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## Sixth Committee

**Summary record of the 24th meeting**
Held at Headquarters, New York, on Wednesday, 26 October 2022, at 3 p.m.

*Chair*: Mr. Afonso . . . . . (Mozambique)
*later*: Mr. Leal Matta (Vice-Chair) . . . . . (Guatemala)

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22-24172 (E)

*The meeting was called to order at 3 p.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. Sarvarian** (Armenia) said that, given the far-reaching importance of the topic "Peremptory norms of general international law (*jus cogens*)", his delegation saw merit in its continued consideration so as to provide the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) with the strongest possible foundation for their subsequent use in practice. There were precedents for revision by the Commission of the initial work done on a topic by the Special Rapporteur, especially such a sensitive and complex topic as that of peremptory norms. For example, on the topic "State responsibility", after the issuance of six reports by the first Special Rapporteur, the Commission had not concluded its work for another 40 years. In addition, on the topic "Succession of States in respect of matters other than treaties", following the controversial reception of the first two reports of the Special Rapporteur, the Commission had decided to focus on succession of States in respect of State property, archives and debts and had taken another 12 years to conclude its work.

3. Referring to the text of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading (see A/74/10), he said that his delegation had ongoing concerns about the positivist basis of draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)). In the commentary to draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)), the Commission cited the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court had referred to "the universal character … of the condemnation of genocide", which it considered to be a consequence of the fact that genocide "shocks the conscience of mankind and results in great losses to humanity" and "is contrary to moral law". Rather confusingly, in scholarly writings, both State practice and moral considerations were cited as *jus cogens* norms. Armenia disagreed with the notion that State consent had historically been required for the recognition of a *jus cogens* norm. Draft conclusions 6 (Acceptance and recognition), 7 (International community of States as a whole) and 8 (Evidence of acceptance and recognition) and the commentaries thereto provided scant explanation of how peremptory norms were supposed to be "accepted and recognized" by the international community of States, hence the illogical notion, set out in draft conclusion 14, paragraph 3, that the persistent objector rule did not apply to peremptory norms, while at the same time the Commission stated, in the commentary to that draft conclusion, that a rule of customary international law was not opposable to a State insofar as it maintained its persistent objection. Concerning draft conclusion 7, paragraph 2, his delegation questioned whether it was possible to quantify acceptance by "a very large majority of States". The Commission might as well adopt the phrase "total acceptance", since the difference between the two was so slight as to be negligible. The bar was set so high that those peremptory norms that were generally recognized as such would not have been so recognized at the time that they had first been put forward as peremptory norms.

4. On draft conclusions 8 (Evidence of acceptance and recognition) and 9 (Subsidiary means for the determination of the peremptory character of norms of general international law), the phrase "subsidiary means" inverted the process by which peremptory norms had been recognized in practice. Courts, not States, had led the process, as had the Commission itself, for example, in the case of articles 53 and 64 of the Vienna Convention on the Law of Treaties and articles 26, 40 and 41 of the articles on responsibility of States for internationally wrongful acts. Concerning draft conclusion 11 (Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)), paragraph 2 was unclear and the commentary unconvincing as to why the Commission had settled on the proposed outcome with respect to separability. Those methodological problems were reflected in the indicative list of peremptory norms set out in draft conclusion 23. For example, the right of self-determination was included in the list, yet a small minority of States contested its status as a peremptory norm. While Armenia believed that the right of self-determination had both customary and peremptory status, it concurred with the view that the draft conclusion would benefit from stronger methodological coherence. As a matter of empirical reality, the peremptory norms on the list would not have been recognized as such through orthodox positivist methodology at the time of their recognition. Armenia considered that moral law, not State practice, was the foundation for their historical recognition.

5. A key issue in the draft conclusions as a whole was the relationship between a peremptory norm of substantive character and a positive rule of procedural character. While the International Court of Justice, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, appeared to definitively state that the procedural rule in question was not displaced by the substantive rule, his delegation suggested that the Commission consider the matter afresh, for example, whether it was possible for the definition of genocide as a peremptory norm to be enlarged beyond the definition set out in article II of the Convention on the Prevention and Punishment of the Crime of Genocide and, if so, whether that would displace procedural rules such as the rule of intertemporal law for State responsibility and the rule of *nullum crimen sine lege* and *nulla poena sine lege* for criminal responsibility.

