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Chair: Mr. Afonso . . . . . (Mozambique)

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22-24171 (E)

The meeting was called to order at 10 a.m.

Agenda item 77: Report of the International Law Commission on the work of its seventy-third session (*continued*) (A/77/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and X of the report of the International Law Commission on the work of its seventy-third session (A/77/10).

2. **Mr. Amaral Alves De Carvalho** (Portugal), referring to the broad issue of codification and progressive development of international law under the auspices of the United Nations, said that codification seemed to have been in decline for some time. Although the Commission's products might have different forms and outcomes, in some cases where the Commission expressly recommended the adoption of draft articles as a convention, the Committee had not acted and had given in to opposition from a few States, despite a widespread and representative sample of States that were prepared to move forward. While the achievement of a consensus was important, it was not an end in itself; consensus should be seen as an instrument for achieving a meaningful substantive outcome, not as a rule or a dogma. It entailed the responsibility to engage and negotiate in good faith, although it could be used as a veto. Unless that issue was addressed and the working methods of the Committee improved, the potential contribution of the Commission and the Committee might be severely impaired and undermined, at a time when more international law that better regulated the fast-evolving context of international relations was needed.

3. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said that the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading were of great assistance for the identification of *jus cogens* norms to which States must adhere, thus contributing to the predictability and stability of the international legal system. Although draft conclusion 23 and the annex containing a list of *jus cogens* norms were welcome, the Commission should have been more ambitious in both the number and the content of the norms listed by, for instance, referring to peremptory environmental norms, such as the obligation to protect the environment.

4. His delegation agreed with the inclusion of the words "and representative" in paragraph 2 of draft conclusion 7 (International community of States as a whole). Indeed, the acceptance and recognition of a *jus cogens* norm must not depend only on a "very large majority of States" but also on a majority that was representative, for example, of the diversity of legal systems and cultures of the different regions of the world. His delegation was satisfied with the work of the Commission on the topic and hoped that the General Assembly would take up the Commission's recommendation that the Assembly take note of the draft conclusions and commend them, together with the commentaries thereto, to the attention of States and all who might be called upon to identify peremptory norms of general international law (*jus cogens*) and to apply their legal consequences.

5. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that, in the preamble to the draft principles on protection of the environment in relation to armed conflicts it adopted on second reading, the Commission acknowledged that effective protection of the environment in relation to armed conflicts required that States, international organizations and other relevant actors take measures to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict. Since the environment was a common good of humanity, it should be a common endeavour of States, international organizations, corporations and individuals to fight environmental degradation and cooperate in the protection of the environment, including in relation to armed conflicts, whatever their nature or how long they lasted.

6. The draft principles reflected a progressive perspective concerning the impact of armed conflicts on the environment, where not only international humanitarian law, but also international human rights law, the law of the sea, international criminal law and international environmental law were applicable. Although protection of the environment could not be absolute, as conditional protection was necessary to guarantee a balance between military, humanitarian and environmental concerns, an acceptable balance had been achieved in that regard. His delegation hoped, therefore, that the General Assembly would accept the Commission's recommendation that the Assembly take note of the draft principles, annex them to its resolution and encourage their widest possible dissemination; and commend the draft principles, together with the commentaries thereto, to the attention of States and international organizations and all who might be called upon to deal with the subject.

7. With regard to "Other decisions and conclusions of the Commission", his delegation welcomed the decision to include the topic "Prevention and repression of acts of piracy and armed robbery at sea" in its

programme of work, as Portugal had been actively engaged in the consideration of legal issues relating to acts of piracy and had been advocating a holistic and sustainable approach to the issue, focusing not only on the repression of those illicit acts but also and particularly on the prevention thereof. His delegation hoped that the Commission's decision to also include the topic "Subsidiary means for the determination of rules of international law" in its programme of work might contribute to the codification and progressive development of international law and provide a useful solution to certain negative consequences of the fragmentation of international law.

8. His delegation's full statement would be made available on the Committee's website.

9. **Mr. Mik** (Poland), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation had continued to urge the Commission to pursue the issue of specific consequences for serious breaches of peremptory norms of general international law, owing to their fundamental importance to the international legal order. Having directly witnessed serious and continuing violations in Eastern Europe since 2014 of an obligation arising from a peremptory norm of general international law, Poland continued to believe that more detailed standards in that respect should be developed. It was therefore regrettable that the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading only reproduced appropriate provisions from the 2001 articles on responsibility of States for internationally wrongful acts, without any further elaboration.

10. The customary rules contained in draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) were still very broad. Unfortunately, the Commission had missed an opportunity to explain how States should discharge their obligations concerning, among other things, their conduct within international organizations. Even so, it was obvious that providing weapons to a State which breached the prohibition of aggression violated the international customary obligation described in that draft conclusion. His delegation nevertheless commended the Commission for citing, in its commentary, instruments reflecting the current practice of States and international organizations, such as General Assembly resolution ES-11/1, in which the Assembly "deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter".

11. With respect to the Commission's working methods, there was a need for a clearer indication of the status of specific provisions within a particular topic. Careful analysis of the Commission's work showed that a provision or a standard could go through several quasi-legislative phases that were not always clearly discernible. Thus, a provision might be proposed by the Special Rapporteur, remain pending in the Drafting Committee, be approved by the Drafting Committee, or be approved by the plenary session, with or without commentary. Within a particular topic, it was typical for different provisions to be at different stages of development. It would therefore be advisable for the Commission to consider inserting into its report a table for each topic, indicating the status each provision in the standard-setting or rule-making process.

12. His delegation supported the inclusion in the Commission's long-term programme of work of the topic of non-binding agreements, which was closely linked to the issue of the definition of the term "treaty", as proposed by his delegation at the seventy-sixth session (see A/C.6/76/SR.17). It was important not to equate that issue with the very complex and broad issue of soft law.

13. **Mr. Smyth** (Ireland), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation generally welcomed the adoption on second reading of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). It had agreed for some time that the Commission's work in that area should indeed take the form of conclusions, where the Commission would survey the existing law in a given area and then present its conclusions as to the content of that law. Equally, it seemed that "conclusions" were not the appropriate vehicle for proposals for progressive development of the law, and that they might more accurately be described as "recommendations".

14. The fact that only a small number of changes had been made to the draft conclusions since their preliminary adoption gave rise to a few questions. For instance, it was unclear whether the expression "the international community of States as a whole", used in draft conclusion 2, and the expression "the international community", used in draft conclusion 3, were intended to mean the same thing, and if so, why consistent terminology was not used. If they were not the same, then the difference between them should be explained. More importantly, however, the concept of modification of a peremptory norm when such a norm was one from which by definition no derogation was possible remained problematic. It was difficult to see how any

peremptory norm could be modified, given that any such modification would necessarily entail a derogation from the original norm. While the Vienna Convention on the Law of Treaties also contemplated subsequent modification of a peremptory norm, it seemed that no peremptory norm would in fact ever be capable of modification, although of course new peremptory norms might emerge in areas not currently covered by such norms.

15. His delegation also wondered whether, as set out in draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)), treaty provisions and general principles of law did serve as bases for peremptory norms. If any treaty did so, that would be because it had codified pre-existing customary law, which was the authentic basis for peremptory norms. Equally, to the extent that general principles informed customary law, they would have a role to play, although it was doubtful that in their own right they could actually serve as a basis for peremptory norms.

16. One of the most important changes made to the draft conclusions since their preliminary adoption was the change of the title of draft conclusion 21 from "Procedural requirements" to "Recommended procedure". Despite that change, the provision was a recommendation rather than a presentation or codification of existing law. In the circumstances, his delegation wondered whether the recommendation should be set as a conclusion at all; a separate section entitled "Recommendations" might have been more appropriate.

