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Chair: Mr. Biang . . . . . (Gabon)
later: Ms. Ponce (Vice-Chair) . . . . . (Philippines)

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18-18132 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI, VII and VIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Ms. Telalian** (Greece), referring to the topic "Provisional application of treaties", said that the adoption of a set of draft guidelines, entitled "Guide to Provisional Application of Treaties", as well as the draft model clauses proposed by the Special Rapporteur in his fifth report (A/CN.4/718) were a significant step toward bringing clarity to the relevant rules on the topic. Her delegation welcomed the approach described in the general commentary to the draft Guide, which should be read together with draft guideline 2 (Purpose). It was important for the Commission to make clear from the outset that its intention was to provide guidance that was consistent with the existing rules, in particular those enshrined in article 25 of the 1969 Vienna Convention on the Law of Treaties, while acknowledging the voluntary and flexible nature of provisional application and the need to accommodate limitations arising from the internal laws of States.

3. The inclusion of draft model clauses in an annex to the Guide would provide additional assistance to States seeking to draft and negotiate treaties. To make the model clauses more user-friendly, it would be useful to indicate whether each clause could be used for either bilateral or multilateral treaties or both.

4. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", she commended the Special Rapporteur for the pragmatic and holistic approach he had managed to take in his third report (A/CN.4/714 and A/CN.4/714/Corr.1) in spite of the scarcity of relevant State practice.

5. With regard to the new draft conclusions proposed by the Special Rapporteur in his report, her delegation considered that paragraph 3 of draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)) and paragraph 2 of draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations) both concerned the principle that norms of international law should, to the extent possible, be interpreted in a way that rendered them consistent with *jus cogens*. For her delegation, that rule also applied to the interpretation of rules of customary international law. Accordingly, it agreed fully with the proposal made during the Commission's consideration of the topic, and endorsed by the Special Rapporteur, that both paragraphs be merged into a single draft conclusion applicable to all sources of international law.

6. Draft conclusion 10, paragraph 2, and draft conclusion 12 (Elimination of consequences of acts performed in reliance of invalid treaty), as proposed by the Special Rapporteur, together reproduced most of article 71 of the Vienna Convention. However, paragraph 1 (b) of article 71 was not reflected in the draft conclusions, even though it set forth an important positive obligation of States, in a case where a treaty was void because it conflicted with a peremptory norm, to bring their mutual relations into conformity with that peremptory norm. Her delegation therefore welcomed the Drafting Committee's decision to amend draft conclusion 12 to incorporate the content of article 71, paragraph 1 (b), in the draft conclusions it provisionally adopted at its seventieth session.

7. Referring again to the draft conclusions provisionally adopted by the Drafting Committee, she noted that the Chair of the Drafting Committee had highlighted in his oral report of 26 July 2018 that draft conclusion 14 (Procedural requirements) was a recommendatory text. However, her delegation was not convinced that the use of words such as "is to" and "are to" clearly conveyed that idea. Similarly, the phrase "may not" in paragraph 4 was unsuitable for a non-binding text. Moreover, in its current form, the draft conclusion might only be applicable to treaties between States, even though it was intended to also cover cases involving binding resolutions of international organizations. In that context, it should be borne in mind that the dispute settlement procedures provided for in article 66 of the 1969 Vienna Convention differed substantially from those set out in article 66 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

8. Referring to the draft conclusions proposed by the Special Rapporteur in this third report, she said that paragraph 1 of draft conclusion 15 (Consequences of peremptory norms of general international law (*jus cogens*) for customary international law) should not apply if the customary international law rule in question was also a *jus cogens* rule. Her delegation did not dispute the premise of draft conclusion 17 that Security Council resolutions, like those of other international organizations, could not conflict with a peremptory norm of general international law (*jus cogens*), but wished to caution the Commission against creating the impression, through the wording of the draft conclusion

or the commentary thereto, that the Security Council was the entity most likely to attempt to set aside peremptory norms of international law.

9. The concept of so-called regional *jus cogens* ran contrary to the very notion of *jus cogens*, which was by definition universal. Peremptory norms of general international law reflected the fundamental values of the international community and, according to article 53 of the 1969 Vienna Convention, had been accepted and recognized by the international community of States as a whole.

10. As to the topic "Protection of the environment in relation to armed conflicts", her delegation commended the in-depth analysis in the first report by the new Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1). Referring to the draft principles provisionally adopted by the Drafting Committee (A/CN.4/L.911), she said that draft principle 19 (General obligations of an Occupying Power) seemed to have been informed by the applicable rules of human rights law and general principles of international environmental law. For example, the obligation of the Occupying Power to respect and protect the environment of the occupied territory and prevent significant harm to the environment of the occupied territory was closely related to the well-established duty of the Occupying Power to preserve civil life and maintain the orderly government of the occupied territory, since environmental protection was now one of the key functions assumed by public authorities. Her delegation welcomed the Drafting Committee's decision to remove the reference to maritime areas adjacent to the occupied territory from the Special Rapporteur's proposal for draft principle 19. The Special Rapporteur had taken for granted that the authority of the Occupying Power extended to maritime areas, while in reality it must be determined on a case-by-case basis whether it was the Occupying Power or the territorial State that had effective control over those areas.

11. Turning to draft principle 20 (Sustainable use of natural resources), she said that the requirement of sustainable use was applicable in relation to the use of any natural resources, whether or not they were located in an occupied territory. However, the complex question of whether and to what extent they might be used by an Occupying Power went beyond the issue of sustainability and would thus be difficult to cover in a single provision. The Commission should take into account not only article 55 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, which laid down the so-called usufructuary rule, but also article 47 of that Convention and article 33 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, which both prohibited pillage. On the basis of the latter two articles, the International Court of Justice had found, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that the looting, plundering and exploitation of natural resources in the territory of the Democratic Republic of the Congo by members of the military forces of a neighbouring country was in violation of the *jus in bello*. Consequently, if draft principle 20 were retained, the circumstances in which the prohibition of pillage might render illegal the exploitation of natural resources in an occupied territory should be spelled out in the commentary. Cases where the exploitation of natural resources might not amount to pillage but would still be illegal under the law of armed conflict because it violated the usufructuary rule should also be identified in the commentary.

12. Furthermore, draft principle 20 seemed to imply that only the law of armed conflict governed the permissibility of the administration and use of natural resources in an occupied territory; other relevant principles of international law, such as the sovereignty of the territorial State over its natural resources and the principle of self-determination, should be taken into account. Similarly, the text did not reflect the obligation of States not to recognize illegal situations, including by abstaining from entering into economic relationships that might entrench such situations, which would be of relevance in situations where natural resources were being exploited for export from an illegally occupied territory. Draft principle 20 should therefore be reformulated to include a reference to applicable principles of general international law, perhaps in the form of a "without prejudice" clause.

13. Addressing the topic "Succession of States in respect of State responsibility", she said that her delegation supported the general rule set forth in draft article 6 of the draft articles proposed by the Special Rapporteur in his second report (A/CN.4/719), namely that responsibility was not in principle transferred to the successor State if the predecessor State continued to exist. That rule was in line with the principle underlying the law of State responsibility that the wrongdoing State should be held responsible for its internationally wrongful act. Her delegation also agreed with the distinction drawn between the attribution of the wrongful act to the predecessor State, which was addressed in paragraph 1, and the legal consequences of such attribution, which were covered in paragraph 2.

14. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her

delegation welcomed the analysis of the procedural aspects of the topic in the Special Rapporteur's sixth report (A/CN.4/722). The proper examination of procedural aspects of immunity was of crucial relevance to the draft articles proposed by the Special Rapporteur, particularly since case law and doctrine on the topic were scarce. Clarifying the procedural aspects could provide a level of neutrality and certainty and help reduce the risk of politically motivated and abusive prosecutions. Her delegation therefore supported the view expressed in the report that the approach to the analysis of the procedural aspects of immunity of State officials from foreign criminal jurisdiction should be broad and comprehensive. It was important to draw a clear distinction between procedural rules, which were applicable in all cases concerning the immunity of a State official, and procedural safeguards, which should apply when exceptions to immunity were at issue.

