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Chair: Mr. Afonso . . . . . (Mozambique)
later: Ms. Romanska (Vice-Chair) . . . . . (Bulgaria)

Contents

22-24219 (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, II, III, IV, V and X of the report of the International Law Commission on the work of its seventy-third session (A/77/10).

2. **Mr. Ikondere** (Uganda) said that his delegation noted with appreciation the Commission's ongoing efforts to carry out the mandate of the General Assembly under article 13 (1) (a) of the Charter of the United Nations and emphasized the need for it to work closely with the African Union Commission on International Law and other regional international law commissions in that regard.

3. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation welcomed the Commission's adoption of the draft principles on protection of the environment in relation to armed conflicts. Since armed conflicts caused direct and indirect harm to the environment that could endanger health and quality of life to such an extent that it threatened the survival of humankind and the effects of which endured beyond the end of the conflict, the international community needed a framework of principles that would help to strengthen existing legal instruments in order to ensure that victims received reparations and to promote the necessary measures to prevent environmental harm and advance conservation and restoration of the environment in the context of hostilities.

4. The Commission should redouble its efforts to draw inspiration from the principal legal systems of the world, including African customary law. His delegation's increasing engagement with the work of the Commission was intended to ensure that those important aspects of its work were duly fulfilled. Uganda was committed to the rules-based international legal system founded on the Charter of the United Nations and valued the Commission's effective contribution to the maintenance of the multilateral system, taking into account the views of all Member States.

5. It was important that the topics included on the Commission's programme of work should add value and be of interest and relevance to the international community as a whole. In that regard, his delegation welcomed the decision to include the topics "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law" on the Commission's current programme of work and to appoint Mr. Cissé and Mr. Jalloh, respectively, as Special Rapporteurs for those topics.

6. **Ms. Dramova** (Bulgaria), speaking on 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 offered a structured guide to *jus cogens*, at a time when that was greatly needed, and highlighted its importance in the context of the general international legal system. In the draft conclusions, the Commission had made a clear distinction between *jus cogens* as an accepted doctrine in international law, the rules of customary international law and obligations created by unilateral acts, and had also sought to clarify how any conflicts with a peremptory norm could be resolved.

7. The use of wording consistent with the Vienna Convention on the Law of Treaties was purposeful and would facilitate the use of the draft conclusions. However, the formulation "other actors" in paragraph 3 of draft conclusion 7 (International community of States as a whole) and in paragraph (5) of the commentary thereto should be subject to further careful consideration, given the context provided by the positions of such actors, the sources they represented and the role they played in the assessment of acceptance by States. With regard to draft conclusion 9 (Subsidiary means for the determination of the peremptory character of norms of general international law), the use of the practice of national courts should be precisely defined, thereby avoiding any confusion in the assessment of *jus cogens* norms. In that regard, further consideration should be given to the use of the word "caution" in paragraph (5) of the commentary to draft conclusion 9. Furthermore, paragraph 2 of that draft conclusion allowed for a broader than needed interpretation of those expert bodies and most highly qualified publicists whose work and teachings, respectively, could serve to determine the peremptory character of norms of general international law.

8. Her delegation acknowledged the approach taken by the Commission in draft conclusion 16 with regard to the legal consequences of peremptory norms of general international law (*jus cogens*) for resolutions, decisions or other acts of international organizations. However, it had some concerns about the possible implications of that approach for future legally binding acts of international organizations. The non-exhaustive list of *jus cogens* norms included as an annex to the draft conclusions required further detailed analysis and consideration.

9. **Mr. Maeda** (Japan), recalling that the mandate of the General Assembly set out in article 13 of the Charter of the United Nations underpinned the work of both the Committee and the Commission, said that close cooperation between those two organs was essential for the important role of promoting the development of international law and the rule of law. In that regard, his delegation noted the Commission's recommendation that it hold the first part of a session in New York during the next quinquennium and hoped that such an initiative would serve to enhance dialogue between the Committee and the Commission. Japan reiterated its assurance of full support and active contribution to the work of the Commission.

10. His delegation noted that the Commission had successfully concluded its work on the topics "Peremptory norms of general international law (*jus cogens*)" and "Protection of the environment in relation to armed conflicts". It also noted that the Commission had added three new topics to its current programme of work and had included in its long-term programme of work the topic "Non-legally binding international agreements". Japan remained concerned about the Commission's heavy workload and expected that, fully taking into account the views of Member States, it would focus on selected topics that were pressing concerns of the international community as a whole. Member States should be given sufficient time to thoroughly examine the work of the Commission, given that its outputs had considerable influence over the wider international law community. The Commission should also properly reflect the views of Member States as expressed orally in the Committee and in writing.

11. With regard to the important topic of peremptory norms of general international law (*jus cogens*), Japan welcomed the modifications made to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), and the commentaries thereto, to reflect the views of Member States. However, it noted that there were still substantial concerns that had not been properly reflected. In particular, with regard to draft conclusion 23 (Non-exhaustive list) and the annex to the draft conclusions, his delegation had reiterated its view that the list should be drafted with proper care, based on reason and evidence. Taking into account that many other Member States had also expressed doubts, reservations and objections, Japan remained concerned at the inclusion of the list in the draft conclusions, especially given that the topic was of extreme importance for all States.

12. With regard to draft conclusion 19, paragraph 1, his delegation, without prejudice to the consequences of serious breaches of other peremptory norms, agreed that in the case of aggression States had a duty to cooperate, within their capacity, to bring it to an end. Recalling that it was not until the completion of the first reading of the draft conclusions that all the draft commentaries had been made available, his delegation reiterated its hope that the Commission would carefully consider its methods of work in order to ensure that sufficient time was given for thorough examination by Member States and that their views were fully taken into account.

13. Turning to the topic "Protection of the environment in relation to armed conflicts", his delegation commended the Commission for its adoption of the draft principles, together with the preamble, on protection of the environment in relation to armed conflicts. As the world faced the war of aggression waged by Russia against Ukraine, the progress of the Commission's work on that topic could not be timelier. The seizure of Ukrainian nuclear power facilities, in particular the Zaporizhzhia nuclear power plant, and other actions by Russian armed forces, posed a serious threat to the safety and security of those facilities, significantly raising the risk of a nuclear accident or incident and endangering not only the population of Ukraine, neighbouring States and the international community, but also the environment. While his delegation remained of the view that it was beneficial to focus on the protection of the environment during armed conflict, as opposed to before or after armed conflict, it nevertheless supported the Commission's recommendation that the General Assembly encourage the widest possible dissemination of the draft principles and commend them, 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.

14. **Mr. Bouchedoub** (Algeria), referring to the topic "Peremptory norms of general international law (*jus cogens*), said that his delegation welcomed the constructive and balanced approach taken in draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)). Paragraph 1 of that draft conclusion provided that States should cooperate to bring to an end any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*). Paragraph 2 provided that no State should recognize as lawful a situation created by a serious breach by a State of an obligation arising under such a norm, nor render aid or assistance in maintaining that situation. It followed, in light 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*)), that any violation of such a peremptory norm would entail international responsibility in accordance with the articles on responsibility of States for internationally wrongful acts.

15. His delegation also welcomed the inclusion, in the norms set forth in the annex to draft conclusion 23 (Non-exhaustive list), of the right of self-determination, which was one of the basic principles of the Charter of the United Nations. It believed, however, that fuller comments should be provided in paragraph (14) of the commentary to draft conclusion 23, in line with the comments provided on the other norms included in the non-exhaustive list. As it stood, that paragraph of the commentary was unclear and inadequate. It would be useful to include references to legal interpretations establishing that the right to self-determination was a peremptory norm of general international law. One example was the judgment handed down by the African Court on Human and Peoples' Rights on 22 September 2022 in *Mornah v. Republic of Benin and others*. In that judgment, the Court had noted that the right to self-determination imposed on States the duty to protect, promote, and fulfil conditions for the realization of the right, and to take actions individually and jointly to facilitate the realization of that right, including by offering assistance to people struggling for independence and freedom from domination. It also entailed a duty to abstain from engaging in acts or taking measures that adversely affected people from fully enjoying their right to self-determination. Similarly, the Court had reiterated that the right to self-determination under article 20 of the African Charter on Human and People's Rights imposed an international obligation on all States parties to take positive measures to ensure the realization of the right, including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that were incompatible with the nature or full enjoyment of the right. The Court had further stated that all State parties to the African Charter on Human and People's Rights and the Protocol thereto, as well as all States members of the African Union, had the responsibility under international law to find a permanent solution to occupation and to ensure the enjoyment of the inalienable right to self-determination of the concerned people, and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of that right.