6. "Protection of the environment in relation to armed conflicts" was a timely and important topic that offered the potential for progressive development of extant treaty and customary law in order to strengthen environmental protection in armed conflicts, taking into account the increasing prominence of international environmental law in the practice of international courts and tribunals. To achieve that objective, the Commission should continue its work on the topic with a view to changing the form of the intended output. Referring to the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on first reading, together with the commentaries thereto (see A/74/10), he said that the text constituted a useful analytical resource concerning the substance of the matter, but should be used as the basis for concrete proposals for legal codification. In particular, proposals for amendments to treaties pertaining to the law of armed conflict would be a suitable means of giving tangible form to the abstract draft principles. One example, premised upon a change to the substance of paragraph 2 of draft principle 13 [II-1, 9] (General protection of the natural environment during armed conflict), might be to amend article 55 of Additional Protocol I to the Geneva Conventions and to add a similar provision to Additional Protocol II.

7. His delegation considered the draft principles to be too broad and anodyne to be of practical use. For example, draft principles 9 (State responsibility), 12 (Martens Clause with respect to the protection of the environment in relation to armed conflict) and 14 [II-2, 10] (Application of the law of armed conflict to the natural environment) were superfluous, as they repeated well-established rules of general international law. More importantly, the term "appropriate", used in paragraph 2 of draft principle 3 [4] (Measures to enhance the protection of the environment), paragraph 1 of draft principle 5 [6] (Protection of the environment of indigenous peoples), draft principle 6 [7] (Agreements concerning the presence of military forces in relation to armed conflict), draft principle 11 (Corporate liability) and paragraph 2 of draft principle 20 [19] (General obligations of an Occupying Power), with respect to preventative measures, was overly broad, and it was unclear who was to determine its meaning. If it was the State that should take preventative measures, then its interpretation was likely to conflict with the interpretation of others.

8. A clearer and more effective standard of obligation for preventative measures would be the customary rule of due diligence with respect to transboundary harm, which was referred to in the draft principles solely in the context of occupation: in the commentary to draft principle 22 [21] (Due diligence), the Commission referred to "the established principle that each State has an obligation not to cause significant harm to the environment of other States or to areas beyond national jurisdiction" as part of "customary international environmental law", but that standard was not applied throughout the text. Though the due diligence obligation in current law pertained to transboundary harm, his delegation believed that its application to environmental protection in armed conflict would be a useful piece of progressive development.

9. Another significant omission from the text was the precautionary principle, which had increasingly been applied in treaty law by States and in international adjudication, to the point that it had either crystallized or was approaching crystallization as customary international law. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had stated in 2011 in its advisory opinion on *Responsibilities and obligations of States with respect to activities in the Area*, "the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law." As a methodological point, the Commission, in the commentaries to the draft principles, should engage in a more precise way with the study by the International Committee of the Red Cross entitled *Customary International Humanitarian Law*, whether to identify *lex lata*, taking into account the criticisms of the study as constituting, at times, progressive development, or to propose *lex ferenda*.

10. The definition, in draft principle 13 [II-1, 9], paragraph 2, of the obligation to protect the natural

environment against “widespread, long-term and severe damage”, which was derived from the definition codified in article 55 of Additional Protocol I to the Geneva Conventions and replicated in article 8 of the Rome Statute of the International Criminal Court, was restrictive and arguably set a high threshold. Its retention in the draft principle failed to progressively develop the law. His delegation recommended that the Commission revisit the issue in order to propose a definition that enhanced environmental protection. While the application of the draft principle to both international and non-international armed conflicts was welcome, the provision would have no practical effect without an amendment to Additional Protocol II to the Geneva Conventions and the Rome Statute to provide for duties of States and individuals with respect to non-international armed conflicts. The development of a proposal by the Commission for consideration by States that were parties to both treaties might facilitate such an amendment.

11. The rationale for the omission of an explicit prohibition of methods or means of warfare that were intended or might be expected to cause damage to the environment, as provided for in article 35, paragraph 3, and article 55, paragraph 1, of Additional Protocol I was difficult to understand. In the commentary to draft article 13 [II-1, 9], the Commission stated: “Concerns that this exclusion may weaken the text of the draft principles should be considered in light of the general nature of the draft principles.” That statement reinforced his delegation’s recommendation that the Commission convert the draft principles into concrete proposals for treaty amendment rather than leaving them in an abstract or “general” form.

12. As explained in the second report of the Special Rapporteur (A/CN.4/728), the Commission, in the commentary to article 16 of the articles on responsibility of States for internationally wrongful acts, foresaw two different scenarios of assistance in the commission of an internationally wrongful act: aiding and assisting that rose to the level of co-perpetration, and “aid or assistance proper”, in which the assisting State had only a supportive role in the realization of the wrongful act. Those two scenarios carried different implications for the assisting State with regard to attribution for the purposes of compensation.