15. With regard to chapter II (Concept of jurisdiction and procedural aspects) of the Special Rapporteur's report, there was no need to define the term "criminal jurisdiction" for the purposes of the draft articles, owing to the diversity and variety of existing national laws and procedures. A functional approach based on appropriate criteria would suffice for the proper examination of the relevant issues. Furthermore, the distinction between immunity *ratione personae* and immunity *ratione materiae* should be maintained to the extent required by the differences in their substantive and normative elements. As to the question of acts of the authorities of the forum State affected by immunity, her delegation considered that issues relating to the consideration of immunity at the investigation stage, the appearance of a foreign official as a witness and precautionary measures required further analysis and clarification.

16. Greece had doubts about the advisability of examining the effect that the obligation to cooperate with an international criminal court could have on the immunity of State officials from foreign criminal jurisdiction and the related procedures. That issue might be considered to be beyond the scope of the topic, given the content of draft article 1 (Scope of the present draft articles), the diversity of the existing international criminal tribunals and the fact that the relevant obligations of States and the procedural handling of such cases were primarily governed by the statutes of those tribunals. Her delegation invited the Commission to continue its examination of the procedural aspects of immunity and to seek to overcome the division concerning draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) by proposing a consensual and balanced text that reflected all the relevant interests of the international community.

17. More detailed comments reflecting her delegation's position on a number of the abovementioned topics could be found in her written statement, available on the PaperSmart portal.

18. **Mr. Lippwe** (Micronesia), referring first to the topic "Protection of the atmosphere", said that his delegation remained deeply concerned about the stringent limits imposed by the Commission on the work of the Special Rapporteur. The scope of the Commission's work should be limited only for the purposes of making the work manageable and useful, not for political reasons, and should not undermine the potential value of the outcome for the international community.

19. Addressing the draft guidelines on the topic adopted on first reading, he said that it was an indisputable truth that a State incurred responsibility under international law whenever it failed to fulfil any of its international obligations. The Special Rapporteur had acknowledged that fact in his original formulation of the draft guideline, asserting that such responsibility was triggered only if the actions or omissions were attributable to the States and the damage or risk was proven by clear and convincing evidence. It was disappointing that that reference to State responsibility had been removed from the draft guideline adopted by the Commission on first reading. The statement in paragraph (7) of the commentary to draft guideline 10 that the 2001 articles on responsibility of States for internationally wrongful acts were equally applicable in relation to environmental obligations, including protection of the atmosphere from atmospheric pollution and atmospheric degradation, affirmed a core norm of international law and could have been included in the draft guideline without upsetting the balance of the text.

20. It was also regrettable that the Commission had not retained the reference to damage that had featured in the Special Rapporteur's original proposed draft. By addressing the relevance of damage to the determination of State responsibility, the Special Rapporteur's proposal would have helped to clarify what constituted an internationally wrongful act or omission that triggered State responsibility in connection with the protection of the atmosphere. While Micronesia had doubts about the reference to "clear and convincing evidence" in the Special Rapporteur's proposal, it commended him for making an effort to discuss and identify a standard.

21. His delegation was satisfied for the most part with draft guideline 11 (Compliance) and the commentary thereto regarding facilitative or enforcement measures used to ensure that Sates fulfilled their compliance obligations. It particularly welcomed the reference to the need to take into account the capabilities and special conditions of States. Micronesia, a small island developing State, was a party to numerous relevant multilateral agreements and was doing its utmost to contribute to the protection of the atmosphere, but its success would depend greatly on capacity-building and other forms of technical, programming and financial assistance. His delegation was pleased that the situation of countries such as his was recognized in the international legal regime on the protection of the atmosphere.

22. His delegation supported the amendments made to the Special Rapporteur's proposal for draft guideline 12 (Dispute settlement), which were reflected in the text adopted by the Commission. The original proposal had been too restrictive, as it had not taken into account the important role of the traditional knowledge of indigenous peoples and local communities in dispute settlement in numerous domestic and regional regimes, in particular in disputes concerning environmental matters. It was well established that indigenous peoples and local communities around the world had close and long-standing ties to and knowledge of the natural environments they inhabited, and their traditional knowledge was useful in understanding environmental phenomena. The importance of such traditional knowledge had been recognized in many multilateral environmental agreements and processes, including the Convention on Biological Diversity, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, and the Paris Agreement under the United Nations Framework Convention on Climate Change. While the reference to "technical and scientific experts" in draft guideline 12 was broad enough to accommodate experts with traditional knowledge, his delegation encouraged the Commission to consider explicitly acknowledging the relevance of traditional knowledge in either the draft guideline or the commentary thereto.

23. **Mr. Tōnē** (Tonga) said that since the atmosphere was a common resource shared by all humankind, States had an obligation *erga omnes* to protect it from degradation caused by human activity, as reflected in draft guidelines 3 (Obligation to protect the atmosphere), 5 (Sustainable utilization of the atmosphere), 6 (Equitable and reasonable utilization of the atmosphere) and 7 (Intentional large-scale modification of the atmosphere) of the draft guidelines adopted by the Commission on first reading. A web of interconnected obligations had been formed with a view to ensuring the conservation and sustainable use of the atmosphere, but the fragmented frameworks and regimes governing different issues, substances and activities made it difficult for States to achieve compliance.

24. His delegation fully supported draft guidelines 10 (Implementation), 11 (Compliance) and 12 (Dispute settlement), which concerned the most important aspects of the law of the atmosphere. They were the intrinsic and logical consequences of the obligations and recommendations set forth in the draft guidelines provisionally adopted by the Commission at previous sessions.

25. With regard to draft guideline 11, his delegation supported the Special Rapporteur's description of "compliance" as referring to mechanisms or procedures at the level of international law to determine whether States in fact adhered to the provisions of a treaty and to the implementing measures that they had instituted. As noted in paragraph (1) of the commentary to the draft guideline, the use of the term "compliance" was not necessarily uniform in agreements or in literature. Small island developing States faced challenges in achieving and maintaining compliance, owing to a lack of capacity and resources. By providing for a choice between facilitative and enforcement procedures in draft guideline 11, paragraph 2, the Commission had rightly made it possible to treat States that wished to comply but were unable to do so differently from those that refused to comply despite having the necessary capacity and resources.

26. One challenge for developing and least developed countries, in addition to the general lack of capacity referred to in paragraph (4) of the commentary, was their limited access to financing mechanisms and other means of financial support. His delegation wished to emphasize the importance of international cooperation, which was covered in draft guideline 8 (International cooperation), to provide capacity-building and sustained access to adequate financial resources to developing countries, in particular small island developing States. The draft guidelines and the commentaries thereto could provide useful guidance that could be taken into account in the finalization of the work programme under the Paris Agreement.

27. His delegation supported draft guideline 12, on dispute settlement, and especially paragraph 2, relating to the need to use both technical and scientific experts in dispute settlement processes, as necessary, to ensure

that the judicial bodies concerned took informed decisions when settling disputes.

28. Protecting the atmosphere had implications for the well-being of terrestrial and marine environments. In its recent special report on global warming of 1.5°C, the Intergovernmental Panel on Climate Change had indicated that it was likely that global warming would increase and that warming from anthropogenic emissions from the pre-industrial period to the present would persist for centuries to millennia and would continue to cause further long-term changes in the climate system. While emissions alone would not be responsible for global warming of 1.5°C, efforts to protect the atmosphere could form part of a preventive approach that would mitigate the cumulative effects of global warming, such as sea-level rise, desalination of the oceans, coral bleaching and ocean acidification. The draft guidelines could thus provide States with useful guidance on addressing the effects of climate change.

29. His delegation commended the Commission for the significant progress that it had made with respect to the topics "Protection of the atmosphere", "Provisional application of treaties" and "Peremptory norms of general international law (*jus cogens*)" and urged all States to enhance their cooperation and collaboration in the progressive development and codification of international law.

30. **Mr. Cuellar Torres** (Colombia), addressing the topic "Protection of the atmosphere", said that the Special Rapporteur had carried out commendable work, despite the limits within which he had had to work. The degradation of the atmosphere, the world's largest natural resource, was extremely concerning. While a number of conventions regulated aspects of the atmosphere, there was no coherent legal framework that addressed it as such. His delegation was therefore pleased that the Commission had decided in 2013 to consider the topic, in what was the first attempt to identify existing norms on the basis of State practice on the topic. However, it was disappointing that the scope of the work had been limited, with questions concerning State responsibility, common but differentiated responsibilities, the polluter-pays principle, the precautionary principle and the transfer of funds and technology to developing countries, including intellectual property rights, having been excluded from the scope of the topic. It was also regrettable that the Commission's work would not cover substances such as black carbon, tropospheric ozone and other dual-impact substances. Black carbon was responsible for 3.2 million premature deaths every year and should certainly not have been excluded from the scope of the topic.