16. Referring to the topic "Protection of the environment in relation to armed conflicts", he said that his delegation welcomed the principles set forth in Part Four (Principles applicable in situations of occupation) of the draft principles on protection of the environment in relation to armed conflicts, in which occupying Powers were required to respect and protect the environment of the occupied territory in accordance with applicable international law. Such provisions constituted the best legal means to prevent the plundering and exploitation of natural resources in occupied territories, including by multilateral companies. They would enable peoples under occupation, particularly in the case of territories that did not form part of another existing State, freely to determine the path of their own development. It would be useful for the draft principles to include environmental restrictions on commercial and economic activity in occupied territory, for whose violation the occupying Power, including the companies active in occupied territory, would be held responsible.

17. Concerning "Other decisions and conclusions of the Commission," he said that his delegation welcomed the inclusion of three new topics in the current programme of work of the Commission. It encouraged the Working Group on the long-term programme of work to continue identifying topics that reflected the needs of States and had reached a sufficiently advanced stage in State practice, particularly topics that reflected recent developments in international law. It welcomed the decision to make available webcasts of the Commission's meetings.

18. **Mr. Martinsen** (Argentina), speaking on the topic of peremptory norms of general international law (*jus cogens*), said that the work of the Commission in that regard was important for the consolidation and progressive development of international law. With regard to the criterion of acceptance and recognition of a *jus cogens* norm by the international community of States as a whole as one from which no derogation was permitted, his delegation agreed with the stipulation in draft conclusion 7 that such acceptance and recognition must be by a very large and representative majority of States, but not necessarily by the entire international community. That said, the individual position of a State regarding the interpretation and scope of a *jus cogens* norm must be adequately assessed and given appropriate weight. In that regard, it was his delegation's view that while the draft conclusions provided that the persistent objector rule did not apply to *jus cogens* norms, a State's position with regard to the interpretation and scope of such norms must be considered to have legal effects.

19. Draft conclusions 8 and 9 were useful for clarifying, on a non-exhaustive basis, those acts of States that could serve as forms of evidence of acceptance and recognition by States, such as public statements made on behalf of States, legislative and

administrative acts and decisions of national courts. However, great caution should be exercised in assessing pronouncements by State organs without responsibility for foreign affairs to determine whether they did in fact reflect the position of the State to which they belonged, since it was not impossible that they might arrive at sui generis interpretations of such norms. With regard to the legal consequences of peremptory norms of general international law, the Commission's draft conclusions addressed in more detail the provisions of articles 44, 53, 64, 65, 66 and 71 of the Vienna Convention on the Law of Treaties.

20. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that since 1977 the protection of the natural environment before, during and after armed conflicts had constantly expanded thanks to developments in various international legal frameworks. The 27 draft principles on protection of the environment in relation to armed conflicts contained provisions of varying normative scope, including some that reflected customary international law and others that contained *de lege ferenda* proposals for progressive development.

21. While the draft principles focused on the protection of the environment during armed conflicts, they were also relevant before and after such conflicts. For example, in the draft principles, the Commission referred to the obligations of States under international law to take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts; it recommended the designation of protected zones in the event of an armed conflict; and it addressed matters relating to the removal of remnants of war on land or at sea in post-conflict situations.

22. Argentina, a State that respected international humanitarian law and was committed to the protection of the environment, appreciated the Commission's work on the topic; the practice of Argentina was in line with the draft principles. As stated by the Argentine Supreme Court in the case *Halabi, Ernesto v. Executive Power*, the environment constituted a collective good, belonging to the whole community, indivisible and admitting no exclusion. Thus, there were not different "environments" that should be specially protected within each State, but rather a single environment needing protection. Consequently, no distinction should be made between the protection of different areas in a single State.

23. Concerning "Other decisions and conclusions of the Commission", his delegation was not in favour of the Commission considering the topic "Non-legally binding international agreements", which had been included in its long-term programme of work. If, however, it were to do so, it should not take into account any unilateral categorization of such an agreement in the domestic law of a State that had signed an agreement of that type. Moreover, caution should be exercised in how such instruments should be designated, given that several treaties referred, for example, to "arrangements" as binding instruments. In short, it would be preferable to continue leaving this issue exclusively to State practice, given that the criteria for distinguishing binding provisions from non-binding formulations had been established in international case law, and the value of such arrangements would, in any case, depend on the interpretation given by the parties to them on a case-by-case basis, or the opinion of an impartial third party.

24. **Ms. Vidović Mesarek** (Croatia) said that, in light of the extremely serious challenges the world was currently facing, the international rules-based order was endangered and all countries must do their utmost to uphold and preserve international law. The Commission's work and efforts were of great importance in that regard.

25. With regard to the topic "Protection of the environment in relation to armed conflicts", Croatia had followed closely the Commission's work and welcomed the adoption of the draft principles, together with a preamble, on protection of the environment in relation to armed conflicts. Her delegation fully supported the Commission's recommendation that the General Assembly take note of the draft principles in a resolution and ensure their widest possible dissemination. It considered that the draft principles were in line with the existing rules of international law, provided a systematic overview of the applicable rules and constituted an excellent development in the field.

26. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she said that her delegation welcomed the Commission's adoption of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), including the annex, and the commentaries thereto. It was particularly pleased that the Commission had accepted the proposal of the Special Rapporteur to include a draft conclusion referring to a non-exhaustive list of *jus cogens* norms in the annex to the draft conclusions. Croatia had previously stated in the Committee that such a list would be a helpful addition to the work of the Commission on the topic in question.

27. Regarding the important topic of "Sea-level rise in relation to international law", Croatia supported the

generally accepted criteria of statehood. With regard to the criterion of territory, it was firmly of the view that a territory was a prerequisite for the existence of a State and that a State without a territory was not possible. Thus, if a State were to lose its territory because it became fully submerged owing to sea-level rise, it could no longer be considered as a State. That did not mean that it would cease to exist as an international subject; rather it would become a different entity. Alternatives could be explored, such as the establishment of new forms of international legal personality without a territory – in other words, sui generis non-territorial subjects of international law – as referred to in the Commission's report (A/77/10, para. 169).

28. With regard to the question of the interrelation between the impact of sea-level rise and the law of the sea, it should be recalled that the principle that "the land dominates the sea" was an underlying premise for the attribution of maritime zones. Croatia was of the view that baselines were fixed and that, once determined, national maritime zones were not subject to change, despite sea-level rise. Furthermore, it was essential for the Commission to continue its work on the topic in a way that guaranteed respect for the United Nations Convention on the Law of the Sea. In that regard, her delegation supported the general position taken on the need to preserve the integrity of the Convention, as reiterated in paragraph 189 of the Commission's report.

29. Her delegation noted with interest the reference to the right of self-determination in paragraph 199 of the Commission's report, in which it was observed that "the preservation of an affected population as a people for the purposes of exercising the right of self-determination should be one of the main pillars of the work of the Commission on the issue". While the Commission should further examine and clarify how and where an affected population could exercise that principle in relation to sea-level rise, it should adopt a very cautious approach given that State practice and *opinio juris* on the issue were non-existent.

30. Her delegation agreed that the content of the principle of international cooperation should be further examined, in connection with both the protection of persons affected by sea-level rise and the preservation of territory. In that regard, mention could be made of financial assistance from international financial institutions for that purpose.

31. **Ms. Dakwak** (Nigeria) said that her delegation welcomed the Commission's adoption of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the draft principles on the protection of the environment in relation to armed conflicts. It reiterated the importance of norms reflecting general principles of international law universally accepted and recognized across legal systems.

32. With regard to the topic "Protection of the environment in relation to armed conflicts", her delegation appreciated the observations and recommendations provided by the Commission in its report (A/77/10). The draft principles adopted by the Commission addressed important issues that cut across many areas of concern. In that regard, her delegation noted with interest draft principle 3 (Measures to enhance the protection of the environment), which required States to take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts, and draft principle 8 (Human displacement), which required States and relevant stakeholders to take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict were located. It acknowledged the importance of including those two draft principles at a time when the world faced the disruptive challenges of climate change and its devastating impact on the environment, including increasing humanitarian crises and escalating armed conflicts.

33. Nigeria would continue to support the work of the Commission and urged it to further deepen its collaboration with Member States and regional international law commissions on relevant topics. With regard to specific issues on which the Commission would find the views of Governments to be of particular interest, the Commission should consider how to frame those issues in such a way as to help Governments gain a better appreciation of them, especially when timely responses were required.