13. With regard to “Other decisions and conclusions of the Commission”, his delegation welcomed the Commission’s decision to add to its programme of work the topic “Settlement of international disputes to which international organizations are parties”, which was an important topic in modern international practice. His delegation urged the Special Rapporteur and the Commission to include in the scope of the work disputes of a private or tortious character, such as those arising out of the use of force or relating to peacekeeping or contractual relationships, because those had been the most pertinent categories of dispute in practice. His delegation also welcomed the addition of the topics “Prevention and repression of piracy and armed robbery at sea” and “Subsidiary means for the determination of rules of international law” to the programme of work. For all three topics, the Commission should consider producing either proposals for hard law or study reports, rather than draft principles or conclusions.

14. **Mr. Ripol Carulla** (Spain), referring to the topic “Peremptory norms of general international law (*jus cogens*)”, said that his delegation appreciated the efforts made by the Commission and the Special Rapporteur to draw on practice, jurisprudence and scholarly writings as the basis for the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the commentaries thereto. His delegation also wished to note the efforts of the Special Rapporteur to incorporate into the commentaries to the draft conclusions adopted on second reading more references to jurisprudence and scholarly writings in Spanish, as had been suggested in the comments and observations submitted on the text adopted on first reading. Notwithstanding the doubts of a few States and any possible observations of a technical nature with regard to the draft conclusions and the commentaries thereto, the Commission’s work proved the recognition of the existence in current international law of norms that, as stated in draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)), reflected and protected fundamental values of the international community, were universally applicable and hierarchically superior to other rules of international law, and also had legal consequences at the international level.

15. With regard to draft conclusion 7 (International community of States as a whole), Spain welcomed the change made to paragraph 2 to specify the level of acceptance and recognition required for the identification of a norm as a peremptory norm and to explain what was meant by the expression “international community of States as a whole”. The new version of the paragraph included both a quantitative and a qualitative requirement, in that it referred to “a very large and representative majority of States”. Spain supported that wording and the explanation for it provided in the commentary to the draft conclusion. Spain also supported the clarification in the draft conclusion and the commentary thereto that “it was not

necessary for the peremptory nature of the norm in question ‘to be accepted and recognized by all States’”.

16. On draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), Spain shared the Commission’s position on the customary nature of the obligation on States to cooperate to bring to an end through lawful means any serious breach of a peremptory norm. On draft conclusion 21 (Recommended procedure), Spain understood the recommendation that disputes should be submitted to the International Court of Justice, but the draft conclusion could not be interpreted as establishing that the Court’s jurisdiction was compulsory in such cases. As the Court itself had indicated on many occasions, the mere invocation of a breach of a peremptory norm could not, of itself, provide a basis for the jurisdiction of the Court.

17. With regard to the non-exhaustive list of *jus cogens* norms contained in draft conclusion 23, Spain noted that the Commission itself, in its commentary to the draft conclusion, introduced some caveats regarding the nature, selection and scope of the list. Furthermore, his Government, in its comments and observations on the text of the draft conclusions adopted on first reading, had already expressed its misgivings about the added value of such a list and had therefore recommended that it be deleted. Spain maintained that position and considered that it would have been preferable not to include a non-exhaustive list of peremptory norms.

18. Turning to the topic “Protection of the environment in relation to armed conflicts”, he said that one of the chief merits of the draft principles on protection of the environment in relation to armed conflicts was that they were aimed at incorporating both the rules of the law applicable in armed conflict and rules in other areas of international law, such as international human rights law and international environmental law. At the same time, the Commission made it clear in the commentaries, particularly in the context of Part Three, which set out principles applicable “during” armed conflict, that the law of armed conflict constituted *lex specialis* and that it prevailed when there was a conflict with another applicable rule of international law.

19. Some of the draft principles clearly set out obligations, whereas others constituted recommendations or soft law. However, it was not always sufficiently clear from the text of the draft principles and the commentaries thereto whether a given principle was mandatory in nature or constituted a non-binding recommendation. The issue was particularly relevant in the Spanish version of the text, in which the future tense was used erroneously to express obligations, while the present indicative was used for provisions that did not constitute obligations. Spain had previously suggested that the word “deben” or “deberán” be used to express an obligation and that the word “deberían” be used to express a recommendation without binding legal force. The Commission, in its report, had made that change in some places but not in others.

20. A more detailed study of the draft principles would no doubt reveal some deficiencies and gaps. However, any such gaps and deficiencies did not detract from the text’s decisive contribution to the codification and progressive development of international law.

21. **Mr. Lippwe** (Federated States of Micronesia), referring to the topic “Protection of the environment in relation to armed conflicts”, said that his delegation welcomed the adoption on second reading of the draft principles on protection of the environment in relation to armed conflicts and the commentaries thereto. Micronesia, whose interest in the matter was clear, had contributed significantly to the Commission’s work on the topic.