31. Moreover, the international regime on the protection of the atmosphere was complex and disorderly, governing various uses of the atmosphere and a variety of substances associated with different risks to health, security and the environment. The Commission should not have been given such a narrow scope of work for such a vast topic. The understanding of the Commission on the inclusion of the topic in its programme of work, which had been agreed by a number of States and the Special Rapporteur in 2013, risked jeopardizing any potential effectiveness of the work, and his delegation hoped that the Commission would remove all references to that understanding during the second reading of the text.

32. Colombia supported the principle of cooperation and therefore, like the Special Rapporteur, preferred cooperative compliance mechanisms over punitive or enforcement mechanisms that were based on the responsibility of States and were intended to place penalties on States that did not fulfil their obligations.

33. Turning to the text of the draft guidelines adopted by the Commission on first reading, he suggested that the phrase "pressing concern of the international community as a whole" in the third preambular paragraph be amended to read "common concern of humankind", in line with the wording of the Paris Agreement and other climate agreements. Similarly, draft guideline 1 (b), defining the term "atmospheric pollution", should be aligned more closely with the 1979 Convention on Long-range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea through the insertion of the phrase "and energy" after the word "substances". On the matter of dispute settlement, he said that the technical character of environmental disputes must be taken into account to ensure that scientific evidence was properly evaluated and that appropriate procedural rules were applied. Overall, his delegation welcomed the work that had been done on the topic and the adoption of the draft guidelines.

34. Holding part of the Commission's seventieth session in New York had provided an opportunity to organize a large number of side events on topics relevant to international law, which had strengthened the interaction between the Commission and the Sixth Committee. It would be useful for the Commission to hold part of its session in New York every five years, with due regard for article 12 of its statute.

35. His delegation welcomed the inclusion of the topic "General principles of law" in the Commission's programme of work and the appointment of a Special Rapporteur on the topic. It was also pleased that the

Commission had decided to include the topics "Sea-level rise in relation to international law" and "Universal criminal jurisdiction" in its long-term programme of work and hoped that those topics could be moved to its current programme of work. However, the Commission should not take on too many topics, or States would not be able to properly follow all of its work.

36. **Ms. Durney** (Chile) said that she would deliver a shortened statement; the full version of her statement could be found on the PaperSmart portal. Her delegation would also submit additional comments in due course, as the short space of time between the publication of the Commission's report and the commencement of the Committee's session had not allowed her delegation to examine fully the work that had been done on each topic.

37. Referring to the draft conclusions on peremptory norms of general international law (*jus cogens*) proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), she said that it was appropriate that paragraphs 1 and 2 of draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*) largely replicated the wording of the corresponding provisions of the Vienna Convention. However, the affirmation in paragraph 1 that a treaty that conflicted with a *jus cogens* norm at the time of its conclusion did not create any rights or obligations was inaccurate, or at least in need of clarification. The statement appeared to indicate that the treaty was ipso facto void, when in reality it was possible for an invalid treaty to create rights and obligations until such time as it was declared invalid in accordance with the procedures set forth in article 65 and following of the Vienna Convention.

38. Moreover, pursuant to article 71 of the Vienna Convention, the retroactive effect of such invalidity applied only to acts arising from the specific provisions that conflicted with the *jus cogens* norm in question; legal situations resulting from the implementation of provisions of the treaty that were not incompatible with *jus cogens* were not affected. However, it was clear from article 65, paragraph 5, of the Vienna Convention that rights and obligations set forth in a treaty that had not yet been declared void or recognized as such by the parties were not enforceable, a principle which was reflected in the treatment of invalid legal acts under various legal systems. In sum, while the provisions of an invalid treaty were not binding, it was possible to maintain a legal situation arising from the implementation of some of those provisions even after the treaty had been declared invalid, provided that the situation was not in conflict with a *jus cogens* norm. Consequently, the most appropriate wording for the second sentence of draft conclusion 10, paragraph 1, was the one proposed by the Drafting Committee in its oral interim report of 26 July 2018: "The provisions of such a treaty have no legal force."

39. Draft conclusion 10, paragraph 2, also appeared to indicate that a treaty was ipso facto terminated by the emergence of a new peremptory norm of general international law with which it was incompatible. That could not be correct, for a couple of reasons. First, articles 65 to 68 of the Vienna Convention stipulated that in order for such a treaty to be terminated, certain procedures must be followed by the party wishing to invoke grounds for termination. The next step following the declaration of termination of a treaty that conflicted with a new *jus cogens* norm was to determine the effects of such termination. The consequences of such termination were governed by article 71, paragraph 2 (b), of the Convention, which provided that such termination did "not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination", unless maintaining those rights, obligations or situations would be in conflict with the new peremptory norm of general international law. Second, ipso facto termination would also create practical problems by undermining procedural safeguards for the termination of treaties and creating legal uncertainty with regard to the moment when a treaty terminated. Moreover, pursuant to article 65, paragraph 3, of the Vienna Convention, the parties had the option of settling through the means indicated in Article 33 of the Charter of the United Nations any dispute concerning the invalidity of a treaty covered by article 53 or article 64 of the Convention.

40. Turning to the Special Rapporteur's proposal for draft conclusion 14 (Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)), she said that paragraph 1, which provided that disputes should be submitted to the International Court of Justice unless the parties agreed to submit the dispute to arbitration, took into account only article 66 (a) of the Vienna Convention; it did not reflect the provisions of article 65, paragraph 3. Under the Vienna Convention, recourse to the International Court of Justice was to be the last resort. The free choice of the means of dispute settlement provided for under the Convention should be maintained in the draft conclusions.

41. Referring to the sixth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/722), she

said that her delegation shared the Special Rapporteur's view that the approach to the analysis of the procedural aspects of immunity should be broad, given the complexities of the question. The debates on the topic had revealed the need to resolve the tension between the principle of the sovereign equality of States and the rejection of impunity for the most serious crimes for the international community. Her delegation did not subscribe to the view that immunity *ratione personae* and immunity *ratione materiae* should apply without distinction or limitation. As the Special Rapporteur herself had acknowledged, while there was a certain amount of case law that did not recognize exceptions to those immunities, there was a trend in contemporary international law to limit the immunity of specific State officials who had committed international crimes, such as crimes against humanity, genocide or torture. The outcome of the Commission's work on the topic should reflect that trend and should firmly establish the limitations and exceptions to immunity *ratione materiae*. The Commission's consideration of the topic offered an opportunity to provide clarity on sensitive elements of the exercise of foreign criminal jurisdiction in respect of State officials, such as avoiding politicization and abuse, while ensuring that immunity did not undermine efforts to combat impunity.

42. **Ms. de Wet** (South Africa), referring to the topic "Protection of the atmosphere", said that her delegation welcomed the new draft guidelines concerning implementation (draft guideline 10), compliance (draft guideline 11) and dispute settlement (draft guideline 12) proposed by the Special Rapporteur and included among the 12 draft guidelines adopted on first reading by the Commission. South Africa would submit its comments on the draft guidelines as a whole by the Commission's deadline of 15 December 2019.

43. Turning to the topic of peremptory norms of general international law (*jus cogens*), she said that her delegation commended the Special Rapporteur on his comprehensive and wide-ranging third report (A/CN.4/714 and A/CN.4/714/Corr.1), which would significantly contribute to the achievement of a common understanding of *jus cogens*. Her delegation encouraged the Commission to embrace the Special Rapporteur's view that non-derogation was a consequence of, rather than a criterion for, *jus cogens* status. While a small number of States appeared to consider non-derogation to be a criterion for the identification of a *jus cogens* norm, her delegation was convinced that non-derogation was the primary consequence of peremptoriness. That consequence was what distinguished *jus cogens* norms from the majority of other norms of international law.