34. Her delegation recognized the ample opportunities that the Commission provided for her country and region to play an important role in formulating international law and norms that reflected the African perspective. It reiterated the need to continue reflecting African customary law in the work of the Commission at its next session, taking note of the diversity of legal systems in Africa.

35. **Mr. Colas** (France) said that his delegation commended the Commission for all the work it had accomplished and for its decisive contribution to the codification and progressive development of international law. The Commission's role was becoming ever more important in the face of growing challenges to the authority of international law, which underpinned

the common multilateral system. At a time when some States were daily violating the most fundamental principles of the Charter of the United Nations, it was important to recall that international law remained the reference point of the international community. The forthcoming changes in the Commission's membership, as several members neared the end of their term of office and the new members elected in November 2021 would shortly join the Commission, offered an opportunity for collective reflection on the Commission's working methods.

36. The need to strengthen the role of multilingualism and consideration of the specific characteristics of different national legal systems should be among the cardinal principles determining the functioning and working methods of the Commission. International law should not reflect only one line of legal thinking transmitted through only one language. As well as being seen in the composition of the Commission, linguistic diversity should also be reflected in the documentary sources used for its work. His delegation found it regrettable that there were obvious errors in the French version of the report of the Commission (A/77/10) and reiterated its call for the Secretariat to ensure that no language version of the report was given priority over the others.

37. Continued work was also needed to enhance the dialogue between the Committee and the Commission, which was key to the success of the work of both bodies. In particular, the Commission's attention must be drawn to the importance of genuinely taking into account the comments and observations of States. It was regrettable that the observations made by States on the topics of "Peremptory norms of general international law (*jus cogens*)" and "Protection of the environment in relation to armed conflicts" had been taken into account by the Commission only to a very limited extent upon its adoption on second reading of the draft texts in question; that was not conducive to improving trust and the quality of exchanges between the Commission and the Committee. Lastly, when the Commission submitted draft texts to the General Assembly, it was the Committee's responsibility to consider them collectively and in a constructive spirit, with a view to deciding the conditions for their adoption as an international convention, if appropriate. It was thus important for the Committee to move forward in respect of the draft articles on prevention and punishment of crimes against humanity, which had been submitted to the General Assembly in 2019.

38. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said that his delegation thanked the Commission for all the work accomplished and took note of the adoption, on second reading, of the 23 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), including the annex thereto, and the commentaries to the draft conclusions. The Commission had introduced some welcome clarifications on second reading. In particular, it had clarified the status of draft conclusion 21, indicating that it contained a "recommended procedure", which was not intended to establish any obligation whatsoever. His delegation also noted that the Commission had attempted to resolve the contradictions in draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)); however, it was not totally convinced by the explanations provided by the Commission in the commentary thereto and reserved its position regarding the formulation of the draft conclusion. The existence of a "conflict" necessarily presupposed the existence of conflicting rules. If one of them did not exist, there could be no conflict. Moreover, the French version of draft conclusion 14, paragraph 1, contained clear errors that affected the meaning and must be corrected.

39. It was unfortunate that the Commission had decided to retain draft conclusion 16, which might be interpreted as permitting a State to unilaterally withdraw from a Security Council resolution, adopted under Chapter VII of the Charter of the United Nations, on the grounds that, according to that State, it was contrary to a *jus cogens* norm. There was no State practice to indicate the possibility of unilaterally refusing to implement a Security Council resolution adopted under Chapter VII of the Charter, on the grounds of an alleged conflict with a *jus cogens* norm. Such an approach risked weakening the authority of Security Council resolutions, which was regrettable.

40. France also doubted the usefulness and relevance of the annex containing a "non-exhaustive list" of *jus cogens* norms. Like other States, it had expressed reservations about whether such a list should be retained. His delegation's understanding of the work of the Commission was that it covered only the criteria for the identification of peremptory norms and their legal consequences; the intention was not to determine, on the merits, which primary rules might constitute *jus cogens* norms. The Commission would have to dedicate a considerable amount of time, certainly several years, if it was thoroughly to conduct such a determination. Furthermore, the list as established could give rise to significant confusion and should have been reworked. For example, it was unclear why the prohibition of aggression had been included on the list but not the

prohibition of the threat or use of force in violation of the Charter of the United Nations, even though the Commission had already characterized the latter as a *jus cogens* norm.

41. The Commission should devote sufficient time to its work. In that regard, the adoption of 23 draft conclusions and the annex thereto seemed premature, bearing in mind that the topic, which was both complex and sensitive, appeared still to be subject to disagreement and discussion within the Sixth Committee. It would have been preferable if the Commission had given itself more time, so that it could submit a technically more finished draft to Member States. Such a short time frame had not been conducive for dialogue with States. Like many delegations, France had submitted detailed comments to the Commission the previous year; those comments had been taken into account only very partially, both in the draft conclusions themselves and in the commentaries thereto. In that regard, France wished to insist that the Commission's work should be based on State practice and not on abstract approaches to international law.

42. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation welcomed the fact that the draft principles on protection of the environment in relation to armed conflicts contributed to the protection of the environment as a whole, without seeking to change international humanitarian law or to call into question the interpretation by some States of certain of its provisions, as evidenced in interpretative reservations. It was also pleased that the Commission had taken into account some of the comments that France and many other States had made with regard to the draft principles adopted by the Commission on first reading. In particular, it had clarified that draft principle 13 (General protection of the environment during armed conflict) did not reflect customary law; it had removed the reference to "military necessity" in draft principle 14; and it had deleted the former draft principle 15, the appropriateness of which his delegation had questioned.

43. It was, however, regrettable that the Commission had not fully clarified other points that France and other States had raised. Generally speaking, the Commission, in the commentary to the draft principles, had not sufficiently specified their normative value. In particular, it had not indicated clearly enough which principles reflected customary international law and which were of a more recommendatory nature. Similarly, France had hoped for greater nuance in the Commission's apparent presumption that international human rights law and environmental law applied to situations of armed conflict and regretted the fact that the Commission had not provided sufficient clarity on that point. His delegation also reiterated its concern that draft principle 9 (State responsibility) could be understood to mean that damage to the environment caused in the context of an armed conflict could entail the international responsibility of a State even if the damage resulted from an act of war that was in compliance with international humanitarian law and the law of the use of force. France maintained its legal position on those matters, without prejudice to its interpretation of other draft principles submitted by the Commission to the General Assembly.

44. Concerning "Other decisions and conclusions of the Commission", his delegation had taken note of the Commission's inclusion in its current programme of work of 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". France stood ready to cooperate with the Commission in providing it with any information, including with regard to its national practice, that would be useful for its consideration of those topics. His delegation had also noted with interest the inclusion of the topic "Non-legally binding international agreements" in the long-term programme of work of the Commission. The topic would be a useful one for the legal advisers of States who, in their daily practice of international law, ever more frequently encountered such instruments, the legal scope of which was often uncertain.

45. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that such immunity flowed directly from the principle of sovereign equality that was at the heart of international law. The topic was thus of great importance for States. Customary rules regarding immunity were long established and played an essential role in the development of good relations between States. At the same time, the principle of sovereign equality also underpinned the sovereign authority of each State to exercise criminal jurisdiction. Furthermore, as the International Court of Justice had stated, immunity could not exonerate the person to whom it applied from all criminal responsibility and should not be equated with impunity.

46. His delegation was grateful to the Special Rapporteur and the Commission as a whole for the extensive work on the topic to date and noted the Commission's decision to transmit the draft articles adopted on first reading to Governments for comments and observations. However, his delegation wondered how definitive the draft articles really were. It

understood from the Commission's report (A/77/10) that draft article 2 (Definitions) remained under development. The Commission should therefore identify the terms whose definitions would complete that draft article. Furthermore, his delegation again drew attention to the fact that several draft articles had been subject to extensive discussion. In that regard, it should be highlighted that the draft articles were unlikely to receive the support of all States if they were not subject to any real consensus within the Commission itself. That lack of consensus seemed directly related to the absence of clarity on which provisions represented the codification of existing international law and which represented progressive development. Given the importance of the subject, the Commission should clarify which of the various draft articles transmitted to Governments for comments and observations fell into which category.

