine) said that her delegation welcomed the adoption by the Commission of the draft articles on prevention and punishment of crimes against humanity and had submitted written comments and made proposals regarding the definition of such crimes. Ukraine was committed to ending impunity and ensuring that the perpetrators of the most serious crimes were brought to justice. Her delegation supported, therefore, the elaboration of a convention on the basis of the draft articles.

124. Ukraine welcomed the adoption by the Commission on first reading of the draft principles on protection of the environment in relation to armed conflicts. The topic was of particular relevance to her country because the ongoing foreign military aggression

it was under had caused significant environmental damage that was affecting ecosystems and public health. The regions affected by the conflict were not only facing the risk of an environmental emergency, but also lasting pollution. Her delegation's commitment to protection of the environment in relation to armed conflicts was evidenced by the resolutions it had sponsored at the second and third sessions of the United Nations Environment Assembly. Both resolutions had made reference to the Commission's work pertaining to protection of the environment in relation to armed conflict, and her delegation viewed them as complementary to the Commission's work.

125. Ukraine was pleased that draft principle 8 (Human displacement) included the call for appropriate measures to be taken to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict were located. However, the geographical areas referred to in the principle should be expanded to include the areas that displaced persons crossed, as such territories also needed protection. Her delegation agreed with the Special Rapporteur's decision to model draft principle 9 (State responsibility) on the articles on responsibility of States for internationally wrongful acts. Ukraine was also pleased that the draft principle included a reference to "damage to the environment in and of itself" as something for which reparation could and should be made.

126. Nevertheless, Ukraine was concerned that the draft principles did not fully address the responsibility and liability of non-State armed groups for damage caused to the environment as a result of armed conflict. While her delegation welcomed draft principles 10 and 11, on corporate due diligence and corporate liability respectively, in its view, those principles should be aimed not solely at corporations and other business enterprises, but also at non-State actors. Many States had made similar suggestions in the past. Her delegation supported, therefore, the development of a draft principle on the criminal responsibility of members of non-State armed groups for environmental damage prior to the second reading of the draft principles.

127. Ukraine was pleased that draft principle 18 affirmed the applicability of the prohibition of pillage to natural resources; there was precedent for such a principle. Her delegation also welcomed the Special Rapporteur's suggestion to link draft principle 18 with draft principle 21 [20], on the sustainable use of natural resources in situations of occupation.

128. Ukraine viewed the topic of protection of the environment in relation to armed conflicts as a humanitarian issue as much as an environmental one, given the relationship between environmental quality and human health. The humanitarian consequences of environmental damage could be lasting and severe, affecting everything from public health to people's livelihoods. Her delegation welcomed, therefore, the inclusion of draft principle 26, on relief and assistance. It agreed with the Commission that establishing responsibility for environmental damage could be complex, particularly when the damage was the result of a chain of events rather than a single act.

129. Given the importance of humanitarian and environmental assistance for post-conflict recovery and peacebuilding, Ukraine would welcome further discussion, in the commentary to draft principle 26, of the "forms of relief or assistance" referred to in the draft principle. Her delegation also wondered whether the wording "States are encouraged to take appropriate measures" was forceful enough. She recalled that the original wording of the proposed draft principle had been "States should take appropriate measures". Nonetheless, once finalized, the draft principles would create a strong and long overdue normative foundation for enhancing the protection of the environment in relation to armed conflicts.

The meeting rose at 12.55 p.m.