44. With regard to the invalidity of treaties as a result of conflict with *jus cogens*, the Special Rapporteur had deftly navigated the nuances between invalidity as a result of a conflict with a *jus cogens* norm that existed at the time of the conclusion of the treaty and invalidity resulting from conflict with a *jus cogens* norm that emerged subsequent to the conclusion of the treaty. Her delegation supported the Special Rapporteur's conclusion that severability was permitted in the latter situation, but not in the former. It also supported the Special Rapporteur's attempts to mitigate the harsh consequences of invalidity and diminish the conflict between the principle of *pacta sunt servanda* and invalidity as a result of conflict with *jus cogens* by referring to the general rules of treaty interpretation. The ideal solution in the event that a treaty conflicted with a *jus cogens* norm was to interpret the treaty in such a way as to take into account both the principle of *jus cogens* and the principle of the enforceability of treaties.

45. The Commission's work on the consequences of *jus cogens* for the law of State responsibility, the relationship between *jus cogens* and obligations *erga omnes*, and the effects of *jus cogens* on criminal responsibility, the jurisdiction of international courts, customary international law and Security Council resolutions was extremely enlightening and would help all States navigate an area of law that had proved to be more complex than anticipated. South Africa noted the Special Rapporteur's comments on immunities in relation to *jus cogens* and would follow future work on that question with particular interest, especially as it pertained to the International Criminal Court. The Commission's work would likely help the international community to deal with the issue of immunity from prosecution for some of the most serious international crimes.

46. South Africa believed that an illustrative list of *jus cogens* norms would quickly become obsolete and would not help lawyers determine whether specific norms had achieved *jus cogens* status. However, it would support the elaboration of a list if it was made very clear that the list was not exhaustive and was without prejudice to the draft conclusions proposed by the Special Rapporteur. The concept of regional *jus cogens* should not be entertained or considered, as it would undermine the supreme and universal nature of *jus cogens* norms as peremptory norms that should be equally applicable to all States, regardless of the region in which they were located. More detailed comments reflecting her delegation's position on a number of the abovementioned topics could be found in her written statement, available on the PaperSmart portal.

47. **Mr. Jaime Calderón** (El Salvador), referring to the draft guidelines on the protection of the atmosphere adopted by the Commission on first reading, said that his delegation welcomed draft guideline 9 (Interrelationship among relevant rules) and the preamble, which reflected the essential elements of the comments submitted by States. However, it had concerns about some of the other draft guidelines.

48. Draft guideline 8 (International cooperation) was somewhat limited in scope: it referred only to cooperation between States and international organizations, whereas other entities had also made an active and significant contribution in the area of atmospheric contamination. That reality should also be analysed in the commentary. The forms of cooperation provided for in the draft guideline were also very limited. In addition to studies and information exchange, such cooperation should include further measures to prevent, reduce and contain the contamination and degradation of the atmosphere.

49. Various States had supplied information on the means they had available at the national level to fulfil their international obligations concerning the protection of the atmosphere, a subject that was addressed in draft guideline 10 (Implementation). For its part, El Salvador had a comprehensive legal framework in place for the protection of the environment, including the atmosphere, and its national courts had ruled on the application of important principles of international environmental law, such as the preventive principle.

50. As to draft guideline 11 (Compliance), it was unfortunate that the Commission had removed the word "effectively" from paragraph 1 as part of its reworking of the draft guideline proposed by the Special Rapporteur in his fifth report. Since international obligations relating to the protection of the environment and the atmosphere concerned global phenomena and were, consequently, universally enforceable, it would be appropriate to stipulate that States must "effectively comply" with them. With regard to the phrase "as appropriate" in paragraph 2, the Commission should indicate in the commentary that it would be useful to apply the criterion of proportionality when attempting to determine whether facilitative or enforcement procedures were most appropriate in a given case.

51. His delegation wished to reiterate the need to review the Spanish translation of the draft guidelines. In particular, in draft guideline 1, the English words "by humans" ought to be rendered in Spanish as "*por los seres humanos*" rather than "*por el hombre*".

52. As to the topic "Provisional application of treaties", his delegation welcomed the adoption on first reading of the draft guidelines as the draft Guide to Provisional Application of Treaties. The draft guidelines generally fulfilled their purpose of contributing to the progressive development of international law. However, at the end of the phrase "or if in some other manner it has been so agreed" in draft guideline 3 (General rule), it would be helpful to more clearly establish the normative connection between that draft guideline and draft guideline 4. Furthermore, the Commission should explicitly address, in the commentary to draft guideline 4, the role of the depositary of a treaty in relation to an instrument containing an agreement on provisional application agreed through the "other means or arrangements" referred to in the draft guideline.

53. With regard to draft guideline 7 (Reservations), his delegation considered that it was appropriate to establish a specific legal framework for reservations in the context of provisional application and welcomed the reference to article 19 of the Vienna Convention in the commentary to the draft guideline. In order to shed more light on the applicable rules and bring draft guideline 7 into line with guideline 2.1.7 of the Guide to Practice on Reservations to Treaties, the Commission should also indicate the possible implications of addressing a reservation to the depositary of the treaty. In that regard, it should be explicitly stated that if a treaty expressly prohibited reservations, that prohibition should also be understood to apply to the provisional application of the treaty. In that connection, the depositary would be able to conduct a legal assessment to determine whether a declaration made by a party to a treaty was a reservation to provisional application and notify the other parties to the treaty accordingly.

54. Referring to the topic "Peremptory norms of general international law (*jus cogens*)" and the debate as to whether non-derogability was a criterion for identification of *jus cogens* or a legal consequence thereof, he said that his delegation shared the suggestion that a study of the negotiating history of articles 53 and 66 and other relevant provisions of the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 be undertaken. In that connection, it should be borne in mind that the Commission had indicated in 1966 that it was not the form of a general rule of international law but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*. Furthermore, in accordance with article 53 of the 1969 Vienna Convention, the norms capable of causing the invalidity of a treaty were accepted and recognized by the international community of States as a whole. It could therefore be concluded that non-derogability from

a *jus cogens* norm was a legal effect of *jus cogens* norms. His delegation consequently considered that it was much clearer to address that issue under draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)).

55. The phrase "not of *jus cogens* character" should be included in paragraph 1 of draft conclusion 15 (Consequences of peremptory norms of general international law (*jus cogens*) for customary international law), to highlight the fact that if the customary international law rule in question was not widely accepted by the international community as a whole it could not arise if it conflicted with a *jus cogens* norm.

56. With regard to the suggestion by some members of the Commission to set out procedures for ascertaining the invalidity of a particular rule of international law owing to conflict with *jus cogens*, the legal nature of the rule must be taken into consideration; it might be a customary rule of international law rather than a rule established in a treaty. If the Commission were to attempt to set out procedures based on articles 53 and 64 of the 1969 Vienna Convention, it must provide a way to deal with rules that were not treaty rules.

57. It was appropriate that the Special Rapporteur had not proposed a draft conclusion relating to general principles of law. Since those principles were based on fundamental precepts of international law on which there was a high level of consensus, and which might themselves give rise to *jus cogens* norms, it was difficult to imagine there ever being a conflict between a general principle of law and a *jus cogens* norm. Lastly, it would be useful for the Commission to develop an illustrative list of *jus cogens* norms, taking into account the comments received from States.

58. **Mr. Eidelman** (Israel) said that his Government's commitment to the protection of the atmosphere was expressed in agreements, arrangements and treaties to which it was a party. Israel objected to the integrative approach proposed by the Special Rapporteur, with the unnecessary and inappropriate linking of separate legal regimes; it believed that each legal regime constituted *lex specialis* to be applied to the appropriate situation and comprised different standards and guiding principles. In that connection, in the draft guidelines adopted by the Commission on first reading, draft guideline 9 (Interrelationship among relevant rules) was of questionable relevance. Existing legal frameworks relating to the protection of the atmosphere already included suitable mechanisms for addressing the issues of implementation, compliance and dispute settlement. The inclusion of draft guidelines on those issues, therefore, could create significant potential for abuse. Against that backdrop, draft guidelines 10 (Implementation), 11 (Compliance) and 12 (Dispute settlement) might be both unnecessary and potentially counterproductive.

59. On the topic "Provisional Application of Treaties, Israel was in the process of studying the draft guidelines adopted on first reading and reserved its right to comment on them at a later point in time.

