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CLUSTER 1

Mr. Chairman (H.E. Michal Mlynár [Slovakia])

I am honoured to speak again on behalf of my country during International Law Week, one year after my last statement to this body. I should first like to offer you my sincerest congratulations on your recent election as Chair of the Sixth Committee. Your professional background and your personal skills will enable you to guide this session responsibly and skillfully, auguring a successful outcome of our work.

I should also like to congratulate the Vice-Chairs of this Committee, Ms. Cecilia Anderberg (Sweden), Mr. Amadou Jaiteh (Gambia) and Mr. Pablo Arrocha (Mexico), as well as the Rapporteur, Mr. Mohamed Hamad-Al-Thani (Qatar), on their election. I extend to all the officers my best wishes for success in their work and my thanks for their time and dedication.

Before commenting on the item on today's agenda, I take this opportunity to congratulate Professor Pavel Sturma (Czech Republic) on his election as Chair of the International Law Commission (ILC) and on the comprehensive report prepared by the Commission on the work of its seventy-first session. This document is remarkable for its high quality and broad scope, which can only be the result of meticulous and intense collective work, for which my delegation is deeply grateful.

In my statement at this session, I shall refer to [three/four] of the topics dealt with in the Commission's report this year, and I shall also take this opportunity to refer to another topic included in the Commission's current programme of work – provisional application of treaties. Today I shall refer specifically to the topics "Crimes against humanity" and "Peremptory norms of general international law (*jus cogens*)", dealt with in chapters IV and V of the report respectively. I shall also refer to the last chapter of the report, concerning other decisions of the Commission.

Regarding the topic of "Crimes against humanity", my delegation welcomes the Commission's decision to adopt on second reading the draft articles on the prevention and punishment of crimes against humanity, together with the commentaries thereto. I warmly congratulate the Special Rapporteur, Professor Sean Murphy, on this important milestone. His hard work, professionalism and openness to constructive comments enabled the Commission to produce a valuable and balanced normative text that will play a leading role in the strengthening of international criminal law.

The draft comprises a preamble, 15 articles and an annex, and was from the outset drafted with the aim of providing a basis for an international treaty reflecting its provisions. The approach adopted had two objectives: a treaty helping to effectively prevent commission of and impunity for crimes against humanity and a text that would command broad support among States. With these goals, and based on the careful work done by the Special Rapporteur, the Commission has prepared a draft that would eventually oblige the States which accept it to adopt a series of specific measures that prevent these wrongful acts and effectively punish them and that are reasonable in scope, enforceable and commensurate with the seriousness of the behavior

constituting crimes of this type. For this reason, my delegation considers that the text adopted on second reading fully achieves the goals set by the Rapporteur and the International Law Commission at the outset of their work on this subject and is fully in line with the Commission's tradition of preparing outstanding drafts designed to become multilateral treaties responding to the needs of the international community.

Before referring to the recommendation submitted by the Commission for the consideration of the General Assembly, I should like to comment on certain aspects of these draft articles in order to highlight some particularly positive elements and to mention other specific aspects which could be improved, if a multilateral convention is to be concluded on the basis of their provisions.

Mr. Chairman,

I should first like to note that the text is a good combination of codification and progressive development of international law. Firstly, it accurately reflects the basic obligations derived from the customary prohibition of crimes against humanity, consisting of the duty of all States to prevent and punish any such crimes that may be or may have been committed in their respective territories. It also suggests a basic definition of these crimes which reproduces almost verbatim the corresponding definition in the Rome Statute and reflects the conduct generally agreed and recognized as constituting this criminal prohibition found in the practice of States and of international tribunals. Secondly, the text proposes new obligations, which largely reflect the goal of promoting horizontal cooperation among States for the investigation and punishment of these crimes, with the ultimate goal of preventing impunity regarding their commission. These include the obligation of every State to establish universal jurisdiction regarding these wrongful acts when the alleged perpetrator is in its territory, to provide the broadest reciprocal judicial assistance for the investigation and prosecution of these crimes and to facilitate extradition for them among States which eventually become parties to a future treaty on this subject.

It is also noteworthy that, although they in no way affect the obligations of States parties to the Rome Statute under that treaty, the draft articles do contain obligations that help to enhance the ability of every State to criminally prosecute persons allegedly guilty of crimes against humanity. This would encourage application of the principle of complementarity, which is one of the factors affecting exercise of the competence of the International Criminal Court. For this reason, appropriate implementation of the draft articles prepared by the ILC would lessen the number of situations likely to require intervention by the Court.

I shall now refer to some specific aspects of the text adopted on second reading. As regards its title, my delegation welcomes the fact that the Commission has clarified this and has entitled the text "Draft articles on prevention and punishment of crimes against humanity". This better reflects its purposes and is consistent with the titles of other similar conventions, such as those on the crime of genocide and on crimes against internationally protected persons.