47. His delegation had taken due note of draft articles 14, 15 and 16, regarding various procedural provisions, which the Commission had considered at its seventy-third session. While his delegation agreed in principle with the Commission that the inclusion of procedural provisions and safeguards gave an added value to the draft articles and helped to strike a balance among the different provisions contained therein, as well as facilitating dialogue among the States involved, it had some questions about the consequences of those draft articles for domestic law provisions regarding criminal procedure and about the relationship between the new provisions and other rules provided for in the draft articles or in general international law. For example, draft article 14, paragraph 5, could lead to the incorporation into a State's national law of a distinct mechanism allowing an independent challenge to be brought against a determination that an official of another State did not enjoy immunity, while draft article 15 called into question the principle of non-divestiture of jurisdiction following an official complaint, which was present in the domestic law of France and other States. Furthermore, the Commission should clarify the link between draft article 14, paragraph 4, regarding the moment at which immunity must be determined, and draft article 9, paragraph 2, regarding the timing of the examination of immunity. Lastly, the relationship between draft article 16, paragraph 2, and the right to consular assistance under the 1963 Vienna Convention on Consular Relations was not totally clear. The provisions of the draft article could lead to the establishment of a specific regime of consular assistance for State officials, imposing obligations on the forum State that went well beyond those laid down in the Vienna Convention.

48. With regard to the topic "Sea-level rise in relation to international law", which was of great importance for many States, including France, his delegation continued to follow the Commission's work closely. It reiterated the importance of addressing the issue in a transparent, comprehensive and inclusive manner. The analysis of the subtopics should lead to an outcome that took into account all the issues and concerns expressed by States. In that regard, it was important to reaffirm the foundational nature of the United Nations Convention on the Law of the Sea for the Commission's work and for all matters relating to activities in the seas and oceans.

49. France had noted with interest the discussions within the Study Group on the issue of statehood in relation to sea-level rise. The Commission should adopt a cautious approach to that complex question, for which there was no State practice as such. Regarding the discussions on the presumption of continuity of statehood, the parallel drawn with military occupation was necessarily particularly convincing, given that occupation was reversible while sea-level rise was not. On another note, it was perplexing to his delegation that the Commission had associated the issue of statehood in the context of rising sea levels with the right to self-determination.

50 His delegation had noted the intention of the Co-Chair of the Study Group to analyse relevant international law issues from the perspective of both *lex lata* and *lex ferenda*. In that regard, it urged the Commission to make a clear distinction throughout its work between what represented codification and what constituted progressive development. It also shared the sense of urgency expressed by some members of the Commission given the issues at stake and the gravity of the situation; however, the international law issues raised by the question of sea-level rise had very complex theoretical and practical implications and the Commission must give itself all the time needed to examine them in depth.

51. *Ms. Romanska (Bulgaria), Vice-Chair, took the Chair.*

52. **Mr. Kapucu** (Türkiye), speaking on the topic "Peremptory norms of general international law (*jus cogens*)", said that his delegation had underscored from the very outset that there was insufficient State practice to justify the Commission's work in that area. Widely divergent views persisted, both among States and within the Commission itself. In his delegation's opinion, the topic was still immature.

53. It was unfortunate that certain concerns and comments raised by Türkiye and other States during the

Commission's work on the topic had not been taken into consideration. His delegation reiterated its previous statements on the topic and also recalled that the inclusion of *jus cogens* in the Vienna Convention on the Law of Treaties was one of the reasons why Türkiye had not become a party thereto. At the time, it had expressed its concern that the lack of a definition of *jus cogens* in the Convention would pave the way for each State to interpret it to fit its own needs, as had indeed happened during the Commission's work on the topic. During the deliberations on the Vienna Convention, Türkiye had also objected to the "hierarchical superiority" of certain norms, which could in fact be established only in national legal systems with the authority to determine and enact such a hierarchy.

54. His delegation noted that the Special Rapporteur had asserted in his fifth report (A/CN.4/747), when addressing a comment on the binding effect of the use of the word "rules" in draft conclusion 17, that "the Convention *as such* does have a legally binding effect on non-parties"; in that regard, Türkiye wished to clarify that it was not a State party to the Vienna Convention on the Law of Treaties and that that Convention did not have a legally binding effect on it. With regard to the comment in the Special Rapporteur's fifth report that Türkiye "took the explicit view that the draft conclusions as a whole were a progressive development", his delegation wished to emphasize that its statement should have been read as indicating that Türkiye "continued to have misgivings about the need for progressive development of the concept of *jus cogens*". Türkiye had also questioned from the outset the need for the Commission to include the topic in its programme of work and had highlighted that the outcome of the work could remain an analysis and a general overview of related conceptual issues.

55. Any absence of a comment or expression of position by his delegation on a particular draft conclusion or commentary could not be construed as an endorsement of the content thereof, and its comments were made without prejudice to its position. Recalling its previous statements in which it had expressed concern that the scope and criteria for the identification of *jus cogens* were ambiguous and did not include any guidance for determining such norms, his delegation remained of the view that non-derogability could not be a criterion for the identification of a *jus cogens* norm but it could instead be a consequence thereof.

56. With regard to draft conclusion 2, the inclusion of the phrase "fundamental values of the international community" could increase the ambiguity of the topic, exposing it to a variety of possible interpretations and ensuing controversies. Moreover, the vagueness of the concept set out in draft conclusion 5, paragraph 2, according to which general principles of law could also serve as a basis for peremptory norms of general international law (*jus cogens*), was likely to increase the subjectivity of the topic. In the commentary to that draft article, the Commission itself recognized that there was little practice in support of general principles of law as a basis for peremptory norms of general international law (*jus cogens*), though it cited a couple of judicial decisions and scholarly works to support their inclusion. His delegation found that justification rather unconvincing.

57. In a previous statement, his delegation had suggested the deletion of draft conclusion 7, paragraph 2, in order to maintain the clarity of paragraph 1. The assertion in paragraph 2 that "acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required" was in contrast with the apparently higher standard set out in draft conclusion 3 and the Vienna Convention on the Law of Treaties, both of which provided that a peremptory norm of general international law was a norm accepted and recognized by the international community of States as a whole. Furthermore, "a very large and representative majority of States" was less restrictive than the requirement of "extensive and virtually uniform" practice that the Commission had set for the identification of customary international law, which, paradoxically, it had referred to as the "most common basis for peremptory norms of general international law (*jus cogens*)". The wording "a very large and representative majority of States" in draft conclusion 7, paragraph 2, should therefore have been amended to read "the international community of States as a whole" or at least, as suggested by several States, "virtually all States".

58. With regard to draft conclusion 8, his delegation was of the view that a State's silence or inaction could not be taken as evidence of acceptance and recognition of a *jus cogens* norm. It also cautioned against treating "decisions of national courts" and "resolutions adopted by an international organization or at an intergovernmental conference" as forms of evidence. The resolutions of international organizations often did not reflect the legal positions of States and could not constitute evidence; rather it was the conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference that should be taken into consideration.

59. The draft conclusions under Part Three had the potential to disrupt well-established treaty relations

among States. Furthermore, legally well-founded concerns of States had not been taken into consideration. In particular, Türkiye had serious concerns about the assertion, in draft conclusion 14, paragraph 3, that the persistent objector rule did not apply to peremptory norms of general international law (*jus cogens*). It objected to the Commission's arguments, which were not based on State practice, and maintained that the persistent objection of certain States to a rule of customary international law, in particular a State that was especially affected by that rule, must be taken into account when determining whether the rule had been accepted and recognized by the international community of States as a whole as a peremptory norm of general international law.

60. With regard to draft conclusion 19, the Commission had based itself, inter alia, on the articles on responsibility of States for internationally wrongful acts, to which States had not given legal status and the customary status of which was subject to debate. Furthermore, it was his delegation's understanding that the resolutions on which the Commission had based its arguments regarding draft conclusion 19 had been introduced as references during its deliberations on second reading, without State scrutiny. Türkiye was concerned about both the method of their introduction and the inferences drawn, in particular from Security Council resolution 541 (1983), in which there was no mention of *jus cogens* or the so-called breach thereof. The Commission had a specific mandate in relation to international law and should be impartial.

61. Lastly, his delegation maintained its serious concerns about the Commission's inclusion, in the annex to the draft conclusions, of a non-exhaustive list of norms that it had previously referred to as having the status of *jus cogens*, even though it had stated in the commentary to the draft conclusions that the identification of specific norms that had a peremptory character fell beyond the scope thereof.

62. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that any absence of a comment or expression of position by his delegation on a particular draft principle or commentary thereto could not be construed as an endorsement of the content thereof. His delegation reiterated its previous statements on the topic, in which it had expressed concerns about a number of issues, including the broadening of the judgment of a judicial organ competent in a specific area to other fields; the generalization of subjective views based on a particular study; the authority of the sources cited by the Commission; broad interpretation with regard to issues such as occupation or protected zones; the expansion of the scope of the topic to cover non-international armed conflicts; and the use of selective analogies. With regard to the sources cited by the Commission, it should be noted that the draft principles on protection of the environment in relation to armed conflicts and the commentaries thereto were heavily based on the articles on State responsibility, which were not legally binding and the customary status of which was subject to debate among States. Furthermore, his delegation had previously called for intense scrutiny of the Commission's claim that a correlation existed between three fields of law, as it could not see any evidence for that assertion. The Commission's all-encompassing and ambitious approach to the topic, aimed at covering – through the application of different fields of law – the temporal application and purpose of the draft principles, the types of measures and types of armed conflicts they covered, and the actors addressed, had prevented the achievement of a satisfactory outcome in any of those areas.

63. The legitimate concerns and legally well-founded proposals of Türkiye, like those of other States, had not been adequately reflected in the work of the Commission. Its previously expressed concerns therefore remained relevant. The conflation of international human rights law, environmental law and humanitarian law in the draft principles led to assertions that went beyond existing law or to the modification of existing rules or other references through interpretation. In particular, the Commission had made assertions based on subjective inferences from, and misrepresentation of, the judgment of the European Court of Human Rights in *Loizidou v. Turkey*. In paragraph (4) of the commentary to Part Four (Principles applicable in situations of occupation), the Commission had contended that it was widely acknowledged that the law of occupation applied in cases of indirect occupation, provided that the local surrogate acting on behalf of a State exercised effective control over the occupied territory, and it had cited *Loizidou v. Turkey* in a footnote to support its argument that the European Court of Human Rights, among other courts, had acknowledged the possibility of such indirect occupation. In fact, the relevant judgment of the European Court of Human Rights related to the applicability of the European Convention of Human Rights, not to the applicability of the "law of armed conflict", and there was nothing in that judgment to suggest that the Court acknowledged the so-called indirect occupation. The Commission had again cited *Loizidou v. Turkey*, in paragraph (3) of the commentary to draft principle 19, in support of its argument that the International Court of Justice had interpreted respect for the applicable rules of international human rights law as

part of the obligations of the occupying Power under article 43 of the Hague Regulations – even though that case had nothing to do with either the judgment of the International Court of Justice or the Hague Regulations. Furthermore, in light of the 1960 Treaties of Guarantee, Alliance and Establishment and the nature and content of the relevant United Nations documents, the references in the *Loizidou* judgment to "invasion" and "occupation" did not reflect reality.

64. Türkiye reiterated its longstanding position that the vague and controversial references in the draft principles or the commentaries thereto to so-called "non-State armed groups", "non-State actors", "parties to an armed conflict" and "relevant actors" were open to misinterpretation and abuse since they did not distinguish between other actors and terrorist organizations or illegal organizations to which national laws applied. Terrorist organizations could not be parties to an armed conflict and the draft principles could not be used as a pretext to engage with such organizations.

65. In view of the foregoing, it was his delegation's understanding that the draft principles and the commentaries thereto, together with the references contained therein, neither codified or restated existing international law nor interpreted the international agreements to which Türkiye was a party. They did not, and could not, create any new obligations for Türkiye beyond the international agreements to which it was already a party.

66. Turning to "Other decisions and conclusions of the Commission", he said that Türkiye was an ardent supporter of the rules-based multilateral system. International law was an indispensable component of the international order and should be diligently developed and strengthened. The Commission, through its recommendations, played an important role in that endeavour. His delegation appreciated the Commission's efforts and welcomed the inclusion of "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" in its current programme of work.

67. **Mr. Hitti** (Lebanon), reiterating his delegation's support for the Commission's work, said that the Commission could further strengthen its cooperation with the Sixth Committee by providing delegations with an executive summary of its annual report and arranging for the Special Rapporteurs to give virtual briefings for Member States several months before the issuance of the report, in order to facilitate greater and more consistent participation by the Committee's members. In addition, the Commission should limit the number of topics on its programme of work so that Member States could duly consider as many as possible. His delegation recalled the importance of promoting greater geographical diversity and gender equity in the appointment of Special Rapporteurs. Regarding "Other decisions and conclusions of the Commission", his delegation had noted with interest the inclusion of three new topics in the Commission's programme of work and the respective appointment of three Special Rapporteurs. It would carefully follow the work of the Commission on those topics.

68. Concerning the topic, "Peremptory norms of general international law (*jus cogens*)", his delegation welcomed the adoption by the Commission of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which were undoubtedly useful as they provided States and other relevant entities, such as courts, with guidance when called upon to determine the existence of *jus cogens* norms and their legal consequences. The non-exhaustive list of *jus cogens* norms in the annex to the draft conclusions was particularly relevant, on the understanding that it was without prejudice to the existence or subsequent emergence of other peremptory norms of general international law. His delegation welcomed the inclusion in the list of the basic rules of international humanitarian law, the prohibition of racial discrimination and apartheid, and the right of self-determination.

69. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation had followed the Commission's work with great interest and had submitted its observations to the Commission. The issue was critically important given the widespread, long-term and severe damage to the environment caused by armed conflicts. Lebanon was a party to several relevant international legal instruments, including the Geneva Conventions of 1949 and their Additional Protocols I and II. His delegation welcomed the adoption of the draft principles on protection of the environment in relation to armed conflicts, which had been developed in a gradual and incremental manner with the objective of clarifying a range of rules and principles related to the topic and specifying their applicability. His delegation had supported the approach taken by the Commission in considering three temporal phases (before, during and after an armed conflict), including in situations of occupation.

70. His delegation emphasized the importance of draft principle 9 (State responsibility), which provided for the

obligation of States to make full reparation for damage caused, including damage to the environment in and of itself. Draft principle 19 (General environmental obligations of an Occupying Power) was also crucial, particularly in view of the effects of the military presence and military activities of occupying forces on the environment. Given that some of those effects might become evident only after an occupation was over, it would have been beneficial if the Commission had included provisions relating to post-occupation responsibilities of occupying forces. Draft principle 20 (Sustainable use of natural resources) should also have contained a reference to the right to self-determination and the use of natural resources by the protected population of the occupied territory, while in draft principle 23 (Sharing and granting access to information) the Commission could have specified the type of information to which the principle was applicable. The draft principles and the commentaries thereto could serve as useful guidelines and should be disseminated widely to all relevant actors.

71. **Ms. Russell** (New Zealand), speaking on the topic "Peremptory norms of general international law (*jus cogens*)", said that her delegation appreciated the diligent work of the Special Rapporteur and the Commission, which had culminated in the adoption of the draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*). The topic was of paramount importance to the international rules-based system, particularly in light of the ongoing Russian war of aggression in Ukraine in violation of the *jus cogens* norm on the prohibition of aggression. Her delegation welcomed the inclusion of draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) and emphasized the importance of the responsibility to cooperate to bring to an end through lawful means any serious breaches of peremptory norms, as well as the obligation not to recognize as lawful situations created by such breaches, nor render aid or assistance in maintaining such situations. The fact that the draft conclusions followed the formulation of the articles on responsibility of States for internationally wrongful acts where appropriate was helpful.

72. Turning to the topic "Protection of the environment in relation to armed conflicts", she said that the draft principles on protection of the environment in relation to armed conflicts were timely and important, in a context of protracted armed conflict in many regions and where, as noted in the preamble to the draft principles, the environmental consequences of armed conflicts had the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss. Her delegation welcomed the draft principles, which, importantly, drew from existing international environmental law and international human rights law principles to address the gaps in that area. Her delegation welcomed in particular draft principle 5, which specifically addressed the protection of the environment of Indigenous Peoples and the participation of Indigenous Peoples in the question of remedial measures.

73. In her country, attacks on the environment were prohibited in the Manual of Armed Forces Law. The obligations to which New Zealand was subject in cases of international armed conflict, as a matter of policy, also applied to non-international armed conflicts; such obligations included prohibitions on the use of methods or means of warfare that were intended or might be expected to cause widespread, long-term and severe damage to the environment. Her delegation highly valued the work of the Commission and the opportunities provided in the Committee and other forums to engage in substantive dialogue on the topics under its consideration.