60. The topic of peremptory norms of general international law (*jus cogens*) concerned a distinctive category of international law that safeguarded the most fundamental rules of the international community of States. Recalling that in its consideration of the topic in 2016 the Commission had encouraged the Special Rapporteur to keep in mind the differences in understandings expressed by Member States and to approach the issue with great caution, he expressed concerns with methodological issues and other aspects of the project. His delegation was of the view that the Special Rapporteur had relied too much on theory and doctrine, rather than on relevant State practice, which should have been the primary focus. The Special Rapporteur's request that the draft conclusions provisionally adopted by the Drafting Committee not be referred to the plenary Commission until after the entire draft text had been finalized derogated from the accepted working practice of the Commission and prevented a robust debate on the draft conclusions and the commentaries thereto, including the all-important substantive input from States.

61. Israel believed that the Commission was right to have chosen to engage in codification of existing law rather in its progressive development. The Commission should therefore confine its work on the topic of *jus cogens*, which had potentially far-reaching consequences, to stating and clarifying international law as it currently stood, which would help to ensure that the outcome of the work was seen as credible and was widely accepted. His delegation therefore opposed the inclusion of draft conclusion 14, which referred to a recommended procedure for settling disputes involving conflict between a treaty and *jus cogens*, and which did not, and indeed could not, reflect existing law in the context of *jus cogens* norms. That draft conclusion might clearly be identified as a proposal for progressive development of the law. Likewise, draft conclusions 20 (Duty to cooperate) and 21 (Duty not to recognize or render assistance), which were largely based on the articles on State responsibility, which themselves did not reflect customary international law, represented attempts to attach consequences to the violation of

jus cogens norms that went beyond the function of *jus cogens* as envisioned in article 53 of the 1969 Vienna Convention. That view was confirmed by the dearth of practice on the consequences of *jus cogens*, which the Special Rapporteur himself had acknowledged.

62. Israel also supported the decision made in the Drafting Committee at the seventieth session of the Commission to exclude provisions such as draft conclusions 22 and 23 proposed by the Special Rapporteur, which concerned the exercise of domestic jurisdiction over a *jus cogens* crime and the question of immunity *ratione materiae*. They did not reflect existing customary law and, in any event, went beyond the scope of the topic, which was meant to focus on methodological rules of process rather than on primary rules. While the decision had been provisionally made to take those issues into consideration in a "without prejudice" clause to be drafted subsequently, his delegation was of the view that any reference to those issues in the draft conclusions was inappropriate and should be omitted altogether. Furthermore, draft conclusions 22 and 23 could be viewed as prejudging the outcome of the Commission's work on the draft articles on immunity of State officials from foreign criminal jurisdiction.

63. The Special Rapporteur had attempted to define what comprised a *jus cogens* norm in draft conclusions 2, 3 and 4, which needed to be fine-tuned in order to reflect the stringent requirements for the identification of *jus cogens* norms set out in article 53 of the Vienna Convention and limit the potential for politicization and fragmentation of international law. In particular, they should reflect the requirement that a norm not only needed to be accepted — which sufficed for identifying customary norms — but that it also needed to be unequivocally recognized as having a *jus cogens* character. Paradoxically, the Special Rapporteur had proposed a standard for the identification of peremptory norms that might be considered less rigorous than the test for identifying customary norms, which would be entirely unsatisfactory. Similarly, he had stated in draft conclusion 7 that a norm needed to be accepted and recognized by a very large majority of States, rather than by the international community of States as a whole — the high threshold set by article 53. Indeed, in line with article 53, virtual universal acceptance and recognition of the norm was required — a notion that had been regrettably lost in the current draft conclusions. In that context, he noted that the label *jus cogens* was sometimes used carelessly in academic and popular literature on the topic and should be used accurately in the draft conclusions, to ensure that the Commission's work reflected existing law and would attract support.

64. Regarding the compilation of a list of *jus cogens* norms, either illustrative or comprehensive, Israel reiterated its view that such a list would likely generate disagreement among States and dilute the concept of *jus cogens* norms. For example, the Special Rapporteur had asserted numerous times in his third report that the right of self-determination was of a *jus cogens* character, whereas it was highly questionable whether the principle of self-determination met the standards set out in article 53. Lastly, no similar list had not been considered necessary in the context of the topic of identification of customary international law.

65. **Ms. Gorasia** (United Kingdom), recalling that her Government had doubts about the need for the Commission's work on the topic of protection of the atmosphere and that existing international obligations with regard to the protection of the environment generally covered many issues associated with the protection of the atmosphere, said that existing agreements had proved to be flexible enough to address new challenges as they had arisen. A notable example had been the extension of the scope of the Montreal Protocol on Substances that Deplete the Ozone Layer to include greenhouse gases.

66. With regard to the draft guidelines adopted on first reading, the ambiguity of draft guideline 9 regarding the interrelationship between the rules of international law on the protection of the atmosphere and other obligations under international law was of continuing concern to her Government. The three new draft guidelines adopted in 2018 - draft guidelines 10 (Implementation), 11 (Compliance) and 12 (Dispute settlement) - added little value as they did not address the lack of resources and political will that stood in the way of implementation, and compliance was already an obligation for States under the treaties to which they were party.

67. Despite having reservations about the project as a whole, the United Kingdom stressed its support for the need to protect the atmosphere and the environment and to tackle climate change. Nothing in its comments on that aspect of the Commission's report should be taken as undermining its commitment to those important goals.

68. Turning to the topic of provisional application of treaties, she said that her Government welcomed the adoption of the draft guidelines and commentaries on first reading, which would give it the opportunity not only to submit observations on the project overall but also to give further thought to the model clauses

proposed by the Special Rapporteur. Her Government also welcomed the inclusion of draft guidelines concerning reservations to provisionally applied treaties and termination and suspension of provisional application. As the Commission was only at the initial stage of considering the question of reservations in relation to the provisional application of treaties, an analysis of the practice of States and international organizations would help to ensure that all aspects of the issue were considered.

69. Although her Government agreed with draft guideline 6, it found the Commission less than clear in paragraph (5) of its commentary, when it stated that "[p]rovisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application 'produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force' does not imply that provisional application has the same legal effect as entry into force". It would be helpful if the Commission could provide a more detailed explanation, if possible with some examples, of the ways in which a provisionally applied treaty was not subject to all rules of the law of treaties.

70. She welcomed the addition of draft guideline 9, on termination and suspension of provisional application, and the pragmatic and flexible approach taken by the Special Rapporteur and the Commission. In view of the difficulties that had arisen in the interpretation of provisional application clauses, she supported the recommendation of the Drafting Committee that a reference be made in the commentaries to the possible inclusion of a set of draft model clauses based on a revised proposal by the Special Rapporteur.

71. Turning to the topic of peremptory norms of general international law (*jus cogens*), she reiterated her Government's support for the Commission's work on the topic, which could be of practical value to States, judges and practitioners. Given the importance and complexity of the topic, and the need to secure wide support from States, she urged the Commission to continue to approach the topic with caution.

72. With regard to the five draft conclusions that had been provisionally adopted by the Drafting Committee, she noted that the texts and the all-important commentaries thereto had not yet been adopted by the Commission in plenary. Also noting the wish of the Special Rapporteur that the Commission conclude a first reading of the draft conclusions at its seventy-first session, she encouraged the Commission not to rush to conclude its work on the topic. The third report of the Special Rapporteur addressed the consequences of *jus cogens* in relation to international criminal law, customary international law and Security Council resolutions — all topics that generated considerable debate in academic literature and divergent views in case law.

73. Her delegation had further, detailed comments which represented the formal position of the United Kingdom on the draft conclusions; those comments were contained in an annex to her written statement, which was available on the PaperSmart portal.

74. *Ms. Ponce (Philippines), Vice-Chair, took the Chair.*

75. **Mr. Horna** (Peru), referring to the draft guidelines on the protection of the atmosphere adopted on first reading, said that the inclusion by the Special Rapporteur of a reference to the close interaction between the atmosphere and the oceans in the preamble, which reflected recent developments in the General Assembly, confirmed the effect of climate change on oceans and the importance of increasing the scientific understanding of the oceans-atmosphere interface. His delegation commended the Special Rapporteur for making use of the findings of the first Global Integrated Marine Assessment (first World Ocean Assessment). However, he should also consider drawing on the report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eighteenth meeting (A/72/95).