17. Nonetheless, Ireland welcomed the fact that the draft conclusions took as their starting point articles 53 and 64 of the Vienna Convention on the Law of Treaties, and that they built on those provisions and the Commission's earlier work on State responsibility to provide a relatively clear guide for both the identification of peremptory norms and the legal consequences of serious breaches of said norms. His delegation particularly welcomed the clear manner in which the Commission set out, in draft conclusion 19, the particular legal consequences of serious breaches of peremptory norms. States should cooperate to bring any such serious breaches to an end and should not recognize as lawful any situation created by such serious breaches.

18. Ireland took note of the inclusion of draft conclusion 23 and the annex containing a list of non-exhaustive peremptory norms to which the Commission had previously referred. The Commission made clear in the draft conclusion that the list was without prejudice to the existence or future emergence of other peremptory norms. As Ireland was one of the delegations that had expressed some reservations about such a list during the Commission's work, and in particular concerning the risk of the list being misunderstood as comprehensive, it welcomed the clarification provided by the draft conclusion. Accordingly, Ireland regarded the list as purely illustrative, even if, in its view, each of the norms listed was indeed a peremptory norm of general international law.

19. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading made a valuable contribution to the general understanding of how international humanitarian law and other areas of international law applied to the environment and armed conflict. Some of the draft principles were presented as codifying applicable law, while others were recommendatory in nature and were intended to contribute to the progressive development of the law. While the use of the term "principle" with respect to both types might tend to confuse readers, Ireland nevertheless appreciated the fact that the Commission had made an effort to distinguish between the two types in its commentaries. However, as with the use of the term "conclusions", the Commission might need to give more thought to the nomenclature of the products of its work.

20. His delegation welcomed the Commission's analysis of how certain aspects of international humanitarian law applied in relation to protection of the environment and of how other areas of international law, including international human rights law and international environmental law, complemented and informed the application of international humanitarian law in relation to protection of the environment in situations of armed conflict and occupation. That analysis had led to the elaboration of the draft principles in Parts Three and Four, which would be of valuable assistance to States and other relevant actors endeavouring to understand the application of relevant international law in that context and to comply with it.

21. Ireland appreciated the Commission's consideration of the comments it had made, along with other States, on the previous text of the draft principles contained in Parts Three and Four and the amendments consequently made by the Commission, which had significantly improved the draft principles and the commentaries thereto. Ireland particularly welcomed the amendments to both draft principle 13, paragraph 2, and draft principle 14 and the commentaries thereto. As for the amendments to the draft principles applicable outside situations of armed conflict and occupation, contained in Parts Two and Five and which were expressed as

binding rules of international law, his delegation remained of the view that the commentaries to draft principle 7 (Peace operations) and draft principle 26 (Remnants of war) did not adequately demonstrate the legal bases for those draft principles as binding rules. In its commentary to draft principle 5, which had previously been expressed as recommendatory but was now expressed as binding, the Commission also did not adequately demonstrate a legal basis for that draft principle as a rule of law.

22. His delegation continued to support draft principles 6, 8, 22, 24, 25 and 27, which were all recommendatory in nature. It did not, at the current stage, take a position in relation to any of the remaining recommendatory draft principles, but intended to give them further consideration.

23. **Mr. Kanu** (Sierra Leone), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation acknowledged the steps taken by the Commission to give the statements of delegations delivered in the Committee the same or equal value as written submissions, as requested between the first and second readings of the draft conclusions prepared on the topic. The conclusion of the Commission's work, under the guidance of an African jurist, was a significant accomplishment. Sierra Leone agreed with the decision to change the title of the draft conclusions adopted by the Commission to "Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)", which clearly described the scope and purpose of the draft conclusions.

24. The compromise reached on draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)), in both its placement and the further clarification of its meaning by splitting it into two sentences, was appropriate, since the first sentence explained that peremptory norms reflected and protected fundamental values of the international community, while the second sentence explained that those peremptory norms were universally applicable and superior to other rules of international law. His delegation took note of the helpful debate on retaining the text of the first paragraph of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*), which entailed deciding whether to change the words "basis" and "bases" to "source" and "sources." Since the Commission had commended the draft conclusions and annex, together with the commentaries, to the attention of States and to all who might be called upon to identify *jus cogens* norms and to apply their legal consequences, its explanation that it had decided not to use the words "source" or "sources" as they might create confusion with the notion of sources of international law was very useful.

25. With regard to draft conclusion 7 (International community of States as a whole), his delegation took note of the Commission's agreement with the suggestion made by the Special Rapporteur in his fifth report (A/CN.4/747) to add the phrase "and representative" in describing the type of majority needed to meet the acceptance and recognition requirement, with the Special Rapporteur further agreeing to elaborate on the issue in the commentary. The Commission's decision not to take steps that might blur the boundary between customary law and *jus cogens* was significant, underlining the substantive differences between those two issues.

26. With regard to draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), his delegation took note of the Commission's approach to address States' concerns regarding paragraph 1, relating to how an emerging rule of customary law could conflict with an existing peremptory norm, by changing the phrase "if it conflicts", on first reading, to "if it would come into conflict", on second reading. The further approach to address the concerns of the stifling of the emergence of new peremptory norms of general international law, to preclude the emergence of a new rule of customary law that ran contrary to an existing peremptory norm, as well as the further clarifications in the commentary, were also well noted.

27. With regard to 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*)), his delegation was satisfied that no State had contested the substance of the legal principle that Security Council decisions were also subject to *jus cogens* norms, since the phrase "obligations created by resolutions, decisions or other acts of international organizations conflicting with a *jus cogens* norm" was broad enough to cover the Security Council. The retention of the reference to the Council in the commentary was helpful to further clarify the issue.

28. The debate in the Commission on draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) had been necessary and appeared to have helped in clarifying the use of the word "serious", leading to the conclusion that all breaches of *jus cogens* norms had legal consequences, such as the duty of cessation and reparation, but serious breaches carried

more specific obligations, such as the duty of States to cooperate in order to bring an end to the breach, and the duty of non-recognition. Although the Commission did not define the concept of seriousness in paragraph 3 of the draft conclusion, it did elaborate on it in its commentary.

29. As for the annex to the draft conclusions, his delegation still supported the approach taken with the illustrative list of *jus cogens* norms and shared the view that the list, which reflected important *jus cogens* norms, including the prohibition of the use of force and the right of self-determination of all peoples, was without prejudice to the existence or emergence of other norms of general international law.

30. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that his delegation noted that African normative instruments, including the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), had been relevant in the discussions on the reports of the Special Rapporteur as well as in the debates of the Commission. His delegation fully supported the scope of the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading, as they applied to the protection of the environment before, during or after an armed conflict, including in situations of occupation, as contained in draft principle 1.

31. Sierra Leone also agreed with the purpose of the draft principles, as expressed in draft principle 2, which stated that the draft principles were "aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment".

32. With regard to draft principle 4 (Designation of protected zones), the Commission had discussed the different wording proposals that were intended to avoid giving the impression that there was a cumulative requirement that the referenced area be both environmentally and culturally important in order to be protected. The proposals had included deleting the word "major" from the phrase "areas of major environmental and cultural importance", as well as adding the phrase "in relation to armed conflict" or "in the event of armed conflict." His delegation was content with the current wording of the draft principle.

33. With regard to draft principle 9 (State responsibility), his delegation agreed with the Commission's decision to keep paragraph 1 unchanged. It took note of the compromise struck on paragraph 2 with the "without prejudice" clause in reference to the rules on responsibility of States or international organizations for internationally wrongful acts. That approach was similarly adopted for paragraph 3 to cover the rules on the responsibility of non-State armed groups and the rules on individual criminal responsibility. While it might have been useful for the Commission to take a position on those matters, given the relevance of both non-State actors and individuals to questions of responsibility, the approach of a "without prejudice" clause was understandable.