22. The hundreds of small islands comprising Micronesia had been a major component of the theatre of armed conflict in the Pacific during the Second World War. The country’s terrestrial and maritime spaces had been converted into instruments of war by foreign powers and had suffered extensive – and sometimes lasting – damage as a result. Numerous wrecks of aircraft and ships littered the country’s waters and threatened to leak fuel and other contaminants, further endangering the country’s people and the fragile natural environments central to their livelihoods, security and identity. It was also not a foregone conclusion that another major armed conflict would not erupt in the same part of the Pacific in the near future.

23. In that connection, Micronesia continued to appreciate the broad temporal scope of the draft principles, which covered periods before, during and after armed conflicts. It supported the specific recognition of the obligation of States to take remedial measures for the adverse effects of armed conflicts on lands and territories that Indigenous Peoples inhabited or traditionally used. It attached great importance to the inclusion of provisions on environmental protection in agreements concerning the presence of military forces and affirmed the principle that “an internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage,

including damage to the environment in and of itself". In that connection, it recalled the recent adoption by the General Assembly of resolution 76/300, in which the Assembly recognized the human right to a clean, healthy and sustainable environment.

24. Micronesia especially welcomed draft principles 26 (Remnants of war) and 27 (Remnants of war at sea), which underscored the obligation of parties to an armed conflict to "seek, as soon as possible, to remove or render harmless toxic or other hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment", with particular attention to ensuring such remnants of war at sea "do not constitute a danger to the environment". Those provisions were in line with the Commission's acknowledgement, in its separate work on peremptory norms of general international law, that the obligation to prohibit the massive pollution of the seas was a peremptory norm of general international law. In sum, the draft principles and the commentaries thereto constituted a major contribution to international law, and Micronesia called upon all relevant parties, including States with a history of armed conflict in the Pacific, to implement them in full.

25. Concerning "Other decisions and conclusions of the Commission", Micronesia noted the Commission's decision to include the topic "Non-legally binding international agreements" in its long-term programme of work and also noted the syllabus of the topic, contained in annex I to the Commission's report. Micronesia looked forward to engaging in discussions on the topic if it was moved to the Commission's current programme of work. It agreed with the recommendation in the syllabus that the Commission should not address the question of the effect of non-binding provisions in treaties, as long as there was an understanding that the presence of such provisions in a treaty did not negate the legally binding nature of the treaty as a whole if there were other provisions in the same treaty that were legally binding. Micronesia also supported the consideration by the Commission of the legal effect or nature of decisions and other acts adopted by conferences of States parties to treaties, as there remained some controversy in international law and practice as to whether such decisions and acts were legally binding or had some other legal effects in the States parties that adopted and implemented them.

26. **Ms. Rubinshtein** (Israel) said that the ability of the International Law Commission to make effective recommendations that would be accepted by States would determine whether it could strengthen what the preamble to the Charter of the United Nations referred to as "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Commission shared with States the responsibility for achieving that goal. Indeed, its dialogue with States held the key to its ability to fulfil its mandate regarding the progressive development and codification of international law.

27. In order to maintain the confidence of States in the Commission, her delegation believed that the Commission should pay due regard to the views and comments of Governments on its draft texts, in particular at the second-reading stage, before draft texts were finalized. The Sixth Committee might invite the Commission to reconsider its drafts in the light of comments from Governments and the discussions in the Committee, as it had done following the second reading of the Commission's work on the topic of arbitral procedure. It was also incumbent on the Commission, in accordance with its statute, to survey the practice of States as comprehensively and accurately as possible in its work on any topic. Indeed, State practice was indispensable to the codification and progressive development of international law. Furthermore, the Commission should continually bear in mind the critical distinction between codification and progressive development of international law. It should ensure that texts put forward by it as codification of existing law accurately reflected and were sufficiently underpinned by State practice and *opinio juris*, and it should indicate the extent of agreement on each point in the practice of States, as well as any divergences and disagreements that might exist. Furthermore, when it was proposing a draft text for the progressive development of the law, it should make clear that it was doing so.

28. Israel attached great importance to the topic "Peremptory norms of international law (*jus cogens*)", which concerned a distinctive category of norms of international law that had a unique role in safeguarding the most fundamental rules of the international community of States. Israel appreciated the efforts of the Special Rapporteur and the Commission on the topic but regretted that most of the concerns previously raised by Israel and numerous other States had not been adequately addressed. Given the importance and inherent sensitivities of the topic, Israel wished to voice its concerns regarding the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading.