76. Referring to draft guideline 4, he said that the obligation of States to ensure that an environmental impact assessment was undertaken was a direct due diligence obligation deriving from article 206 of the United Nations Convention on the Law of the Sea and also a general obligation under customary international law. In that connection, in addition to recalling the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the Special Rapporteur should also consider the 2011 advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in the case of *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, in reaction to that judgment. In that advisory opinion, the Tribunal had stated that "[t]he Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind." With regard to draft

guideline 12 (Dispute settlement), he welcomed the reaffirmation of the principle of the peaceful settlement of disputes and the inclusion of the reference to Article 33 of the Charter of the United Nations in the commentary. It would be appropriate to include a similar reference in the draft guideline itself.

77. Turning to the topic of provisional application of treaties, he noted that Peru had already submitted some preliminary comments concerning its experience with the provisional application of treaties. With regard to the draft guidelines on the topic adopted on first reading, he welcomed the incorporation of the relevant rules of the 1969 Vienna Convention, applied mutatis mutandis, in draft guideline 7 (Reservations), which assured consistency with the internal laws of States. Referring to draft guideline 9 (Termination and suspension of provisional application), he said that further analysis was needed to show the difference between bilateral and multilateral treaties subject to provisional application and, in the case of multilateral treaties, to reflect situations where a treaty might have entered into force for some States parties while being applied provisionally by other States.

78. With regard to the topic of peremptory norms of general international law (*jus cogens*), his delegation was troubled by the possible effects of *jus cogens* norms in the context of immunity. The Commission should ensure that its work on the topic did not overlap with its work on the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction, beyond the formulation of "without prejudice" clauses, especially in the case of the topic of immunity.

79. **Ms. Kim** Hye Mi (Republic of Korea) said that the topic of protection of the atmosphere was increasingly relevant in the light of concerns with transboundary air pollution and the problems caused by fine dust. The Commission's work on the topic should take the form of guidelines and should not interfere with political negotiations on other environmental issues nor seek to fill gaps in existing treaty regimes. Rather, the Commission should focus on ways to facilitate and promote cooperation among interested States.

80. Turning to the draft guidelines adopted on first reading, she said her delegation agreed with the distinction made in draft guideline 10 (Implementation) between "obligations" and "recommendations", which had been dealt with separately in paragraphs 1 and 2. However, while the scope of what constituted "obligations" had been clearly described in paragraphs (3) and (5) of the commentary to the draft guideline, what constituted "recommendations" had been left rather unclear. The explanation would be more accessible if it was set out explicitly in the draft guidelines or the commentaries thereto.

81. Draft guideline 11 (Compliance) and the commentary thereto set out a clear explanation of measures that could be undertaken to achieve compliance, including facilitative or enforcement procedures, promoted a comprehensive understanding of the issue of compliance and could serve as an authoritative text of international law. As disputes relating to atmospheric pollution and atmospheric degradation, including inter-State environmental disputes, were fact-intensive and science-dependent, her delegation supported the recommendation contained in draft conclusion 12 (Dispute settlement) that technical and scientific experts be used.

82. Turning to the topic of provisional application of treaties, she reaffirmed her Government's belief that the Commission's work on the topic would contribute to the development of treaty law. Concerning the set of draft guidelines adopted on first reading, her delegation welcomed draft guideline 7 (Reservations) and draft guideline 9 (Termination and suspension of provisional application). Nonetheless, those draft guidelines should be approached with caution, given that there was no relevant State practice. Her delegation therefore supported the inclusion of the phrase "in accordance with the relevant rules of the 1969 Vienna Convention on the Law of Treaties, applied mutatis mutandis" in both draft guidelines. With regard to the model clauses proposed by the Special Rapporteur, she noted that they were designed for just one of the forms of agreement prescribed in draft guideline 4. The elaboration of model clauses could be interpreted as encouraging States to apply a treaty or a part of a treaty provisionally. She therefore encouraged the Commission to carefully review that issue at its next session.

83. The Special Rapporteur's work on the topic of peremptory norms of general international law (*jus cogens*) concerned some of the most challenging aspects of international law, including the relationship between peremptory norms of general international law and various other topics, including treaties, State responsibility, individual criminal responsibility and other sources of international law. The Special Rapporteur had been able to prepare a comprehensive report that attempted to clarify those fundamental issues of international law, despite the dearth of State practice and jurisprudence. Nonetheless, she also expressed concern at the large number of draft conclusions that had been proposed by the Special Rapporteur for consideration over a very short time period. Since the draft conclusions could not be easily changed, altered or

reversed once adopted, the Commission should conduct a careful review, grouping related draft conclusions, rather than discussing too many draft conclusions in one session.

84. The overall structure of the draft conclusions could be compressed and simplified. For instance, draft conclusions 10 to 14, regulating the relationship between a peremptory norm of general international law and treaties, could be merged into fewer articles. Draft conclusions 10 and 11 both concerned the validity of a treaty that was in conflict with a peremptory norm of general international law and could be combined into one provision. Similarly, draft conclusions 20, 21 and 22, which all dealt with the responsibility of States, and draft conclusions 22 and 23, which concerned crimes prohibited by peremptory norms of general international law, could be combined into one or two provisions.

85. Some of the draft conclusions were also in need of clarification to offer better guidance to States. As a case in point, while the issue of conflict between various sources of international law was addressed multiple times, the term "conflict" was ambiguous. Indeed, States characterized and interpreted their own actions, such as the use of force, differently, which sometimes led to disagreement among States over the existence of a conflict. It was also unclear who decided whether a conflict existed as a matter of law. The Special Rapporteur should clarify which elements States should consider when deciding whether a conflict existed as a matter of law.

86. With regard to the formation of *jus cogens*, certain draft conclusions specifically addressed the legal effects that resulted from the emergence of a new peremptory norm of general international law, but it was unclear when those legal effects took place. According to draft conclusion 11, paragraph 2, a treaty which became invalid due to the emergence of a new peremptory norm of general international law terminated in whole; and according to draft conclusion 12, paragraph 2, the termination of a treaty on account of the emergence of a new peremptory norm of general international law did not affect any right, obligation or legal situation created through the execution of the treaty. However, the lack of relevant State practice and jurisprudence meant that more discussions were necessary for States to have clarity on the matter.

87. Her delegation reiterated its view that it would be more useful to provide an illustrative list of *jus cogens* norms as part of the draft conclusions. Although it might take time to agree on that list, it would contribute significantly to the progressive development of international law, thus averting future disputes on identifying *jus cogens*.

88. **Mr. Scott-Kemmis** (Australia) said that the Commission's work on the topic of provisional application of treaties would provide clarity to the international community on that topic. His Government looked forward to studying in detail the draft guidelines adopted on first reading.

89. Turning to the topic of peremptory norms of general international law (*jus cogens*), he welcomed the efforts of the Special Rapporteur to consider the consequences and legal effects of *jus cogens* norms in the light of the relevant provisions of the 1969 Vienna Convention and other international instruments. As States disagreed as to the propriety of dealing with the questions of individual criminal responsibility and immunity *ratione materiae* in the context of that topic, clarification by the Commission regarding that important area of international law would be appreciated.

90. Of the draft conclusions proposed by the Special Rapporteur, draft conclusions 22 and 23 did not reflect any real trend in State practice, still less existing customary international law. Considering the divergent views reflected in the Special Rapporteur's report on those draft conclusions; the proposal by the Special Rapporteur to replace draft conclusions 22 and 23 with a single "without prejudice" clause; and the fact that the Drafting Committee had not yet considered the two draft conclusions, the Commission should give careful consideration to the matter, in view of the significant consequences for States of the Commission's work on those issues..