34. The reformulation of the first part of the first sentence of draft principle 10 (Due diligence by business enterprises) to delete the words "legislative and other" before the word "measures", to read "States should take appropriate measures", addressed the concern that differences in legal systems allowed States to achieve the desired impact of the draft principle with or without legislation, and took into account existing legislation that covered the relevant issues. With the importance of enhancing the existing obligations of States, the decision to indicate that the words "appropriate measures" encompassed a variety of measures States could take, such as legislative, administrative and judicial, was helpful. The clarity provided with the replacement of the phrase "an area of armed conflict or in a post-armed conflict situation" with "an area affected by an armed conflict" was also helpful.

35. Referring to Part Three (Principles applicable during armed conflict), he said that his delegation agreed with the change from the use of the term "natural environment" to "environment" in draft principles 13, 14 and 15. It also agreed with the explanation given by the Commission in paragraph (5) of the commentary to Part Three that that change should not be understood as altering the scope of the existing conventional and customary law of armed conflict, or to expand the scope of the notion of "natural environment" in that law.

36. With regard to draft principle 13 (General protection of the environment during armed conflict), the new paragraph 2 (b), which had been proposed by the Special Rapporteur in response to comments from States, appeared to be an important addition. As the paragraph read: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited". It was hard to understand why objections had been raised in respect of that paragraph in the first place, when no reference had been made therein to any specific weapon or even to weapons in general. Besides, that prohibition already existed in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims

of international armed conflicts (Additional Protocol I). As the Special Rapporteur had argued, not including it in a set of principles specifically addressing the protection of the environment in relation to armed conflicts would have cast a shadow over the existing prohibition. Although the new text of paragraph 2 was composed of two subparagraphs, his delegation agreed that the bifurcation provided more clarity on the normative nature of the provision.

37. Concerning "Other decisions and conclusions of the Commission", his delegation welcomed the Commission's decision to include in its current programme of work the topics "Settlement of international disputes to which international organizations are parties", "Prevention and repression of piracy and armed robbery at sea", and "Subsidiary means for the determination of rules of international law". It was regrettable, however, that the topic "Universal criminal jurisdiction" was still on the long-term programme of work, despite the wide support expressed by Member States for its inclusion in the current programme of work. It appeared that the Commission was being deferential to the Committee, even though it could independently exercise its mandate, which could even help end the political impasse by putting the collective focus of Member States back on clarifying any legal uncertainties over the issue of universality.

38. The topic "Extraterritorial jurisdiction", which had been put on the long-term programme of work in 2006, was yet to be placed on the current programme of work. It might be recalled that the topic "Jurisdiction with regard to crimes committed outside national territory" had been on the list of fourteen topics identified in 1949, with the thinking that the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) fell within its scope. The Commission, therefore, could strive for completeness and perhaps avoid the political debate in the Committee by combining those topics and studying the wider issue of jurisdiction, which might then allow it to comprehensively clarify the various legal challenges arising from the exterritorial application of criminal jurisdiction. His delegation took note of the Commission's decision to place the topic "Non-legally binding international agreements" on its long-term programme of work.

39. Referring more generally to the Commission's report (A/77/10), he said that his delegation welcomed the progress made on other aspects of the Commission's work. It took great interest in the reminder contained in paragraph 263 of the Commission's role of strengthening the current international legal framework, consistent with article 17 of its statute. His delegation welcomed the recommendation contained in paragraph 281 for the Commission to hold the first part of a session in New York during the next quinquennium, which would help to promote greater interaction with Member States and might well assist in possibly strengthening the Commission's relationship with the Committee. To that end, it was vital that all members from all regional groups be able to access the Commission's meetings with the relevant facilitation by the Secretariat and the host State.

40. Lastly, Sierra Leone welcomed the additional information provided in paragraph 285 of the report in response to the request by the General Assembly in paragraph 34 of its resolution 76/111 and contained in annex II to the report for a trust fund to assist Special Rapporteurs of the Commission, especially those from developing countries. His delegation appreciated the dedication of the members of the Commission and the Secretariat who, despite the continuing challenges of the COVID-19 pandemic, had made the personal sacrifices which had enabled the Commission to resume its work in a hybrid format. That said, as in-person interactions both formally and informally were critical for progress, it was important to resume the usual working methods of the Commission on the normal schedule with in-person meetings.

41. **Mr. Napurí Pita** (Peru), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading were truly important, given that *jus cogens* norms reflected and protected fundamental values of the international community and were universally applicable and hierarchically superior to other rules of international law, as set out in draft conclusion 2. Draft conclusion 7 (International community of States as a whole), in particular its paragraphs 1 and 2, was noteworthy, in that it was the acceptance and recognition by the international community of States as a whole or a very large and representative majority of States that was relevant for the identification of peremptory norms of general international law (*jus cogens*), not acceptance and recognition by all States.

42. His delegation took note of draft conclusion 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)), in which the Commission sought to define the relationship between norms of general international law (*jus cogens*) and obligations *erga omnes*, indicating that *jus cogens*

norms gave rise to obligations *erga omnes*, owed to the international community as a whole and in relation to which all States had a legal interest. Accordingly, any State was entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on responsibility of States for internationally wrongful acts. His delegation took note of draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) and the point made in the commentary that the draft conclusion applied, as appropriate, to international organizations.

43. The non-exhaustive list of *jus cogens* norms provided for in draft conclusion 23 and presented in the annex to the draft conclusions was relevant, even though the Commission indicated in its commentary to the draft conclusion that the draft conclusions were methodological in nature and did not attempt to address the content of individual peremptory norms of general international law (*jus cogens*). The concept of a list was fluid and evolving and could therefore not be meant to put an end to the debate on the issue.

44. The topic "Protection of the environment in relation to armed conflicts" was vital, owing to the seriousness of global environmental issues, such as climate change and the loss of biodiversity, which could be exacerbated by armed conflicts. Referring to the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading, he said that his delegation wished to draw particular attention to draft principles 2, 3, 4, 5, 8 and 9, concerning, respectively, the purpose of the draft principles, measures to enhance the protection of the environment, designation of protected zones, protection of the environment of Indigenous Peoples, human displacement and State responsibility. Draft principles 13 (General protection of the environment during armed conflict) and 18 (Protected zones) were also noteworthy because protected zones included areas of environmental importance and areas of cultural importance so designated by agreement.

45. His delegation appreciated the efforts made by the Secretariat to address the challenges faced in the organization of hybrid sessions in 2021 and 2022. The Secretariat should continue to leverage technology to ensure efficiency, transparency and safety. His delegation also commended the Commission and the Secretariat for their commitment to multilingualism.

46. **Ms. Rathe** (Switzerland), referring to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, said that her delegation was satisfied with the final outcome of the draft conclusions and was convinced of their usefulness. It thanked the Commission for having taken into account the comments that Switzerland had submitted to it.

47. Her delegation also reiterated in particular its satisfaction with draft conclusion 23 and the non-exhaustive list of *jus cogens* norms set out in the annex to the draft conclusions. Switzerland had developed in its practice a broader understanding of what constituted the core of *jus cogens* than that stemming from the illustrative list. It therefore welcomed the stipulation that the list was without prejudice to the existence or subsequent emergence of other *jus cogens* norms. It regretted, however, the inconsistency between the French version, which referred to "les règles fondamentales du droit international humanitaire" and the English version, which referred to "the basic rules of international humanitarian law". It would have preferred the English version to read: "the fundamental rules of international humanitarian law", in line with the wording used by the International Court of Justice.

48. Turning to the topic "Protection of the environment in relation to armed conflicts" and the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading, she said that Switzerland underlined the importance of better protecting the environment in contemporary armed conflicts. It welcomed the clarification on the temporal scope of application as well as the draft principle on protected zones, which could be powerful tools for the protection of areas of environmental importance.