74. **Archbishop Caccia** (Observer for the Holy See), speaking on the topic "Peremptory norms of general international law (*jus cogens*)" said that, as early as 1968, at the United Nations Conference on the Law of Treaties, the Holy See had supported the adoption of the concept of *jus cogens*, on the grounds that it could serve to transpose into positive law some of the universal dictates arising from natural law. At that Conference, his delegation had also noted the urgent need to develop rules of interpretation to assist States in delineating the specific content of peremptory norms of international law, even without enumerating them one by one. His delegation therefore supported the Commission's recent efforts to develop guidance on the methodology for identifying the peremptory norms of general international law and determining their legal consequences. At the same time, it noted that the Commission's draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*) were, in essence, secondary norms of international law and did not provide any guidance on the specific content of *jus cogens* norms.

75. As noted by the Commission, the concept of *jus cogens* presupposed and reflected an international community founded on common values: an international public order based on moral values shared by all in light of their common human nature rather than on raw power. Unfortunately, transposing such high aspirations into positive law while relying on the positivist

methodology that characterized the modern science of public international law presented an intrinsic contradiction. His delegation questioned, for example, how draft conclusion 2, which defined the nature of *jus cogens* norms by reference to fundamental values, could be harmonized with draft conclusions 7 and 8, which required an empirical examination of actual State practice to identify the specific content of the peremptory norms. Similarly, it questioned how the Commission could affirm in draft conclusion 2 that *jus cogens* norms reflected the values of the international community as a whole, while requiring acceptance and recognition by a very large and representative majority of States in paragraph 2 of draft conclusion 7. Although his delegation supported the general thrust of the draft conclusions, it believed that the provision referred to in draft conclusion 7, paragraph 2, required further consideration, as it raised such questions as who could define what constituted a very large majority of States, who could decide that such a majority of States was representative and why the views of a persistent objector should be disregarded. The proposed approach might give rise to abuses. If a self-proclaimed majority of States were able to enact new *jus cogens* norms by ignoring the views of the minority, the current structure of the international community, based on the sovereign equality of States, would be called into question. The concept of *jus cogens* was useful only insofar as it was reserved for those essential principles and rules that were truly shared among all States. If the concept was instead deployed as an instrument of political argumentation to ostracize opposing views, it would lose its value.

76. Turning to the topic "Protection of the environment in relation to armed conflicts", his delegation noted that the Commission's work on the topic had rightly brought to light the fact that international humanitarian law at present addressed the subject only marginally. That was not surprising given that the response to the urgent humanitarian needs of civilians, displaced persons and those not taking active part in the hostilities, including combatants *hors de combat*, must always take precedence over the diffuse interest of protecting the environment. In that context, the formulation of some of the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission should have given greater emphasis to the humanitarian and humanistic aspect of the laws of war. For example, with regard to draft principle 8 (Human displacement), although refugees and displaced persons might cause environmental stress to the areas where they were located or through which they transited, environmental considerations should not prevent, discourage or delay in any way the provision of relief and emergency assistance to those persons in need.

77. Although the draft principles were not a restatement of current customary international law, they could serve as a useful basis for further reflection by States and thus assist in both the development of State practice and specific codification efforts. His delegation therefore supported the Commission's proposal that the text be brought to the attention of all States.

78. **Ms. Sayej** (Observer for the State of Palestine) said that the direct institutional relations between the Commission and the Sixth Committee must be protected and advanced. Regarding the topic "Protection of the environment in relation to armed conflicts", the State of Palestine attached great importance to the protection of the environment and had long engaged in multilateral efforts to strengthen environmental governance in armed conflict and ensure the rights of affected people. Her delegation therefore welcomed the draft principles on protection of the environment in relation to armed conflicts, which presented a concise statement of law in one document. They revisited the Martens Clause and demonstrated that the protection of the environment in armed conflict was at the intersection of various international law regimes. Further, they established that the environment was to be treated as a civilian object. Their novel structure and innovative approach in ensuring legal analysis before, during, and after armed conflict were intended to enhance the protection of the environment to the greatest extent possible.

79. Representing the most recent and most significant examination of the law of occupation since the Protocols Additional to the Geneva Conventions of 1949, adopted in 1977, the draft principles built on the existing obligations of occupying Powers set out in international humanitarian law, specifically the Geneva Convention relative to the Protection of Civilian Persons in Time of War, which, although it remained central and must be followed by all States, did not always directly address modern challenges, including prolonged occupations and the exploitation of natural resources as a tool of warfare and oppression. The draft principles restated and modernized the toolbox of international humanitarian law and considered the urgent realities on the ground.

80. Her delegation reaffirmed its long-standing position that the applicability of international human rights law in relation to armed conflict was uncontested. The wide range of human rights instruments were essential for environmental governance, for example in defining the obligations to protect human health and limit environmentally harmful practices, and had been

developed in line with the changing nature of armed conflicts, including belligerent occupations.

81. Her delegation welcomed the evolutionary interpretation of the law of occupation set out in draft principle 20 (Sustainable use of natural resources), which consolidated modern interpretations of the principle of usufruct, accounting for the obligation of the occupying Power to temporarily administer natural resources for the benefit of the protected population of the occupied territory. Regarding draft principle 21, the progressive reference to the obligations of the occupying Power in areas of the occupied State beyond the occupied territory was particularly applicable to prolonged occupations. It confirmed that physical control of an occupied territory, without legitimacy or sovereignty, was indeed the basis for State liability for acts affecting other States. The use of the terms "protected persons" and "protected population" in the draft principles, in accordance with international humanitarian law, should be read in the context of paragraph 2 of draft principle 19, which indicated that significant harm to the environment of an occupied territory would have adverse consequences on the protected population, in particular with respect to the enjoyment of basic fundamental rights.

82. Although only alluded to in the draft principles, the right to self-determination and the principle of permanent sovereignty over natural resources of people under foreign occupation and racist regimes were cardinal principles of international law, including principle 23 of the Rio Declaration on Environment and Development, according to which "the environment and natural resources of people under oppression, domination and occupation shall be protected". Her delegation wished to see more explicit reference to self-determination and permanent sovereignty throughout the draft principles and also recommended providing for a claim to restitution arising from any exploitation, damage, loss or endangerment of natural resources as a result of illegal measures.

83. Her delegation welcomed the inclusion of references to corporate due diligence, in draft principle 10, and to corporate liability, in draft principle 11, as an important step in recognizing that the most egregious environmental harms caused during belligerent occupations, in particular prolonged and illegal occupations, were orchestrated and facilitated by corporations for substantial commercial gains. The draft principles established that States should legislate and adopt other measures to ensure corporate due diligence in areas of armed conflict or in post-armed conflict situations and, most importantly, take measures to ensure that those corporations, and subsidiaries acting under their de facto control, could be held liable for their impact on the environment. Those principles reflected the growing business and human rights movement and provided strong support for the consistent calls made by the State of Palestine for States to take responsibility for the actions of corporations and other business entities operating in or for the settlement enterprise of Israel and its associated regime in the State of Palestine.

84. Draft principle 8 stemmed from concerns about the environmental stress caused by the continued forcible displacement of people, particularly in relation to systematic policies and practices in situations of occupation where the protected population was forcibly displaced and replaced by settlers, in violation of the basic principles of international humanitarian law. Draft principle 8 also related to the congregation of groups in small areas, such as refugee camps. When considered together with draft principle 9, which placed responsibility for damage to the environment squarely on States, the text constituted a welcome step towards ensuring that appropriate measures were taken to prevent and mitigate environmental degradation in areas where displaced persons were located.

85. Her delegation commended the inclusion of draft principle 5 (Protection of the environment of Indigenous Peoples). The rupturing of the relationship between native people and their land continued to detrimentally affect environmental governance and such acknowledgment was necessary for a comprehensive examination of the issue.

86. In light of ongoing intransigence when it came to taking responsibility for environmental damage and crimes, draft principles 25 and 26 required States, in accordance with common article 1 of the Geneva Conventions, to respect and ensure respect for the Geneva Conventions, including through not recognizing breaches of international humanitarian law as lawful. Critically, draft principle 25 (Relief and assistance) drew on the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had recognized the need for compensation by Israel for damage caused, including environmental damage, and noted the uneven implementation of calls for reparation for environmental damage more broadly. Her delegation was also pleased to see that that advisory opinion, and those on *Legality of the Threat or Use of Nuclear Weapons*, and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, had been used as authoritative sources of international law throughout the draft principles.