29. As previously stated not just by Israel but also by members of the Commission themselves, the Special Rapporteur had relied greatly on theory and doctrine, rather than on relevant State practice, which should have been the primary focus in his work. The lack of rigorous

analysis of State practice raised significant concerns. Israel also remained concerned that the draft conclusions did not accurately encapsulate the exceptional character of *jus cogens* norms and the very high threshold for their identification pursuant to article 53 of the Vienna Convention on the Law of Treaties. For example, the requirement that a norm be "accepted and recognized" by "the international community of States as a whole" set an extremely high standard that was not met by the current wording of draft conclusion 7, paragraph 2, which erroneously referred to "a very large and representative majority of States". In line with article 53, virtually universal acceptance and recognition of a norm was required in order for it to be identified as *jus cogens*. The threshold and process for the identification of *jus cogens* norms under international law must be particularly demanding and rigorous. To preserve the effectiveness and acceptance of a hierarchy of norms in international law, the parameters that divided peremptory norms from other norms must be identified clearly. A less thorough approach was a recipe for politicization and confusion.

30. Israel was of the view that the draft conclusions should strictly reflect customary international law and widely accepted principles and had therefore made it clear that it opposed the incorporation of elements in the draft conclusions that failed to reflect existing law adequately. However, those concerns had not been sufficiently taken into consideration. In particular, Israel remained concerned at the attempts to attach consequences to the violation of *jus cogens* norms that went beyond the function of *jus cogens* envisioned in article 53 of the Vienna Convention.

31. Her delegation, like many others, also doubted whether the "particular consequences" referred to in draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) reflected existing customary international law, including the asserted duty of States to cooperate to bring to an end a breach of *jus cogens* and prohibition against recognizing as lawful, or rendering assistance in maintaining, a situation created by a breach of *jus cogens*. The draft conclusion appeared to be based largely on the articles on responsibility of States for internationally wrongful acts and on two non-binding advisory opinions of the International Court of Justice. Yet, not all the articles on State responsibility reflected customary international law and, in the two advisory opinions in question, the Court had not explicitly identified a norm of *jus cogens*, but rather had noted the *erga omnes* character of the obligation in question. The advisory opinions could therefore not serve as a relevant source for establishing a duty of States to cooperate to bring to an end a breach of *jus cogens*. In the commentary to the draft conclusion, the Commission acknowledged that, in the two advisory opinions, the Court did not make an explicit reference to *jus cogens* norms. The Commission nonetheless contended that there was a significant overlap between *jus cogens* norms and *erga omnes* obligations, such that the deduction that the Court in those decisions was referring to *jus cogens* norms "is not unwarranted". The Commission further stated in the commentary that, "since in judicial decisions *erga omnes* obligations have been said to produce the duty to cooperate to bring to an end all serious breaches" and since all *jus cogens* norms "produce *erga omnes* obligations, it follows that all peremptory norms would also produce this duty". Those contentions further supported her delegation's view that the Special Rapporteur tended to conflate the term "*erga omnes*" with the term "*jus cogens*", which gave a misleading impression of the existing state of customary international law.

32. For many reasons, Israel still had significant misgivings about the inclusion of a non-exhaustive list of norms that the Commission had previously referred to as having *jus cogens* status in the annex to the draft conclusions. First, it did not agree that all of the norms listed had *jus cogens* character; indeed, the list was likely to generate significant disagreement among States and to risk diluting the concept of *jus cogens* norms and its legal authority. Second, even if such a list was described as non-exhaustive and merely reflecting the prior work of the Commission, it would likely be perceived by others as practically complete, or as a claim by the Commission that the norms included therein were more significant than those that were not. Indeed, it was unclear how the norms included in the list had been selected, which could only add to its contentious nature. Third, the inclusion of any list of substantive norms of *jus cogens* in a text dedicated solely to the methodology of identifying such norms seemed unwarranted. In the commentary to draft conclusion 23, the Commission stated that, in putting together the list, it "did not apply the methodology it set forth in draft conclusions 4 to 9", and that "the list is intended to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms". If the list was not even presumed to reflect the methodology proposed in the draft conclusions, the value of its inclusion was further undermined.

33. In conclusion, Israel was of the view that the draft conclusions should not include a list of substantive norms, whether illustrative or otherwise. Previous

statements and submissions from numerous States indicated persistent concerns regarding the inclusion of such a list and reflected their view that it would be a legal error to do so. The Commission should pay due regard to the comments of States, in particular on highly significant topics such as *jus cogens*. More generally, in its work on the topic of *jus cogens*, it should confine itself to stating and clarifying international law as it currently stood, on the basis of rigorous methodology grounded in State practice. Failure to do so would diminish the credibility of its work. Israel therefore hoped that the concerns raised by States would be reflected in the presentation of the Commission's output by the Committee to the General Assembly.