49. Lastly, in reference to "Other decisions and conclusions of the Commission", she said that her delegation welcomed the inclusion in the long-term programme of work of the topic "Non-legally binding international agreements". The discussion on the handling of such soft law instruments was important from both a rule of law and a democracy perspective.

50. **Mr. Nyanid** (Cameroon), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation welcomed the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, which represented an attempt to strengthen the legal framework established by the Charter of the United Nations and other rules of international law, especially in the current context when certain States tended to

transform unilateral acts contrary to the Charter and international law into legitimate practice. The draft conclusions should become a methodological guide to assist States and international organizations in identifying the emergence of *jus cogens* norms and their legal consequences.

51. As to the form of the draft conclusions, his delegation suggested that, for ease of comprehension, the chronological order could be adjusted, starting, for example, with draft conclusion 3 (Definition of a peremptory norm of general international law (*jus cogens*)), followed by draft conclusions 1 (Scope), 4 (Criteria for the identification of a peremptory norm of general international law (*jus cogens*), 9 (Subsidiary means for the determination of the peremptory character of norms of general international law), 2 (Nature of peremptory norms of general international law (*jus cogens*)), 5 (Bases for peremptory norms of general international law (*jus cogens*)), 6 (Acceptance and recognition) and 8 (Evidence of acceptance and recognition).

52. In terms of substance, his delegation took note of the non-exhaustive list of *jus cogens* norms provided in the annex to the draft conclusions, although it had reservations about the principle of including such a list and was concerned about some of the norms included on the list. It might be desirable to focus on State practice and *opinio juris*, which was the best way of determining the willingness of States to elevate certain norms to *jus cogens* or *erga omnes* status. In that connection, draft conclusion 5 neatly captured the idea that customary international law was the clearest manifestation of *jus cogens*. His delegation therefore welcomed the wide variety of forms of evidence of acceptance and recognition of *jus cogens* norms as suggested in draft conclusion 8. That desire for openness should, however, not lead to redundancies. For example, the expression "and other conduct of States" used in paragraph 2 of that draft conclusion was sufficiently broad and should cover all public statements made on behalf of States; official publications; government legal opinions; and diplomatic correspondence, which were also listed in the paragraph.

53. His delegation was concerned about the stipulation in draft conclusion 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)) that peremptory norms of general international law (*jus cogens*) give rise to "obligations owed to the international community as a whole". The nexus between *jus cogens* norms and obligations *erga omnes* recognized in State practice was not an obligation *erga omnes*, since States could refuse to accept *jus cogens*, as was the case with certain States that had refused to ratify the 1969 Vienna Convention on the Law of Treaties. Moreover, many States parties to the Convention had formulated reservations regarding the unilateral referral of disputes on the application of articles 53 and 64 to the International Court of Justice. His delegation therefore suggested that the draft conclusions stay true to the Westphalian principle of international law, whereby that law was one made by States for States. It would be counter-productive for the mandatory character of a norm of international law to be enshrined in a draft conclusion. Indeed, the reluctance of the International Court of Justice to refer to *jus cogens* was reflective of the sensitive nature of those norms. At no point in its case law did it use the expression "*jus cogens*", although it had recognized the concept through the term "obligations *erga omnes*".

54. His delegation therefore supported draft conclusion 7 (International community of States as a whole) and, in particular, the wording that "a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*)". It recalled that, bearing in mind the principle of sovereign equality of States, a customary rule was established on the basis of its acceptance by the greatest possible number of States, irrespective of their size, influence or wealth. His delegation therefore supported the current formulation that referred to a "large majority of States".

55. Cameroon supported the indication in draft conclusion 16 that a resolution, decision or other act of an international organization that would otherwise have binding effect did not create obligations under international law if and to the extent that they conflicted with a peremptory norm of general international law (*jus cogens*), given the obvious impact that resolutions had on international peace and security. While his delegation agreed generally with the stipulation in draft conclusion 18 that no circumstance precluding wrongfulness under the rules on responsibility of States for internationally wrongful acts might be invoked with regard to any act of a State that was not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*), it was concerned about the application of that provision in extreme cases of self-defence. It would be desirable to reconsider the formulation of the draft conclusion to take into account all configurations, not only that relating to human rights, which seemed to have informed the wording of the draft conclusion.

56. His delegation was also concerned about the scope of the "obligation to cooperate", contained in draft conclusion 19, to "bring to an end through lawful means any serious breach by a State of an obligation arising

under a peremptory norm of general international law (*jus cogens*)". While that obligation reflected the general obligation to cooperate enshrined in international law, it was doubtful that it could be applied to bring to an end to an internationally wrongful act, particularly one thought out and structured by the perpetuating State.

57. His delegation also had concerns about the consistency between draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) and draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)). Since customary international law was recognized as the most common basis for peremptory norms of general international law, there could be no conflict between the two norms, because one derived from the other. It would be more appropriate to refer to the need to avoid allowing the establishment of an international custom that would undermine the interests of humanity.

58. Lastly, it was regrettable that the draft conclusions did not deal with controversial issues, such as the intersection between State immunity, jurisdiction and the application of State responsibility for breaches of *jus cogens* norms.

59. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that his delegation took note of the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading, given the difficulty in implementing the legal and regulatory provisions governing armed conflicts and the environment in international law. With regard to their form, it would have been preferable for the Commission to reorder the draft principles for better comprehension.

60. As to their substance, his delegation suggested that the preamble be tightened and that excessively general provisions be pruned. With regard to draft principle 1 (Scope), while his delegation could agree that the provision applied to the protection of the environment during an armed conflict, including in situations of occupation, it had doubts about its application before and after an armed conflict. Situations prevailing before and even after an armed conflict could not be considered under the umbrella of the armed conflict, because they were governed by ordinary international environmental law. The draft principle traced the path of an exceptional environmental law that should govern nothing but the exceptional situation of protection of the environment during armed conflicts. For that reason, his delegation welcomed the precision of draft principle 2 (Purpose).

61. While his delegation generally agreed with the content of draft principle 3, on measures to enhance the protection of the environment, given the obligation that the law of armed conflicts imposed on States and which contributed directly or indirectly to enhancing the protection of the environment, it wondered about the timing of the measures to be taken. It was imperative to have clarity on that point, since it was doubtful that the primary concern of a State facing a threat to its security would be to legislate or to take administrative or other measures, as suggested by paragraph 1 of the draft principle. It would be desirable to consider the matter further, taking into account contingencies imposed by war, which even the law of war was not yet able to cover. Indeed, despite the designation of protected zones suggested in draft principle 4, belligerents sometimes denied responsibility for bombing such zones, on the pretext that said zones were military objectives or places for the concealment of offensive weapons, an exception that could be contemplated based on the reading of draft principle 18.

62. His delegation also wondered about the relevance of draft principle 5 (Protection of the environment of indigenous peoples), since that environment could be included in the regime of draft principle 4 by specifying the measures addressed exclusively to States and those concerning international organizations and other relevant actors. It would suffice to point out that the special relationship between Indigenous Peoples and their environment had been recognized, protected and upheld by international instruments such as the Convention concerning Indigenous and Other Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples.

63. His delegation suggested that draft principle 6, which dealt with agreements concerning the presence of military forces, and draft principle 7, which dealt with peace operations, be merged into one draft principle. His delegation wondered about the content of draft principle 10 (Due diligence of business enterprises), which referred to responsible business practices, since businesses had a special understanding of the concept of responsibility in their quest for profits. It would be desirable to establish a link between draft principle 10 and draft principle 16 (Prohibition of pillage), which was a form of the "due diligence with respect to the protection of the environment" and "ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner" set out in draft principle 10.