91. **Ms. Nguyen** Thu Giang (Viet Nam) said that as the protection of the atmosphere was a pressing concern for States and the international community as a whole, the concept of the "common concern of humankind", referred to in the Paris Agreement under the United Nations Framework Convention on Climate Change, should be incorporated into the fourth preambular paragraph of the draft guidelines adopted on first reading. Recalling that the eighth preambular paragraph had been included to reflect the understanding that the draft guidelines must not interfere with the Paris Agreement negotiations in 2013, and that the Paris Agreement had been adopted in 2015, she said that it was no longer necessary to reflect that understanding in the draft guidelines and that the Commission should reconsider its decision to include that paragraph. Viet Nam supported the Special Rapporteur's view that scientific evidence played an indispensable role in ensuring the fair adjudication of highly technical

environmental disputes and safeguarding the interests of the parties to the dispute. Therefore, her delegation agreed that, rather than passively admit evidence submitted by the parties, international tribunals and courts should seek the assistance of scientists and experts when dealing with such disputes.

92. Viet Nam supported the completion of the first reading of the draft guidelines on the provisional application of treaties which, while non-binding in nature, would assist States in developing consistent practice on that topic. With regard to draft guideline 4, paragraph b, of the draft guidelines adopted on first reading, she wondered whether, in a situation where the provisional application of a treaty had been agreed based on a resolution of an international organization that had been adopted by a majority of States parties, the treaty would be applicable to States that had opposed its provisional application. It was also unclear whether the application of that treaty would negatively affect the national sovereignty of the States in question.

93. With regard to draft guideline 9, paragraph (c), which included a "without prejudice" clause with respect to part V, section 3, of the 1969 Vienna Convention, she noted that part V only dealt with treaties already in force, whereas the draft guideline in question concerned treaties that were being provisionally applied. The legal consequences for serious violations of provisionally applied treaties therefore represented uncharted territory. The Special Rapporteur and the Commission should carefully evaluate such violations to ascertain whether the Vienna Convention applied mutatis mutandis.

94. Turning to the topic of peremptory norms of general international law (*jus cogens*), she said that peremptory norms played an important role in international law and were recognized under the Vienna Convention as well as under the domestic laws of many States. Her country's Law on Treaties, adopted in 2016, recognized *jus cogens* as a principle to be adhered to in the course of negotiating and entering into international treaties. However, it remained unclear how such norms were to be identified. Although the Commission had tackled *jus cogens* topic without much success in the past, she encouraged it to continue its research into matters related to the topic.

95. With regard to draft conclusion 16 of the draft conclusions proposed by the Special Rapporteur, her delegation fully supported the idea that a unilateral act that was in conflict with a *jus cogens* norm was invalid. However, for the sake of legal precision, she proposed including the words "*ab initio*" at the end of the draft conclusion, as such a unilateral act would be null and void from the very beginning. Noting that, in addition to resolutions, intergovernmental organizations also produced binding decisions and guidelines and took other binding actions, she said that it would be helpful if the Special Rapporteur could clarify whether draft conclusion 17 covered all binding acts by international organizations and how the binding nature of such acts could be ascertained.

96. Draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) had been formulated with the clear intention to create an exception to immunity *ratione personae*. Doing so would likely violate the principle of sovereignty and might overlap with the relevant rules under discussion in connection with the topic of immunity of State officials from foreign criminal jurisdiction. She encouraged the Commission to approach the matter based on a rigorous and thorough analysis of State practice and case law and, in order to prevent duplication of the Commission's work, to take up the matter under the topic of immunity of State officials from foreign criminal jurisdiction.

97. **Ms. Jabar** (Malaysia), referring first to the topic of protection of the atmosphere and the draft guidelines adopted on first reading, said that draft guideline 10 (Implementation), which dealt with national implementation of international obligations relating to the protection of the atmosphere, should be given due consideration. With regard to draft guideline 11 (Compliance), which reflected the *pacta sunt servanda* principle and described facilitative and enforcement procedures that could be used to assist States in adhering to their obligations under the relevant international law, she noted that developing and least developed countries faced special challenges in the discharge of such obligations, making capacity-building measures especially important. That draft guideline should therefore also be given due consideration. Draft guideline 12 (Dispute settlement) reflected the current tendency of States to bring disputes relating to the protection of the atmosphere before international courts and tribunals and should also be given due consideration.

98. Turning to the topic of provisional application of treaties, she said her delegation reiterated its comments on the draft guidelines submitted at previous sessions, in particular at the seventy-second session of the General Assembly (A/C.6/72/SR.22), and pointed out in that connection that the country's domestic law did not include any express provision that prohibited or allowed for the provisional application of treaties. Malaysia had always ensured that appropriate domestic legislation was in place before it ratified any treaty.

99. In reference to the two new draft guidelines proposed by the Special Rapporteur in his fifth report (A/CN.4/718), she said that, in its understanding of draft guideline 8 bis (Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach), Malaysia was guided by article 60 of the Vienna Convention, in line with which a material breach of a treaty by a State entitled a State that was provisionally applying the treaty to invoke the breach as a ground for terminating or suspending its provisional application thereof. Malaysia was also of the view that only a violation of an essential provision of the treaty should be considered to be a material breach by the affected State. In that connection, she noted that article 60 referred only to breaches of treaties that were in force between the parties. Nonetheless, it had been confirmed throughout the study of the topic that provisional application of a treaty produced legal effects as if the treaty were actually in force and that obligations arose therefrom which must be performed under the *pacta sunt servanda* principle. The draft guideline should therefore be reformulated to refer to the States or international organizations that had negotiated the treaty and had agreed to provisionally apply it.

100. With respect to draft guideline 5 bis (Formulation of reservations), Malaysia was guided by article 19 of the Vienna Convention, which was silent regarding the possibility of formulating reservations in the context of the provisional application of a treaty. For purposes of consistency and clarity, it might be good practice for a State to formulate reservations with respect to a treaty to be applied provisionally if that treaty expressly permitted doing so and if there was reason to believe that the treaty's entry into force would be delayed for an indefinite period of time.

101. She reiterated that it was crucial to determine the provisional application of a particular treaty from the source of obligations as provided therein. Otherwise, if recourse to alternative sources should be had, the analysis of legal effects should be guided and determined by the unequivocal indication by a State that it accepted the provisional application of a treaty, as expressed through a clear mode of consent. The topic should therefore be further discussed, taking into account States' sensitivities, the uniqueness and contextual differences of various treaty provisions, and State practice in response to such differences.

102. Her delegation welcomed the inclusion of the topic of peremptory norms of general international law (*jus cogens*) in the Commission's programme of work; the study of the topic would bring much needed clarity to a principle that was integral to the progressive development of international law. With regard to the question of whether a non-State party to a treaty could determine that the treaty was invalid on the basis of its conflict with a particular *jus cogens* norm, Malaysia was of the view that States should be allowed to determine the content of treaties to which they were parties, provided said treaties were in line with *jus cogens* norms. However, it was the international community as a whole that should be able to determine a treaty's validity with respect to *jus cogens* norms. She asked that the Special Rapporteur provide further clarity on the issue of the sources of *jus cogens* and conduct a thorough analysis of the element of modification under article 53 of the Vienna Convention.

103. With regard to draft conclusion 9 of the draft conclusions proposed by the Special Rapporteur, which dealt with evidence of acceptance and recognition, she said that the work of expert bodies and scholarly writings as a secondary means of identifying *jus cogens* norms must be recognized by the international community of States.

104. With regard to the possibility of regional *jus cogens*, her delegation was of the view that it might not be consistent with the very concept of *jus cogens* norms, which implied acceptance and recognition by the community of States as a whole. Regional *jus cogens* might also create confusion and should therefore be avoided. She also suggested that the Special Rapporteur undertake a study of State practice concerning *jus cogens* in relation to treaties.

105. More detailed comments reflecting her delegation's position on a number of the abovementioned topics could be found in her written statement, available on the PaperSmart portal.

106. **Ms. Buner** (Turkey), referring to the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that draft guideline 4 was inconsistent with the purported general nature of the draft guidelines as a whole. Although the last preambular paragraph and the general commentary contained assurances that the text was not intended to fill gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein, draft guideline 4 (Environmental impact assessment) set out an entirely new obligation for States. That inconsistency had not been satisfactorily addressed in the commentary to the draft guideline.

107. The coherence of draft guideline 11, paragraph 2 (b), with the stated purpose of the draft guidelines was similarly questionable. While subparagraph (a) contained suggestions for facilitative procedures that could be used to provide assistance to a State in a transparent, non-adversarial and non-punitive

manner to ensure the State's conformity with its obligations, subparagraph (b) contained a description of stringent enforcement procedures that could be taken against non-complying States and used wording that was open to interpretation. Her delegation would prefer for the subparagraph to be either removed or clarified and supplemented with examples.