87. Turning to the topic “Peremptory norms of general international law (*jus cogens*)”, she said that her delegation welcomed the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). The draft conclusions were important for shaping *jus cogens* norms, preserving their superiority as natural law, ensuring their enforceability and giving predictability and legitimacy to the international order based on international law. Her delegation welcomed the addition of “identification and legal consequences” to the title of the draft conclusions, which rightly examined the consequences of breaches of peremptory norms. Her delegation supported both the non-exhaustive list contained in the annex to the draft conclusions and the approach taken by the Commission in that regard. The list reflected foundational *jus cogens* norms, including the right of self-determination and the basic rules of international humanitarian law, that were firmly rooted in the moral and legal conviction of the international community and were essential to the coexistence of nations.

88. *Jus cogens* norms were legal, not political, norms. The politicization of the identification process and isolated efforts to undermine the peremptory nature of those fundamental norms of international law in order to justify their violation or underplay the legal consequences of derogation therefrom would, if entertained, have negative and irreversible implications for the unified international legal order. The most important attribute of *jus cogens* was clear: a *jus cogens* norm was binding even on its objectors. In that respect, the draft conclusions played a critical role in advancing and promoting *jus cogens* norms. For example, the peremptory norm of the prohibition of racial discrimination and apartheid had been the subject of extensive legal studies by the United Nations, experts, non-governmental organizations, international organizations, lawyers and others, reflecting its gravity and making it one of the most widely documented and analysed peremptory norms. That bore testament to the increasing vitality of the principle of *jus cogens* and its developing predominance in international law, as well as to the nature of the draft conclusions, which reflected the interests of the international community as a whole.

89. The draft principles on protection of the environment in relation to armed conflicts and the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) would both serve as catalysts of ambitious action, help to focus attention where it was most needed, increase accountability and improve the outlook for justice, peace and cooperation among nations. Her delegation urged States to strengthen their cooperation on the protection of the environment in relation to armed conflicts, put in place an international mechanism to monitor the implementation of the draft principles and make recommendations based on good policies and practices. Her delegation also urged States to respect and uphold peremptory norms and punish those that violated them.

90. **Mr. Mabe** (Observer for the International Committee of the Red Cross (ICRC)), speaking on the topic “Protection of the environment in relation to armed conflicts”, said that ICRC appreciated the Commission’s careful consideration of the comments it had submitted in that regard. Current armed conflicts largely unfolded at the epicentres of environmental and climate crises. The natural environment was frequently damaged by warring parties, affecting the well-being, health and survival of dependent communities. That reality was now exacerbated by climate risks. It was clear that the legal framework applicable to conflict-related environmental harm needed to be clarified and strengthened; the draft principles represented a historic contribution in that regard.

91. The draft principles on protection of the environment in relation to armed conflicts adopted by the Commission were complementary to the efforts of ICRC to enhance respect for international humanitarian law rules protecting the natural environment in armed conflict and to the updated ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict. The draft principles were broader in terms of their temporal scope and the branches of public international law on which they drew. They also addressed important legal issues beyond the scope of international humanitarian law. The Commission focused in the draft principles on some of the most relevant rules and principles of international humanitarian law providing protection to the environment; other rules were also referenced in several commentaries, while it was clearly stated that all other rules of international humanitarian law remained applicable and could not be disregarded.

92. In that respect, ICRC recalled that the draft principles and their commentaries must not be interpreted as restricting or impairing applicable rules of international law. As had been reiterated by the Special Rapporteur in her third report (A/CN.4/750), the topic had been developed consistent with the point of departure that the Commission had no intention, and was not in the position, to change the law of armed conflict. Although a general “without prejudice” clause had not been used, the clarifications introduced to that effect in some of the commentaries were welcome. For

example, it was stated in the commentary to draft principle 8 that relief and assistance for displaced persons and local communities must be provided in accordance with international obligations. Those included obligations under the detailed rules of international humanitarian law aimed at ensuring that the basic needs of the populations concerned were met.

93. Draft principle 14 reaffirmed the applicability of international humanitarian law principles and rules on distinction, proportionality and precautions to the environment. While, as noted in the commentary, the draft principle did not elaborate on how those well-established principles and rules were to be interpreted, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict provided complementary commentary on them. Draft principle 13, which restated that no part of the environment might be attacked, unless it had become a military objective, was based on the fundamental rule under international humanitarian law that a distinction must be made between military objectives and civilian objects, as stated in the commentary thereto. The inherently civilian nature of the environment was emphasized in the commentaries to both draft principle 13 and draft principle 14.

94. The draft principles also addressed other rules of international humanitarian law, including the prohibition of the use of methods or means of warfare that were intended, or might be expected, to cause widespread, long-term and severe damage to the natural environment, which in the view of ICRC, had been established as a rule of customary international law in international armed conflicts and, arguably, also in non-international armed conflicts. As noted in the commentary to draft principle 13, the said prohibition established a high threshold that must, nonetheless, be interpreted considering current scientific knowledge of ecological processes. Other specific elements that should inform a contemporary understanding of the threshold included the recommendation of the United Nations Environment Programme to use the terms used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. ICRC had also made that recommendation and further set out its interpretation of the threshold in its Guidelines on the Protection of the Natural Environment in Armed Conflict.

95. ICRC welcomed the modifications that had been made to the draft principles on protected zones as it had long promoted the protection of areas of particular environmental significance or fragility. The clarifications made regarding the temporal and personal scope of the draft principles were also welcome, specifically the fact that the Commission had affirmed in several commentaries that relevant draft principles applied to all parties to armed conflicts. His delegation hoped that the draft principles would generate renewed momentum to better minimize environmental damage throughout conflict cycles. It stood ready to support efforts to accelerate respect for international humanitarian law.

96. **Ms. Heredero** (Observer for the Council of Europe) said that her delegation was grateful for the participation of the Chair of the Commission in the 63rd meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, held in September 2022 in Bucharest. The Chair's annual participation in the meetings of CAHDI was an excellent means of cooperation between the Council of Europe and the Commission.

97. Concerning "Other decisions and conclusions of the Commission", her delegation welcomed the Commission's timely decision to include the topic "Non-legally binding international agreements" in its long-term programme of work. In March 2021, CAHDI had decided to follow up on the topic of the practice of States and international organizations regarding non-legally binding agreements and had subsequently distributed a questionnaire on the subject to delegations. Thus far it had received some 20 replies. Depending on the outcome of its first analysis of the results, CAHDI would decide whether the outcome of the exercise would be a glossary of terms, a model memorandum of understanding or another guidance tool. The outcome could be of interest to the Commission when it began its work on the topic and the Council of Europe would continue to cooperate with the Commission accordingly. CAHDI was also working on the related topic of treaties not requiring parliamentary approval, which had been proposed by the delegation of Slovenia.

98. The topic "Settlement of international disputes to which international organizations are parties", which the Commission had decided to include in its current programme of work, had been on the agenda of CAHDI since 2014. CAHDI had conducted an analysis of main trends in the responses to a questionnaire on the subject in 2017, and, although the data was still confidential, it would seek ways to share with the Commission its years of experience on the topic.

99. **Mr. Tladi** (Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)"), speaking via video link and responding to comments made during the Sixth Committee's final debate on the topic, said that he was grateful for all comments by delegations, both positive and critical, on

the draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*). The Commission had made every effort to consider, and where possible to respond to, past comments made by Member States both orally and in writing. Many delegations had acknowledged those efforts during the current debate.

100. He agreed with the comments of the representative of France concerning the importance of dialogue between the Commission and the Sixth Committee, and in that regard noted that dialogue implied communication in both directions. While the Commission should consider the comments of Member States, Member States should also respond directly to the Commission's explanations, which, regrettably, occurred rarely. In that context he noted that the comments made by the representative of Türkiye concerning the fifth report of the Special Rapporteur (A/CN.4/747) were incorrect. For example, the assertion that the report stated that States that were not a party to the Vienna Convention on the Law of Treaties were bound by that treaty was based on a misunderstanding of the text. Similarly, the representative of Armenia had indicated that the Commission should have discarded the framework of the Vienna Convention and based its work on natural law. He had expressed sympathy for that view in his report, while also noting that such an approach would be rejected by virtually all States. That assertion had been borne out by the fact that during the current debate many States, including those that had been generally critical of the Commission's work on the topic, had appreciated the fact that the framework adopted was that of the Vienna Convention. Another delegation had persisted with the narrative that the draft conclusions were based on judicial decisions and theory. He had thoroughly responded to that point in paragraphs 14 to 26 of his fifth report, but the delegation in question had not responded to those paragraphs. It was therefore impossible to advance the dialogue further, except to say that it was incorrect to assert that the draft conclusions relied on judicial decisions and theory.