64. Draft principle 12 (Martens clause with respect to the protection of the environment in relation to armed

conflicts) was too broad and was similar in spirit to draft principle 13 (General protection of the environment during armed conflict). Further discussion to make the provision as precise as possible would be desirable. The inclusion of draft principle 15 (Prohibition of reprisals) was inappropriate, since the customary character of prohibitions of attacks against the environment as reprisals had not yet been established. The provision could therefore give rise to resistance and its scope could be very limited. His delegation welcomed the detailed review of Part Four (Principles applicable in situations of occupation), which would pave the way for a practical solution reflecting the wide variety of circumstances that could constitute a situation of occupation.

65. Turning to "Other decisions and conclusions of the Commission", he said that the French version of the proposed topic of non-legally binding international agreements ("Accords internationaux juridiquement non-contraignants") should more appropriately be referred to as "Actes concertés non conventionnels". Such informal agreements could take different forms, including oral agreements, and were accepted in international law, as reflected in jurisprudence and State practice. They satisfied the needs of States and were consistent with the nomenclature of international agreements as determined by instruments such as the 1969 Vienna Convention on the Law of Treaties between States and the 1986 Vienna Convention on treaties concluded by international organizations, which referred broadly to "all forms of international agreement in writing concluded between States", "governed by international law".

66. Lastly, the legal effects of such agreements should be considered in a comprehensive manner, taking into account their specificity. It would be counter-productive to establish a rigid comparison between such agreements and those governed by Article 102 of the Charter. States could express their wishes to be bound in so many different ways, including through words, whether expressed orally or in writing, and even through symbols, such as white flags displayed by two parties during an armed conflict or conclusive acts or conduct for tacit agreements. The International Court of Justice had recognized the latter example in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, when it said: "Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line".

67. **Mr. Nguyen** Khac Tuan (Viet Nam), addressing the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, said that his delegation was concerned about the annex containing a non-exhaustive list of norms that the Commission had previously referred to as having the status of peremptory norms, because the Commission's mandate was to specify criteria for the identification of peremptory norms, not to identify a list of such norms. His delegation reiterated its request for the seven principles enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States be included on the list.

68. The nature of peremptory norms of general international law (*jus cogens*), set out in draft conclusion 2, should not constitute an additional criterion for the identification of such norms to those contained in draft conclusion 4, which were drawn from article 53 of the Vienna Convention on the Law of Treaties. With regard to draft conclusion 7 (International community of States as a whole), the qualification "as a whole" meant that the acceptance and recognition should be by a very large and representative majority of States. The test of representativeness required that the acceptance and recognition be across regions, cultures, legal systems and development levels. While the views and practices of non-State actors might provide context and contribute to the assessment of the acceptance and recognition by the international community of States as a whole, it was the acceptance and recognition of States that mattered as evidence of the emergence of peremptory norms.

69. Turning to the topic "Protection of the environment in relation to armed conflicts" and the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading, he said that his delegation fully understood the long-lasting consequences of armed conflicts to the environment and supported the identification in the draft principles of the principle of protection of the environment before, during or after an armed conflict. States, business enterprises and other entities that caused damage to the environment in situations of armed conflict should make full reparation for such damage by, for example, conducting post-armed conflict environmental assessments and implementing remedial measures; removing toxic and hazardous remnants of war, clearing minefields, providing relief and assistance; and paying full reparation to the victims of the environmental damage they caused.

70. **Ms. Joyini** (South Africa), addressing the topic "Peremptory norms of general international law (*jus*

cogens)", said that her delegation commended the Special Rapporteur for having considered the comments and observations submitted by States in finalizing the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading. Her delegation was pleased that draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)) had been retained following its comments after the first reading, which had been incorporated into the fifth report of the Special Rapporteur (A/CN.4/747). The description of the distinctive nature of those norms would be a useful tool in enhancing the understanding of peremptory norms (*jus cogens*).

71. Her delegation also took note of the retention of paragraph 2 of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) in its previous form, in which treaty provisions were identified as a basis for peremptory norms. Nonetheless, it remained unconvinced by the ambiguity of the Commission's treatment of treaty provisions as basis for *jus cogens*. Although the Commission suggested at various places in its commentary that treaty provisions could only form the basis of *jus cogens* to the extent that they reflected customary international law, it ought to have made that point clear in the text of the draft conclusions.

72. Her delegation welcomed the inclusion of the phrase "and representative" in paragraph 2 of draft conclusion 7 (International community of States as a whole), which would enhance the understanding of the type of majority needed to meet the acceptance and recognition requirement. It supported 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*)) and was pleased that the Commission had confirmed that resolutions, decisions or other acts of the Security Council under Chapter VII of the Charter were subject to peremptory norms of general international law (*jus cogens*). Indeed, resolutions and decisions of the Security Council should have been explicitly mentioned in the text of the draft conclusion, although the draft conclusion in its current form provided for a broader application of resolutions, decisions or other acts of international organizations and their organs, including those of the Security Council. Her delegation was encouraged by the further clarity provided in the commentary, in particular in paragraph (5) thereof, where the Commission attempted to elaborate and explain the procedure that States should follow as set out in draft conclusion 21 prior to adopting any measure in the belief that a binding Security Council resolution was in conflict with *jus cogens*.

73. South Africa appreciated the use of the word "particular" in the title of draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), which showed the Commission's intention not to introduce an exclusive list of consequences, but to rather identify additional consequences which flowed from breaches of *jus cogens* that met the threshold under paragraph 3 of the draft conclusion, as further explained in paragraphs (17) and (18) of the commentary. However, with the inclusion of the word "serious", the draft conclusion still implied an existence of other or non-serious breaches of peremptory norms of general international law (*jus cogens*), taking into consideration paragraph (1) of the commentary, where the Commission stated expressly that the draft conclusion did not address the consequences of breaches of peremptory norms that were not serious in nature.

74. With regard to draft conclusion 23 (Non-exhaustive list), her delegation welcomed the further clarity provided by the Commission in its commentary on the list of peremptory norms following the second reading and would continue to support the contents of the draft conclusion, especially considering the Commission's view that the inclusion of a list on a "without prejudice" basis was not intended to exclude the existence of other norms that might have peremptory character, or the emergence and development of other norms in the future.

75. Turning to the topic "Protection of the environment in relation to armed conflicts", she said that armed conflicts continued to have a devastating impact on the environment, increasingly causing environmental degradation with dire effects on the civilian population. New means of warfare and the way they were employed posed new challenges for the protection of the environment, with the use of nuclear and conventional weapons as well as other methods of mass destruction contributing to the destruction of the environment in war-torn societies.

76. Her delegation therefore commended the Commission for developing a legal framework aimed at enhancing protection of the environment during and after armed conflict, with the adoption of its draft principles on protection of the environment in relation to armed conflicts on second reading. Those draft principles would help to strengthen the capacities of the international community to protect the environment in the context of armed conflicts. In that regard, it welcomed the inclusion of the preambular paragraph

that read: “Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation”.

77. Her delegation supported the stipulation in draft principle 4 that States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas were of cultural importance. While that principle applied to States only, it would have been valuable if it applied to all parties to the armed conflict.

78. The impact on the environment often began long before war started and the testing of weapons could create emissions and chemical and noise pollution and destroy landscapes. The disposal of those weapons through dumping was also a serious cause for concern. It was therefore imperative that the draft principles were always applied by States, even in peace time. Her delegation was therefore encouraged that its request for inclusion of issues that were relevant to that work, including the impact of refugee flows and human displacement on the environment, were addressed in draft principle 8. It was worth noting that African normative instruments in that area, such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), had been of relevance to the Commission in its work on that draft principle.

79. In draft principle 10 (Due diligence by business enterprises), the words “appropriate measures” were broad and ambiguous, since the word “appropriate” could mean different things to different people. Her delegation therefore appreciated the clarification in the commentary that the reference to “appropriate measures” should be understood to encompass a variety of measures States could take, such as legislative, administrative and judicial.