34. With regard to the topic "Protection of the environment in relation to armed conflicts"), Israel appreciated the observations made by the Special Rapporteur on the comments of States, including Israel. As a general observation, with regard to the draft principles on protection of the environment in relation to armed conflicts, the inaccuracies concerning the state of the law in the draft principles that employed mandatory language appeared, in places, to owe to the Commission's desire to make the topic more manageable and easier to delineate. There were a few methodological choices that raised particular concern.

35. The draft principles borrowed from formulations found in recognized legal obligations, or merged together different rules from different legal contexts, or conflated the rules of international humanitarian law, international human rights law and international environmental law, in a way that altered or misrepresented the substance or scope of application of those rules. In addition, while Israel recognized the significance of different legal regimes, it wished to reiterate that the boundaries between regimes must not be blurred, as had evidently happened throughout the draft principles. Rather, those legal regimes should be understood as distinguishable from one another, each designed for a specific purpose.

36. Throughout her third report (A/CN.4/750), the Special Rapporteur made use of terms that were not part of the general discourse of the law of armed conflict. For example, in draft principle 19 (General environmental obligations of an Occupying Power), the phrase "health and well-being" was used instead of the phrase "health or survival", while draft principle 14 (Application of the law of armed conflict to the environment) altered the existing balance struck in international humanitarian law by granting elevated status to humanitarian considerations over military necessity. Moreover, the accepted legal distinction between international and non-international armed conflicts was set aside, and in several places assertions were made without sufficient substantiation. Lastly, throughout the text, legal obligations were amalgamated together with suggestions for practical implementation, progressive development of the law and non-binding standards. While the Special Rapporteur addressed that issue in her report, she often did not affirm whether specific draft principles reflected customary law or were of a more recommendatory nature. That lack of clarity might lead to erroneous interpretations of the law. Israel believed that the draft principles constituted recommendatory guidelines and therefore supported the Special Rapporteur's acknowledgement that the draft principles were not intended to become a treaty.

37. As an overarching matter, Israel recalled that the protection of the natural environment under the customary law of armed conflict was anthropocentric in nature, in the sense that, under customary international law, an element of the natural environment constituted a civilian object only when it was used or relied upon by civilians for their health or survival. That approach found ample support in the actual practice of States and many legal sources. Israel welcomed the statement in the report of the Special Rapporteur addressing that issue and explicitly acknowledging that "the anthropocentric approach is inherent in the law of armed conflict". However, it was regrettable that the text of the draft principles remained vague in that regard and that no explicit clarification concerning the anthropocentric approach was included in the commentaries. Furthermore, the Special Rapporteur claimed that the view of the natural environment as a civilian object enjoyed general support. However, that claim was based solely on the *Guidelines on the Protection of the Natural Environment in Armed Conflict* of the International Committee of the Red Cross, with no reference to State practice. Israel wished to reiterate its principled position that the Commission was mandated to engage in progressive development of the law, but that such development must be based on sufficient and convincing State practice.

38. **Mr. Chrysostomou** (Cyprus), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that Cyprus welcomed the adoption on second reading of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the commentaries thereto. With regard to draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)), Cyprus underscored the importance of paragraph (10) of the commentary to the draft conclusion, in which the Commission stated that the universal applicability of peremptory norms meant that

they were binding on all subjects of international law that they addressed, including States and international organizations. On draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)), Cyprus agreed with the observation in paragraph (4) of the commentary that customary international law was the most common source for peremptory norms of general international law. It also agreed with the recognition of the special character of the Charter of the United Nations in paragraph (8) of the commentary, in which the Commission made reference to its observation in the commentary to draft article 50 of the 1966 draft articles on the law of treaties that "the law of the Charter concerning the prohibition of the use of force" constituted a "conspicuous example of a rule in international law having the character of *jus cogens*". In addition, with regard to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), Cyprus agreed that, as a general rule, a treaty became void as a whole if it conflicted with a peremptory norm of general international law, such as the prohibition of the use of force.

39. Cyprus agreed with the view expressed in paragraph (5) of the commentary to draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) that the principle of self-determination was a *jus cogens* norm. Self-determination had become a principle of international law in the course of the decolonization movement and had always been applied to situations of colonial rule or foreign occupation. In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV), the Assembly stated: "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States." Furthermore, the Helsinki Final Act adopted by the Conference on Security and Cooperation in Europe in 1975 stated: "The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State." Thus the integrity of all boundaries, post-self-determination and otherwise, had been reinforced by the development of the rule that boundaries might not be altered by any use of force. Self-determination and the principle of non-partition met the criteria to be considered *jus cogens* norms on the basis of draft conclusion 4 (Criteria for *jus cogens*) as set out in the second report of the Special Rapporteur (A/CN.4/706), insofar as they were "norm[s] of general international law" that were "accepted and recognized by the international community of States as a whole as … norm[s] from which no derogation is permitted".