108. With regard to the topic of provisional application of treaties, she said that determining the legal effect of provisional application, on which the Vienna Convention was silent, was the trickiest part of the draft guidelines proposed by the Special Rapporteur. According to draft guideline 6, the provisional application of a treaty produced a legally binding obligation to apply the treaty as if it were in force, unless it provided otherwise. Where a treaty was silent on the matter of the legal effect of provisional application, the Special Rapporteur preferred the option of a legally binding obligation. However, since treaties were usually silent on the matter, vesting the provisional application of a treaty with default binding force could turn that option into a rule in fact. That situation could pose a threat to the exclusive power of the legislative authority to consent to international undertakings by removing the need for approval; it could also discourage the executive authority from initiating and working with the legislature to complete the ratification process.

109. Further discussion and analysis were needed with respect to that draft guideline and draft guideline 7, which dealt with reservations that a State might formulate to modify the legal effect produced by the provisional application of a treaty. Disagreement among the parties to a treaty regarding the binding force of provisional application could result in differences in compliance and legal uncertainty and raise questions regarding the conformity of the treaty with the general principle of contract law according to which mutual consent to be bound by the agreement was essential for the formation of a contract. Further examples of reservations in the context of the provisional application of a treaty and clarifications could be incorporated into the draft guidelines or the commentaries thereto.

110. Turning to the topic of peremptory norms of general international law (*jus cogens*), she said that in order to substantiate his preference to focus on the consequences of *jus cogens*, the Special Rapporteur had referred to the inseparability of the concepts of "criterion" and "consequence". He had argued, for instance, that non-derogability was a criterion for identification, not a consequence of, *jus cogens* norms. Her delegation was of the opposite view: non-derogability could not be a criterion for the identification of a *jus cogens* norm but it could instead be a consequence thereof. The lack of State practice and the deep differences among States on other aspects of the concept of *jus cogens* indicated the topic's complexity and immaturity.

111. In addition to being ambiguous in its scope and content, the topic was abstract in its essence. The definition of a *jus cogens* norm as one that "must be accepted and recognized by the international community of States as a whole", as stated in article 53 of the Vienna Convention, did not include any guidance for determining such norms. The definition was also not accepted by all States, some of which argued that a large majority of States was sufficient. The failure by the authors of the Vienna Convention to identify a universally accepted criterion for the identification of a *jus cogens* norm was the reason why no further explanation had been provided and no illustrative *jus cogens* norms had been included in the Convention. Such lack of certainty in scope and content could pave the way for the misinterpretation of the concept of *jus cogens*. Indeed, the Special Rapporteur had provided an example of such misinterpretation in his first report on the topic (A/CN.4/693). Turkey had objected to the accuracy of that reference in a statement delivered in 2016. While thanking the Special Rapporteur for his response, she reiterated her country's objection on the grounds indicated in that statement.

112. More detailed comments reflecting her delegation's position on a number of the abovementioned topics could be found in her written statement, available on the PaperSmart portal.

113. **Mr. Ahmadi** (Islamic Republic of Iran) said that the topic of protection of the atmosphere was difficult, as it was closely intertwined with political, technical and scientific considerations. An international legal regime on the topic that adhered to the general principles of international law and to the principle of the sovereign equality of States could be developed only if due consideration was given to the special needs and priorities of developing countries. Noting that the concept of the "common concern of humankind" was well known and had already been supported and reflected in a preambular paragraph to the 2015 Paris Agreement, his delegation was of the view that, in the draft guidelines adopted on first reading, it would be more appropriate to include a reference to that concept in the fourth preambular paragraph rather than the phrase "pressing concern of the international community as a whole".

114. Turning to the topic of provisional application of treaties, he reiterated his delegation's view that, in line with article 25 of the Vienna Convention, the

provisional application of a treaty by a State did not produce any obligations and therefore could not serve as a basis for restricting a State's rights with regard to its future conduct under a treaty that might be provisionally applied. Stressing the crucial importance of the principle of consent in international law, and particularly in treaty law, and the need to preserve the flexibility and non-binding nature of the proposed guidelines on the topic, he said that the provisional application of a treaty by a State should always be voluntary, rather than mandatory.

115. In that connection, the Special Rapporteur was right to indicate in his report (A/CN.4/718) that the draft guidelines, without detracting from the flexibility inherent in the mechanism of provisional application by overdeveloping the regime set out in article 25 of the Vienna Convention, would serve as a practical tool for the growing number of users of international law. It was his delegation's understanding that the draft guidelines would be applicable to only multilateral treaties, and not to bilateral treaties, as the temporary application of bilateral treaties was illogical, in the light of the basic principle of equality of States and the reciprocity of rights and obligations as a result of such treaties. His delegation agreed with the view that in dualistic States, where treaties needed to be accepted through internal legal procedures before they entered into force, the provisional application of treaties would similarly become applicable only after being accepted through internal procedures. His delegation welcomed the decision to include a draft guideline on reservations in the context of the provisional application of a treaty or a part of treaty. Article 19 of the Vienna Convention provided that a State could formulate a reservation to a treaty, and therefore a State's provisional application of a treaty did not preclude its right to enter reservations to that treaty.

116. Turning to draft guideline 4, he said that the forms of agreement on the provisional application of a treaty described therein should also apply in the case of treaties that did not provide for provisional application. He also reiterated his delegation's concern regarding the inclusion of resolutions and declarations adopted by international organizations any other means or arrangements for agreeing to the provisional application of treaties. Although resolutions adopted at international forums carried some weight with respect to treaties they referred to, they were sometimes the results of political convenience and did not always reflect the consent of States to give effect to treaties or the provisional application thereof. Furthermore, the phrase "any other means or arrangements" was too broad. With regard to the conclusion of a separate treaty as another means for agreeing to the provisional application of treaties, he noted that a separate treaty would require its own separate process and thus would not facilitate a treaty's entry into force, which was supposed to be the role of provisional application.

117. With regard to the topic of peremptory norms of general international law (*jus cogens*) and the draft conclusions proposed by the Special Rapporteur, his delegation agreed with draft conclusion 17, which stated inter alia that binding resolutions of the Security Council did not establish binding obligations if they conflicted with a *jus cogens* norm. As asserted by the Special Rapporteur in his third report (A/CN.4/714), it was generally agreed that the role of non-derogation from peremptory norms would be equally applicable to Security Council resolutions. It was his delegation's belief that Article 103 of the Charter of the United Nations, which affirmed that in the event of a conflict between the obligations under the Charter and the obligations under any other international agreement, obligations under the Charter would prevail, would not apply in the event of a conflict between *jus cogens* norms and Charter obligations, and that *jus cogens* norms would therefore prevail. His delegation was also of the view that resolutions of the Security Council that were inconsistent with international law and the provisions of the Charter did not create any obligations for States.

118. Draft conclusions 20 (Duty to cooperate) and 21 (Duty not to recognize or render assistance) were clearly inspired by articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts. Obligations under paragraph 2 of article 41 constituted progressive development of international law, as recognized and supported by the International Court of Justice in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In the Wall advisory opinion, the Court had determined that all States were under an obligation not to recognize the illegal situation resulting from the breach of obligations arising from *jus cogens* and had also held that there was an obligation not to render aid or assistance in maintaining the situation created by the breach. However, his delegation believed that a paragraph should be added to the effect that non-recognition should not put the affected individuals or people at a disadvantage. Thus, the relevant acts, such as

registration of births, deaths and marriages, ought to be recognized, in line with the *Namibia* advisory opinion.

119. With regard to draft conclusion 23 on the non-applicability of immunity *ratione materiae* for offences prohibited by *jus cogens*, his delegation was of the view that it was not supported by the practice cited by the Special Rapporteur and went much further than its corresponding provision in the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. The inclusion of the draft conclusion was therefore problematic and would make it more difficult to reach consensus on two other topics: immunity of State officials from foreign criminal jurisdiction and crimes against humanity. The Commission should refrain from addressing those issues within the context of the topic of *jus cogens* and from prejudging the outcome of its deliberations on the other two topics, to avoid inconsistency and duplication.

The meeting rose at 1 p.m.