80. Her delegation supported the prohibition of the use of methods and means of warfare that were intended, or might be expected, to cause widespread, long-term and severe damage to the environment in draft principle 13, along with the stipulation in draft principle 14 that the principles and rules on distinction, proportionality and precautions should be applied to the environment. Those principles were in line with the rules of war contained in the Geneva Conventions, which set out what could and could not be done during armed conflict. It was regrettable, however, that the Commission did not attempt to define the concepts of “widespread, long-term and severe” set out in draft principle 13. Although Additional Protocol I to the Geneva Conventions did not provide a definition of those concepts, it did indicate how they should be understood.

81. South Africa attached great importance to the measures and actions aimed at removing hindrances to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, including the protection of the environment. It therefore appreciated draft principles 19, 20 and 21, contained in Part Four of the draft principles (Principles applicable in situations of occupation).

82. Concerning “Other decisions and conclusions of the Commission”, her delegation commended the Commission’s decision to add the topics “Prevention and repression of piracy and armed robbery at sea”, “Subsidiary means for the determination of rules of international law” and “Settlement of international disputes to which international organizations are parties” to its current programme of work. It also supported the Commission’s decision to include in its long-term programme of work the topic “Non-legally binding international agreements”, given the growing trend and practice of States entering into such agreements.

83. Lastly, her delegation was delighted that for the first time the Commission had appointed two African members as Special Rapporteurs at the same time, while a third African member was currently the Chair of the Commission. That was a good starting point on the path towards equity in the distribution of Special Rapporteurs. There had been concerns about the handling of visas by the State hosting the Commission. It had been flagged that it was more cumbersome and time-consuming for members from certain global South countries to obtain visas in comparison to their Western counterparts, and that members from Africa, Asia and Latin America had been issued visas of shorter durations than their counterparts from elsewhere. The timely issuance of visas for all members, without distinction, was vital for the members to do their work and was consistent with the obligations of the host country under the agreement with the United Nations. The host country should see to it that those issues were addressed.

84. **Ms. Langrish** (United Kingdom) said that, at the seventy-fourth and seventy-sixth sessions, the United Kingdom had emphasized the importance of the Commission distinguishing clearly between when it was codifying international law and when it was proposing the progressive development of the law, or new law, and the need for the Commission to engage more with States and take into account their comments, both when it considered new topics and when it engaged in its ongoing work. That included taking account of the

resources States had available to engage with the Commission's work. Her delegation welcomed the Commission's recognition of the importance of those issues and looked forward to further progress in those areas.

85. Concerning "Other decisions and conclusions of the Commission", she said that her delegation noted the Commission's decision to include the topic "Non-legally binding international agreements" in its long-term programme of work and agreed with the author of the syllabus, annexed to the Commission's report (A/77/10), that a key question would be how non-legally binding agreements would be distinguished from legally binding agreements. In that regard, her delegation advocated using one of the alternative terms identified in the syllabus, such as "instruments" or "arrangements".

86. Concerning the three new topics the Commission had decided to include in its current programme of work, she noted that a careful study of the topic "Subsidiary means for the determination of rules of international law" would fit in well with the Commission's work on the sources of international law. On the topic "Prevention and repression of piracy and armed robbery at sea", the Commission could usefully suggest improvements to arrangements for the prosecution of piracy and armed robbery at sea, while work on the topic "Settlement of international disputes to which international organizations are parties" might serve to address an ongoing problem.

87. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she said that the Commission should proceed with caution. Following the first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*), the United Kingdom had emphasized the importance of ensuring that States' views and concerns were taken into account on second reading. The draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted on second reading by the Commission should be of assistance in ensuring that States and courts were appropriately rigorous when faced with questions of *jus cogens*. However, the draft conclusions did not in all respects reflect current law or practice. Given their potentially far-reaching consequences, the draft conclusions should be taken forward alongside the views of States, including as expressed in the Committee, and courts and practitioners should be clearly informed of such views when considering the legal status of the draft conclusions.

88. In its written observations on the draft conclusions adopted on first reading, the United Kingdom had noted that the persistent objection of certain States, particularly those that were specifically affected, to a rule of customary international law while that rule was in the process of formation was relevant to concluding that the rule had been accepted and recognized by the international community of States as a whole as having a peremptory character. The United Kingdom also remained doubtful that there was sufficient State practice to support the proposition in paragraph 3 of draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)) that the persistent objector rule did not apply to peremptory norms of general international law (*jus cogens*). With respect to 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*)), her delegation welcomed the clarification in the commentary that the procedural rules in draft conclusion 21 were "particularly important in relation to resolutions of the United Nations adopted under Chapter VII of the Charter of the United Nations." However, it remained of the view that there was insufficient practice to support the position that a State could refuse to comply with a binding Security Council resolution on the basis that it might be in breach of a *jus cogens* norm.

89. Draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) was based on articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts, which did not in their entirety reflect existing customary international law. Further, her delegation questioned whether the State conduct cited in the commentary to the draft conclusion evidenced a legal duty to cooperate. With regard to draft conclusion 23 (Non-exhaustive list) and the annex to the draft conclusions, it would be better not to include a non-exhaustive list of norms having the status of peremptory norms. Her delegation was particularly concerned that, as acknowledged by the Commission in paragraph (3) of its commentary, when putting together the list the Commission had not applied the methodology set out in its own draft conclusions for the identification of such norms. The United Kingdom did not consider that all the norms listed clearly fulfilled the relevant criteria, referring in particular to the inclusion of the right to self-determination.

90. On the topic "Protection of the environment in relation to armed conflicts", her delegation considered the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading to be a positive contribution to

environmental protection. Given their wide scope, which touched on the law of armed conflict, international human rights law and international environmental law, the draft principles should not be regarded as in any way modifying international humanitarian law nor affecting any limitations and reservations relating to that law. Her delegation welcomed the confirmation in the commentary to draft principle 11 that the use of terminology in the draft principles that did not align with international humanitarian law, as for example the use of the word "environment" rather than "natural environment", should not be understood as altering the scope of international humanitarian law. Her delegation similarly welcomed the recognition in paragraph (4) of the general commentary that international humanitarian law, where applicable, was *lex specialis*.

91. *Mr. Leal Matta (Guatemala), Vice-Chair, took the Chair.*

92. **Mr. Skachkov** (Russian Federation), speaking with regard to "Other decisions and conclusions of the Commission", said that his delegation welcomed the inclusion by the Commission of the topics "Settlement of international disputes to which international organizations are parties" and "Prevention and repression of piracy and armed robbery at sea" in its current programme of work. The Commission's in-depth study of those topics would make a positive contribution to the codification and progressive development of international law.

93. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said that his delegation was disappointed that, despite having examined the positions of States expressed in the Committee in his fifth report (A/CN.4/747), the Special Rapporteur had not incorporated the changes expected by many delegations into the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) submitted for the Commission's consideration on second reading.

94. His Government's written comments provided in August 2021 remained applicable to the draft conclusions adopted by the Commission on second reading. With reference to draft conclusion 7 (International community of States as a whole) and draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), his delegation continued to have doubts about the meaning of the phrase "international community of States as a whole" and how it related to the non-applicability of the persistent objector rule to *jus cogens* norms. Ultimately, an international obligation, whatever its character, could not be imposed upon a State against its will.

95. His Government continued to disagree that 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*)) could be applied to resolutions of the Security Council and had explained repeatedly that the draft conclusion did not reflect State practice. The same could be said of parts of the commentary to the draft conclusion concerning the relationship between obligations arising under Article 103 of the Charter and *jus cogens* norms. There was also insufficient State practice to conclude that there was a correlation between *jus cogens* norms and obligations *erga omnes*, as set out in draft conclusion 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)) and the commentary thereto. His delegation had already suggested that the Commission exclude that issue from the study for lack of sufficient evidence.