40. The obligation of States to cooperate to bring to an end through lawful means any serious breach by a State of a peremptory norm of general international law, as set forth in article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, was a general obligation under customary international law. Therefore, Cyprus appreciated the inclusion in the Commission's report of a reference to the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court reaffirmed that there was an obligation to cooperate to bring to an end breaches of "obligations to respect the right … to self-determination, and certain … obligations under international humanitarian law". That principle had also been affirmed in the Court's advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

41. Cyprus agreed with the obligation not to recognize as lawful a situation created by a serious breach of a peremptory norm of general international law and the obligation not to render aid or assistance in maintaining such a situation, as set out in draft conclusion 19, paragraph 2; that paragraph, as stated in paragraph (12) of the commentary to the draft conclusion, was based on article 41, paragraph 2, of the articles on State responsibility. In paragraph (14) of the commentary, the Commission emphasized the role of the Security Council and the General Assembly in connection with the obligation not to recognize a situation created by a breach of a peremptory norm of general international law, such as an illegal annexation of an occupied territory or any illegal secessionist act in an occupied territory as a result of foreign aggression.

42. Cyprus agreed with paragraph 3 of draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), which provided that the persistent objector rule did not apply to peremptory norms; as stated in paragraph (10) of the commentary to the draft conclusion, the non-applicability of that rule to peremptory norms of general international law (*jus cogens*) flowed from both the universal application and the hierarchical superiority of *jus cogens*, as reflected in draft conclusion 2. The doctrine of the persistent objector would undermine the immutability and

universal application of *jus cogens* norms and would subvert the very definition of *jus cogens* norms as norms "from which no derogation is permitted". Indeed, Cyprus was aligned with the position taken by the United Kingdom in the *Fisheries* case before the International Court of Justice: "where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle". With regard to draft conclusion 23 (Non-exhaustive list), his delegation took particular note that the list of norms in the annex was non-exhaustive and was without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*).

43. Concerning the topic "Protection of the environment in relation to armed conflicts", Cyprus welcomed the adoption on second reading of the entire set of draft principles on protection of the environment in relation to armed conflicts and the preamble and commentaries thereto. As noted in the commentary to draft principle 7 (Peace operations), peace operations were directly related to armed conflicts, as many such operations were deployed over the course of hostilities, or following the end of hostilities and the signing of a peace agreement. Cyprus wished to highlight the concern expressed by the High-level Independent Panel on Peace Operations that many missions operated in environments where no political agreements existed, or where efforts to establish one had failed. It was therefore vital that any ongoing and future United Nations peacekeeping missions were multidimensional and comprehensively addressed peacebuilding activities in their host countries, including providing secure environments, monitoring human rights, rebuilding the capacity of a State and ensuring the protection of civilians.

44. On draft principle 9 (State responsibility), the Commission correctly pointed out, in paragraph (4) of the commentary: "the law of armed conflict extends the responsibility of a State party to an armed conflict to 'all acts committed by persons forming part of its armed forces'. As far as the law on the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage caused by that violation, whether or not resulting from a violation of the law of armed conflict."

45. With regard to draft principle 10 (Due diligence by business enterprises), Cyprus recommended that the phrase "including where the business enterprises are operating in unlawfully occupied territories effectively controlled by occupying States" be added after the word "jurisdiction", so that the first sentence of the draft principle would read:

> States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, including where the business enterprises are operating in unlawfully occupied territories effectively controlled by occupying States, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict.

46. Similarly, with regard to draft principle 11 (Liability of business enterprises), Cyprus proposed that the phrase "or effectively controlled by occupying States" be added after the word "jurisdiction", so that the first sentence of the draft principle would read:

> States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction or effectively controlled by occupying States, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict.

47. Draft principle 18 (Protected zones) currently dealt with tangible and intangible cultural heritage. In his delegation's view, the importance of natural heritage, including culturally significant landscapes and geological, biological and physical formations, should also be captured in the draft principle. The Commission referred in its report to the evolution of cultural and natural heritage since the adoption of the Convention for the Protection of the World Cultural and Natural Heritage and the important work carried out by the United Nations Educational, Scientific and Cultural Organization, the International Criminal Court and other international and regional organizations. Cyprus therefore recommended that the phrase "and/or constitutes natural heritage" be added after the words "cultural importance", so that the first sentence of the draft principle would read:

> An area of environmental importance, including where that area is of cultural importance and/or constitutes natural heritage, designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective.