101. Regarding the responsiveness of the Commission on various points, it should be noted that, out of nearly 60 States that had expressed views on draft conclusion 2, only 6 had opposed the contents thereof. Further, even with the majority of States supporting the approach to draft conclusion 2, the Commission had endeavoured to make modifications in order to address the views of States not fully in agreement, for example, by reversing the order of draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*)) and draft conclusion 3 (Definition of a peremptory norm of general international law (*jus cogens*)) to distance draft conclusion 2 from draft conclusion 4 (Criteria for the identification of a peremptory norm of general international law (*jus cogens*) and making explicit in the commentary that draft conclusion 2 did not impose additional criteria for the identification of peremptory norms or substitute the criteria set out in draft conclusion 4. As the representative of Germany had noted, some nuanced wording remained in the commentary suggesting that the characteristics contained in draft conclusion 2 played some role in at least assessing evidence for the identification of peremptory norms. When assessing the responsiveness of the Commission, it should be borne in mind that some States had actually wanted to see a more explicit connection between draft conclusion 2 and the criteria for identification set out in draft conclusion 4.

102. Several States had expressed the view that the Commission had not clarified the apparent conflict between the phrase "the international community" in draft conclusion 2 and the phrase "the international community of States as a whole" in draft conclusion 7, despite being requested to do so. In fact, the Commission had engaged in a long debate on the issue, which was documented in the summary records of its meetings. The discussion was also addressed in paragraph (9) of the commentary to draft conclusion 2.

103. Four delegations had expressed concerns regarding draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)). In particular, they had stated that the proposition that treaty provisions and general principles of law were possible bases for *jus cogens* norms was not supported by practice, which was true. While the representative of South Africa had also indicated that the explanation in the draft conclusion was unconvincing, she had subsequently referred to the respective commentary, which reflected the nuance that such sources could serve as bases for *jus cogens* norms only to the extent that they could be regarded as norms of general international law. That nuance was in fact already in the text of draft conclusion 5, which did not state that treaties and general principles of law constituted bases for *jus cogens* norms. Rather, the phrase "may also" was intended to indicate simply that the possibility of treaty provisions and general principles of law forming the basis of peremptory norms of general international law (*jus cogens*) could not be a priori excluded. As indicated by the representative of South Africa, paragraph (2) of the commentary made explicit, particularly with respect to treaties, that such a possibility was to be understood by reference to the fact that treaty rules could codify customary international law. In effect, it would be the rule of customary international law codified by a treaty

rule, rather than the treaty itself, that would form the basis for *jus cogens*. The concerns of the four Member States in question were therefore in fact fully addressed.

104. All but one delegation commenting on draft conclusion 7 (International community of States as a whole) had expressed appreciation for the fact that the Commission had inserted the reference to "representative" in the text. The main question raised in relation to that draft conclusion concerned the threshold for reaching a "majority of States". While the Commission had not modified the threshold set out in the draft conclusion, namely, a "very large" majority, it had discussed the concerns of States and had taken into account that the vast majority of them supported that definition. In fact, only five States had supported the higher threshold of "virtually all States". More importantly, the legal reason advanced to support that higher threshold, which was that it could be implied from the *North Sea Continental Shelf* cases, was incorrect. In his fifth report he had stated:

> While it is true that the International Court of Justice in *North Sea Continental Shelf* cases referred to "virtually uniform" for the purposes of customary international law, it is also true that the Court has also described the test using different phrases … Moreover, the phrase "virtually uniform" in that passage refers not to quantity, i.e., how many States, but rather to the quality, i.e., the type of practice. In other words, it is not how many States participated in the practice, but rather whether the practice of those States that did participate, however many, was uniform. In fact, the quantitative element in the *North Sea Continental Shelf* cases is "extensive".

That was a much lower threshold than a "very large majority".

105. The considerations he had described in relation to draft conclusion 2 also applied to the many comments made by delegations 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*)). Notwithstanding the broad support expressed for including the reference in the commentary to the Security Council, the Commission had taken extraordinary steps to address the concerns expressed by some States. Those steps had been described by the relevant delegations and he was grateful that they recognized that the Commission had gone out of its way to respond to their concerns.

106. Turning to draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), he noted that delegations' comments had reflected conflicting concerns. Five delegations had suggested that the Commission had gone too far in suggesting that the contents of the draft conclusion reflected customary international law, while three other delegations had suggested that, by simply restating articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts, the draft conclusion did not go far enough and should have in fact identified aggravated consequences for serious breaches of *jus cogens*. The first concern had been addressed in his fifth report. Regarding the second concern, the Commission could have come up with aggravated consequences, including aggravated responsibility, for example by deciding that States should automatically lose their seats in international organizations or should lose their right of veto in the event of serious breaches. However, that would have rightfully raised questions regarding what jurisprudence the consequences would be founded upon. In 2022, but also in 1974, States had been suspended from organs of international organizations, but those were examples of the implementation of the duty to cooperate to bring to an end serious breaches of *jus cogens* rather than of automatic consequences. Such actions by States acting collectively were intended to put pressure on States in serious breach of their duties arising under *jus cogens*.

107. Draft conclusion 21 (Recommended procedure) was an apt example of the Commission's responsiveness to Member States' views, as many modifications had been made to it. With regard to draft conclusion 23 (Non-exhaustive list), a common thread running through delegations' comments during the debate was that the Commission had not applied its own methodology when drafting the list of peremptory norms of general international law. In fact, that issue had been subject to debate both within the Drafting Committee and in the plenary of the Commission. The Commission believed that the concern was addressed in the text of draft conclusion 23, which was simply a statement of fact indicating that the list found in the annex comprised norms previously identified by the Commission as having *jus cogens* status. It had therefore taken into account the concerns regarding methodology when drafting that text and the norms listed in the annex.

108. One delegation had stated that the modification of peremptory norms was not possible if customary international law was to be seen as the main basis of *jus cogens*. Although the draft conclusions did not address that issue, it was discussed in the commentary. Moreover, the argument that modification was not possible was based on the erroneous view that

modification was always in relation to a conflicting rule. In fact, a modification could relate to the expansion of a *jus cogens* norm where no conflict existed, such that the question of conflict with an existing norm did not arise. Even in cases of modification involving some conflict, it should be recalled that paragraph (7) of the commentary to draft conclusion 14 actually addressed that point.

109. It was clear from the debate that, overall, there was a broad and representative majority of Member States in support of the draft conclusions. Concerns had been expressed by a small number of States regarding a limited number of draft conclusions. He therefore hoped that the Committee would be in a position to act on the Commission's recommendation concerning the draft conclusions. *Jus cogens* was the weapon of the disenfranchised against abuses by the powerful and privileged. The draft conclusions were an excellent outcome that would not exist without the comments received from Member States, for which the Commission was grateful.

110. **Ms. Lehto** (Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts"), responding to comments made during the Sixth Committee's final debate on the topic, said that the final debate was an important part of the dialogue between the Commission and the Sixth Committee. Once the Commission completed its work, Member States had the final say, and in that regard she was pleased to note that the draft principles on protection of the environment in relation to armed conflicts had received a great deal of explicit support from delegations. The insightful comments, support, contributions and constructive criticism by members of the Sixth Committee were evidence of their engagement with the topic. She thanked the secretariat of the Commission for its support.

Statements made in exercise of the right of reply

111. **Mr. Chrysostomou** (Cyprus) said that the comments made by the representative of Türkiye regarding Security Council resolution 541 (1983), which referred to the illegal secession of the occupied part of Cyprus, and the European Court of Human Rights judgment in the *Loizidou v. Turkey* case, on Cyprus, did not reflect the reality on the ground and were unacceptable. The Sixth Committee was a legal body; Member States should not make any attempt to politicize the discussion of the Commission's report, which should be based on legal arguments.

112. **Mr. Kapucu** (Türkiye) said that he had not politicized the Committee's discussion. His comments noting that the Commission, in its report (A/77/10), had misrepresented *Loizidou v. Turkey*, had been entirely of a legal nature.

113. **Ms. Rubinshtein** (Israel) said that her delegation regretted that certain delegations had decided to narrow the scope of the discussion and drag the legal debate into the realm of political issues well beyond the purview of the Sixth Committee, taking the limited time given to leaders in the field of law to discuss important concepts and wasting valuable resources. The Committee's discussions should be a place to discuss divergent views and find common ground rather than advance narrow political goals and sow further divisions during the current polarized time.

The meeting rose at 5.45 p.m.