96. It was unfortunate that the Commission had eschewed its long-standing practice and had overstepped its mandate by bringing politics into its commentary to draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)). His delegation categorically disagreed with a number of the documents involving the Russian Federation mentioned in the footnotes to the commentary, while noting the Commission's explanation, in paragraph (3) of the commentary to draft conclusion 1, that references to different materials in the commentaries were meant to illustrate methodological approaches and did not imply the Commission's agreement with, or endorsement of, the views expressed therein. His delegation questioned the assumption in the commentary to draft conclusion 19 that the duty of States to "cooperate" included a duty to support various resolutions condemning breaches of obligations arising from *jus cogens* norms, and that international organizations and their members had a duty to "react" to such breaches by supporting such resolutions. The draft conclusion and the commentary thereto did not accurately reflect the true state of affairs in international law, as dozens of States would be in violation of such a duty, having objected to or withheld support for such resolutions.

97. With regard to draft conclusion 21 (Recommended procedure), his delegation welcomed the change of the title from "Procedural requirements" but noted that no change had been made to the rest of the draft conclusion.

The draft conclusion still did not reflect *lex lata* and did not contribute to the formation of *lex ferenda*. There was no State practice justifying the extension of the procedure set out in the 1969 Vienna Convention on the Law of Treaties to rules of customary international law.

98. No significant changes had been made to draft conclusion 23 (Non-exhaustive list) either, even though the Commission had acknowledged in the commentary to the draft conclusion that the elaboration of a non-exhaustive list of *jus cogens* norms would require a detailed and rigorous study of many potential norms and that doing so would fall beyond the scope of the exercise of elaborating draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Indeed, such a study had not been conducted. The inclusion of the list as an annex to the draft conclusions was unwise and brought no added value. From the outset, the draft conclusions had been intended to be methodological in nature and the Commission's main objective had been to establish a process for the identification of *jus cogens* norms. The elaboration of the list by the Commission could have far-reaching consequences and could negate the rest of its work on the topic.

99. In the light of the foregoing, the comments of States on the draft conclusions should be reflected in the wording of the resolution to be proposed to the General Assembly. Taking paragraph 3 of General Assembly resolution 76/112 on the protection of the atmosphere as a model, the proposed paragraph would read: "The General Assembly takes note of the views and comments expressed in the debates of the Sixth Committee on the subject, including those made at the seventy-seventh session of the General Assembly, after the International Law Commission had completed its consideration of this topic in accordance with its statute".

100. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that his delegation remained of the view that the matter was sufficiently addressed in international law, first and foremost in international humanitarian law. His delegation therefore noted with satisfaction that the Commission had chosen to formulate the general guidance as a set of non-legally binding draft principles on protection of the environment in relation to armed conflicts.

101. Although the Commission had made significant changes to the draft principles it had adopted on first reading, the text adopted on second reading still contained provisions that unnecessarily expanded the scope of the topic. In reference to draft principle 1 (Scope), his delegation reiterated the point it had made in 2019 (see A/C.6/74/SR.31) that the focus of the draft principles should be on protection of the environment during armed conflicts, and that the periods before and after were considered peacetime, during which the general norms relating to the protection of the environment were fully applicable. His delegation's previous comments with regard to draft principles 4, 8, 10, 11, 12 and 18 continued to be relevant.

102. **Ms. Cáceres Navarrete** (Chile), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that when a rule of customary international law conflicted with a *jus cogens* norm, 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 a retroactive effect.

103. With regard to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted on second reading by the Commission, while her delegation broadly agreed with the elements defining the nature of *jus cogens* norms set out in draft conclusion 2, it noted that the concept of "fundamental values of the international community" needed to be defined, which would make it possible to distinguish such norms from other norms.

104. With regard to the criteria for identifying a *jus cogens* norm, evidence of State acceptance was required for a norm to have peremptory status; in other words, a *jus cogens* norm could only be established on the basis of its widespread acceptance and recognition by States across the various regions. In that respect, it would be appropriate to apply the criteria set out by the Commission to identify *jus cogens* norms, ensuring to determine primarily whether States accepted and recognized them as peremptory, and prioritizing quality over quantity by focusing on a small number of *jus cogens* norms to be analysed in detail.

105. The process of identifying peremptory norms of general international law should result in the identification of truly universal norms, involving all legal systems, so as not to generate "false universalization" based on only some legal orders. Universality was consubstantial with *jus cogens* and therefore constituted an expression of the common interest of the entire international society. In that regard, and concerning the bases for peremptory norms provided in draft conclusion 5, it would be more appropriate to refer to "sources", in the traditional sense,

and not “bases”, as they were different concepts that aimed to reflect different effects.

106. With regard to draft conclusion 7 (International community of States as a whole), her delegation agreed with the proposal of the Special Rapporteur to insert the word “representative” in paragraph 2. It should be understood that the acceptance and recognition of a *jus cogens* norm must be sufficiently widespread, representative and consistent, given the importance of the value that was meant to be protected. In that respect, a comparative method needed to be developed and applied with the aim of identifying representativeness, so as to ensure the universality of the acceptance and recognition.

107. While her delegation agreed that *jus cogens* norms had a universal character and that regional *jus cogens* was questionable, it believed that regional systems, such as regional human rights systems, could serve as an important tool when determining the representativeness, acceptance and recognition of a peremptory norm. Regional approaches to international law could be useful to identify, for example, what was meant by the terms “fundamental values” or “shared values”, as they would be the product of concurrence or commonality across different regional public regimes.

108. The illustrative and non-exhaustive list of *jus cogens* norms reproduced in the annex to the draft conclusions could be useful for identifying what types of norms fulfilled the criteria established in draft conclusion 4 (Criteria for the identification of a peremptory norm of general international law (*jus cogens*)). However, that list should be compatible with the methodological nature of the draft conclusions, Part Two of which regulated the requirements to be met for a given norm to be identified as a peremptory norm of international law. Draft conclusion 23 provided that the norms contained in the annex were those that had been previously referred to by the Commission as having peremptory character, but the Commission did not indicate how the requirements set out in its draft conclusions were met in order to justify that assertion. In that regard, it would be useful to conduct an analysis to demonstrate how those requirements should be met.

109. Moreover, the Commission set out that list without assessing whether the norms included therein were *jus cogens* norms or whether they had been duly formulated as such. The Commission could have conducted a more extensive analysis of its proposed list of norms, which would have allowed it to determine with relative certainty whether or not they were indeed of a peremptory nature, and to offer an example of best practices on the application of its criteria for identifying *jus cogens*, thus clarifying the significance and enhancing the overall usefulness of those criteria.

110. **Mr. Chaipatiyut** (Thailand), speaking on the topic “Peremptory norms of general international law (*jus cogens*)”, said that given the extraordinary legal effects of peremptory norms of general international law on the international community, the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading had significant implications. For a norm of general international law to meet the criteria of being accepted and recognized by the international community of States as a whole as having a peremptory character, it must be universally accepted and recognized across regions, legal systems and cultures.

111. Concerning the non-exhaustive list of norms of general international law having peremptory status provided in the annex to the draft conclusions, it was stated in draft conclusion 23 that the list was without prejudice to the existence or subsequent emergence of other peremptory norms of general international law. Indeed, the list merely provided indicative examples prepared by the Commission and could be used as a reference point when considering whether a norm was universally accepted and recognized.

112. Regarding draft conclusion 14, on rules of customary international law conflicting with *jus cogens*, his delegation was satisfied with the general approach taken since the Commission’s first reading of the draft conclusions, and welcomed in particular paragraph 1, which stated that “a rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*)”, while also recognizing the possible modification of a *jus cogens* norm by a subsequent *jus cogens* norm. His delegation shared the view expressed in the commentary to the draft conclusion that, even if the constituent elements of customary international law were to be present, a rule of customary international law would not come into existence if the putative rule conflicted with *jus cogens*. In that context, the phrases “does not come into existence” and “would conflict with”, used in the draft conclusion, were appropriate.