48. With regard to Part Four of the draft principles (Principles applicable in situations of occupation), Cyprus proposed that the following sentence be added to paragraph (3) of the commentary: "The occupying Power shall not engage in any maritime exploration or extraction of occupied land and maritime zones." It acknowledged the significance of draft principle 21

(Prevention of transboundary harm), particularly with regard to the obligation of States to prevent significant harm to the environment of other States.

49. With regard to draft principle 25 (Relief and assistance), Cyprus encouraged the Commission to develop clearer guidelines to help to promote the principle of relief and assistance, taking into account environmental damage caused by continued occupation. Remedial measures, such as the sharing of information and natural resources, should be an enumerated duty of the occupying Power. Cyprus therefore proposed that the words "or continued occupation" be added after the words "armed conflict", so that the draft principle would read:

> When, in relation to an armed conflict or continued occupation, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

50. A detailed version of his delegation's statement would be made available in the eStatements section of the *Journal of the United Nations*.

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

52. **Mr. Lasri** (Morocco) said that his delegation noted the Commission's work on the topic "Peremptory norms of general international law (*jus cogens*)" but did not support all the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and shared the view that there was room for them to be further improved with a view to taking greater account of the observations and concerns expressed by States. His delegation agreed with the clear definition of the term "peremptory norm" set out in article 53 of the Vienna Convention on the Law of Treaties of 1969. With regard to draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)), his delegation strongly supported the principle of the universal applicability and hierarchical superiority of peremptory norms, provided that there was no ambiguity, ambivalence or uncertainty surrounding such norms. His delegation was not certain that the first part of the draft conclusion belonged in the text.

53. On draft conclusion 7 (International community of States as a whole), his delegation strongly supported the principle of unanimity with regard to the acceptance and recognition of *jus cogens* norms. A "large majority" of States, as referred to in paragraph 2 of the draft conclusion, was an imprecise and random concept that was not consistent with that principle. It was also incompatible with paragraph 1 of the draft conclusion and with draft conclusions 3 and 4 (b), and it distorted the true spirit of article 53 of the Vienna Convention. Article 53 should remain the strict framework for all analysis and interpretation of the criteria for the identification of peremptory norms; under no circumstances should the draft conclusions establish less rigorous requirements than those set out in article 53.

54. With regard to draft conclusion 9 (Subsidiary means for the determination of the peremptory character of norms of general international law), his delegation recognized the role of the decisions of the International Court of Justice in determining the peremptory character of norms of general international law but did not accept the attribution of a prominent role to the works of expert bodies other than the Commission and totally disagreed with the explanations provided in that regard in the commentary to the draft conclusion. The Commission had a specific mandate for the progressive development of international law, whereas other expert bodies, such as the human rights treaty bodies, did not. The inclusion of the works of other expert bodies as a subsidiary means of determining recognition and acceptance of a peremptory norm risked according them a role that went beyond their mandate, which, in the case of the treaty bodies, was to evaluate and monitor the implementation by States parties of the nine core human rights treaties and their optional protocols.

55. On 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 did not agree with the idea that Security Council resolutions were hierarchically inferior to *jus cogens* norms. The debate on the issue was premature; in the commentary to the draft conclusion, the Commission had not identified a single case in which the Council had derogated from *jus cogens* or in which a resolution or act of the Council had been in conflict with a peremptory norm.

56. With regard to draft conclusion 23 (Non-exhaustive list), his delegation had doubts about the usefulness, added value and relevance of the list of norms annexed to the draft conclusions and about the method and criteria used to compile the list. In particular, it was concerned about the selective approach to the choice of norms and the uncertainty as to whether some of them had acquired the status of *jus cogens*. For example, there was, as yet, no jurisprudence establishing the peremptory character of the basic rules of international

humanitarian law, while the right to self-determination had never been qualified as a *jus cogens* norm by the International Court of Justice, and the Special Rapporteur himself, in his fourth report on the topic (A/CN.4/727), referred to the complex nature of that right. Furthermore, the omission from the list of the prohibition of piracy, the need to protect the environment, and other principles such as territorial integrity, raised questions. Lastly, there was a lack of agreement on the wording of some of the items in the annex.

57. Morocco wished to reiterate its position on many of the draft conclusions, in particular 3, 7, 9, 16 and 23, and remained doubtful about the material scope and form of the text. However, it was open to interaction between the Commission and Governments with regard to the definition of *jus cogens* norms, on the basis of clear and unanimous criteria. The role of the Commission was to identify criteria for the emergence of a norm, not to establish, on a selective basis and without using the methodology set out in the draft conclusions, a list of norms that did not enjoy unanimous support. Morocco therefore requested that more time be taken to allow the draft conclusions to develop through discussion and debate between the Commission and Governments.

*The meeting rose at 4.35 p.m.*