113. On the topic of protection of the environment in relation to armed conflicts, his delegation recognized the crucial role that relevant actors, including international organizations, could play with respect to post-armed conflict environmental assessments. Cooperation with international organizations, such as the United Nations Environment Programme, the United Nations Educational, Scientific and Cultural

Organization and the International Committee of the Red Cross, given their experience and expertise, would shed light on how to identify and address environmental consequences of armed conflicts as well as their risks to health, livelihoods and security. Given the degree to which so many relied on the environment for their livelihood and survival, it was incumbent on humankind to protect the environment, in times of both conflict and peace.

114. Regarding "Other decisions and conclusions of the Commission", his delegation took note of the Commission's decision to include the topics "Settlement of international disputes to which international organizations are parties", "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law" on its programme of work and stressed that the Commission should complete its work on those topics on the basis of sufficient State practice. His delegation would follow with interest the Commission's work on those topics as well as on the topic of sea-level rise in relation to international law, which was of particular importance to Thailand. Considering the extensive impacts of the coronavirus disease (COVID-19) pandemic on people's livelihoods and economic well-being around the world and the critical importance of international investment in pandemic recovery efforts, there was much practical value to be gained from the Commission initiating its work on topics that would clarify international law principles used in international investment agreements, in particular the fair and equitable treatment standard in international investment law, a topic which was already on the Commission's long-term programme of work.

115. His delegation attached great importance to promoting better knowledge of international law and was therefore pleased at the resumption of the International Law Seminar in 2022. The Seminar's contributions to building the capacity of young international legal practitioners, particularly those from developing countries, was invaluable. His delegation encouraged continued voluntary contributions to the United Nations trust fund for the Seminar. Thailand cooperated closely with the United Nations to promote international law and would co-host, for the eighth time, the United Nations Regional Course in International Law for Asia-Pacific in 2022.

116. In view of the significance of the Commission's work, it was important that it should reflect and address the needs and concerns of all States. Enhanced interactions between the Commission and Member States through the Committee, through both formal and informal channels, were essential. The outcomes of the Commission's work should be the result of a participatory process for States and should respond to new needs in a timely manner. Thailand stood ready to support the Commission, particularly through the exchange of views with its members.

117. **Mr. Lefeber** (Netherlands) said that his Government prioritized submitting substantive contributions to the Commission in the form of comments, observations, examples of State practice and other views when requested. Having noted the many new topics that had been added to the Commission's programme of work, his delegation reiterated its recommendation that the Commission should limit the number of topics on its agenda, which would allow States to study the topics in depth and contribute in a more meaningful way to the discussions in the Committee.

118. On the topic of peremptory norms of general international law (*jus cogens*), his delegation welcomed the adoption on second reading of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, and in particular the amendments and additions that had been made in accordance with the written comments and observations submitted by the Netherlands. In its commentaries, for instance, the Commission now recognized that treaties and general principles of law could only serve to a limited extent as a basis for *jus cogens*. The Netherlands could support a General Assembly resolution in which the Assembly would take note of the draft conclusions, without a decision to further include the topic in its agenda.

119. On the topic of protection of the environment in relation to armed conflicts, his delegation noted the adoption on second reading of the draft principles on protection of the environment in relation to armed conflicts. While his delegation appreciated that the some of its written observations and comments had been reflected in the draft principles, it noted that some had been left out, such as its view that draft principle 7, on peace operations, did not reflect customary international law. His delegation could support a General Assembly resolution in which the Assembly would take note of the draft principles, without a decision to further include the topic on its agenda.

120. As to "Other decisions and conclusions of the Commission", his delegation welcomed the inclusion of the topic "Settlement of international disputes to which international organizations are parties" in the Commission's programme of work, considering that there had been an increase in the number of disputes

with a private law character that had been brought against international organizations and their host States. A study of the issue by the Commission would be timely and useful, given the legal complexities raised by the settlement of those disputes.

121. His delegation noted the inclusion of the topic "Prevention and repression of piracy and armed robbery at sea" in the Commission's programme of work and welcomed the widening of the scope of the topic to include armed robbery at sea. Given that piracy at sea was already covered extensively by international, regional and national law, there was no need for further guidance or clarification on the issue, which was not the case with armed robbery at sea. It would therefore be useful for the Commission to focus on providing guidance for the development of domestic criminal law on that issue.

122. Regarding the Commission's inclusion of the topic "Non-legally binding international agreements" in its long-term programme of work, his delegation agreed that work on that topic could contribute to the development of international law. The practice of concluding non-legally binding international agreements had grown and more clarity on the matter was needed. The legal issues raised by the use of non-binding instruments in the identification and application of international law were pertinent to international practice.

123. His delegation would welcome an international discussion on the implications under international law of the inability to renounce a second nationality. Some individuals encountered difficulties in renouncing a second nationality and concerns had been expressed regarding the involuntary acquisition of nationality, unwanted associations with a second nationality or with the country concerned, and the virtual impossibility of renouncing a nationality. Those issues were also related to foreign interference in the domestic affairs of States and unforeseen consequences for individuals through the exercise of extraterritorial jurisdiction on the basis of nationality. In that regard, the Commission would be best equipped to examine issues related to the renunciation of a second nationality, including the scope of the right to nationality. His delegation therefore invited the Commission to include that topic in its programme of work.

124. **Mr. Rhee** Zha Hyoung (Republic of Korea), speaking on the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation welcomed the adoption on second reading of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). *Jus cogens* norms were recognized in international law as well as in domestic law. The scope of the subject should be extended to cover not only the law of treaties but also State responsibility, the relationship between sources of international law, and other areas of international law. The addition of the phrase "identification and legal consequences" to the title of the draft conclusions had made the title clearer and more appropriate.

125. His delegation also agreed with the change made to the title of draft conclusion 21 from "Procedural requirements" to "Recommended procedure". Indeed, considering the reservations that could be raised on the basis of article 66 of the Vienna Convention on the Law of Treaties, the previous title had not been accurate. While some parts of the draft conclusion were too vague to implement and were open to interpretation, the Commission's recommendation that the General Assembly commend the draft conclusions to the attention of States was appropriate and necessary for legal practitioners and those engaging in international relations.

126. On the topic "Protection of the environment in relation to armed conflicts", his delegation welcomed the adoption, on second reading, of the draft principles on protection of the environment in relation to armed conflicts. His delegation also appreciated the third report of the Special Rapporteur (A/CN.4/750, A/CN.4/750/Corr.1 and A/CN.4/750/Add.1), which included suggestions for the revision of each draft principle that reflected the comments and observations received from Governments, international organizations and civic groups, including the International Committee of the Red Cross. In that regard, his delegation noted that comments received from international organizations and civic groups were given proper weight in the draft principles.

127. His delegation supported the linguistic improvement to the text with the consistent use of the phrase "to prevent, mitigate and remediate harm to the environment" in draft principles 2, 6, 7 and 8. As for the use of the term "environment" rather than "natural environment" in draft principles 13, 14 and 15, his delegation would have preferred to retain the term "natural environment", to remove any uncertainty as to the meaning and raison d'être of the draft principles. Further, the term "natural environment" was more consistent with existing international environmental law. The use of "environment" as a stand-alone term had turned the draft principles from *lex lata* to *lex ferenda*.

128. The draft principles contained provisions of different normative values; some could be seen to reflect

customary international law, while others had a more recommendatory nature. His delegation therefore supported the final outcome of the Commission's work as draft principles, which could provide appropriate guidance to States and relevant actors in practice and contribute to the progressive development of international law. His delegation supported the recommendation made by the Commission to the General Assembly to take note of the draft principles, annex them to a resolution and encourage their dissemination, and to commend the draft principles not only to States but also to international organizations and all those who might be called upon to deal with the important subject.

The meeting rose at 1 p.m.