I welcome the fourth preambular paragraph, which acknowledges the *jus cogens* character of the prohibition of crimes against humanity. However, as the Chair of the Drafting

Committee indicated in his speech on 22 May this year, this certainly does not imply that all the provisions included in the draft have that same legal status.

As regards existing article 2, the Commission rightly advocates a definition of crimes against humanity that is as consistent as possible with the one used in the Rome Statute, except for those aspects which need to be changed in order to reflect normative developments since 1998 and because of the nature of these draft articles, which do not define or delimit the competence of an international tribunal. For this reason, my delegation welcomes the deletion of the third paragraph originally included in this article, which contained a restrictive definition of the word "gender". It created problems which my Government described last year in its written comments on the text adopted on first reading. I also welcome the rewording of paragraph 1 (h), referring to persecution as a crime against humanity, and express my delegation's satisfaction with the new wording. Although the subparagraph still requires that persecution must be "in connection with any act referred to in this paragraph" in order to remain covered by the definition of crimes against humanity, it provides a satisfactory solution, since subparagraph 1 (k) refers to "other inhumane acts of a similar nature causing great suffering, or serious injury to body or to mental or physical health". Paragraph (38) of the relevant commentary provides a satisfactory clarification of this issue. Accordingly, in light of the interaction between the above-mentioned rules, all the most serious and inhumane instances of persecution would remain covered by the definition used in this draft article. In this connection, my delegation considers simply that it would be desirable to clarify the scope of the phrase "in connection with any act" used in paragraph 1 (h) of this article. Since the concept of "persecution" involves intentional and severe deprivation of fundamental rights, for the reasons given in paragraph 2 (g) of this draft article, it should be noted that behavior involving persecution which is severe enough to constitute a crime against humanity usually occurs through the acts listed in paragraph 1, including those in paragraph 1 (k). It should therefore be noted that the phrase "in connection with any act" definitely includes the case of persecution "committed in connection with any act referred to in this paragraph".

For these reasons, my delegation considers that draft article 2 generally provides a very satisfactory definition of crimes against humanity. However, there is another element which should have been modified and which could be addressed if a multilateral convention is concluded on the basis of these draft articles. I refer to one aspect of the definition of "enforced disappearance of persons" given in paragraph 2 (i) of this draft article. Specifically, the last phrase ("with the intention of removing them from the protection of the law for a prolonged period of time") should have been reworded. According to this phrase, in order for enforced disappearance to be considered as a crime against humanity, there would have to be an intentional element of a subjective nature aimed at achieving a specific purpose. In addition to the fact that this would be difficult to prove, there are no substantive reasons why it should be a constituent element of this criminal prohibition: if the other requirements of the definition are met and, as a result, the persons affected are beyond the protection of the law, the harm done would also be severe.

In addition, this element of intent, found in the Rome Statute, is not consistent with the two earlier international instruments that deal specifically with this subject: it is not found in the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 1992, or in the 1994 Inter-American Convention on Forced Disappearance of Persons. Moreover, its inclusion in the draft articles is also inconsistent with an important normative development that occurred after 1998: the International Convention for the Protection of All Persons Against Enforced Disappearance, which was concluded in 2006 and which refers specifically to this criminal prohibition. Echoing the wording of a preambular paragraph of the 1992 Declaration, the 2006 International Convention refers in objective terms to the role of protection of the law in the description of this criminal prohibition. After defining the acts constituting enforced disappearance, article 2 of the 2006 Convention adds the phrase “which place such a person outside the protection of the law”. This alludes to an objective effect that the alleged act must have in order to constitute a crime against humanity. This is definitely reasonable, because it is an element of its severity. For these reasons, my delegation considers that the last clause in the definition of enforced disappearance given in these draft articles should use the wording of the 2006 Convention.

According to the statement made by the Chair of the Drafting Committee on 22 May this year, several Committee members also favoured deletion or rewording of the final clause in the definition of enforced disappearance contained in the draft articles. However, he stated that most members considered that the words “without prejudice to” in the last paragraph of the article would preserve the application of broader definitions of crimes against humanity included in other treaties or national laws. Nevertheless, this argument ignores an adverse effect that would undoubtedly result if the element of intent were to be retained in a future treaty on this subject. In this connection, since many States have still not specifically included crimes against humanity in their national legal regulations, the existing text of the draft articles would encourage them to add this element of intent to their domestic legislation, which would certainly run counter to the normative trends initiated by the 1992 Declaration and would allow acts of enforced disappearance of the same severity as those covered by the definition to go unpunished. For this reason, the issue should be revisited in the future.

Based on this analysis, and without prejudice to the caveat regarding the definition of enforced disappearance, my delegation welcomes draft article 2, because it is an excellent foundation for the other obligations established elsewhere in the text.

I now turn to draft article 3. We are glad that a new paragraph 1 has been added and that paragraph 3 has been transferred from draft article 4, because it establishes a general rule that should apply to both the prevention and the punishment of crimes against humanity. As far as content is concerned, the three paragraphs of this draft article very faithfully reflect the generic obligations deriving from the customary prohibition of these wrongful acts, and I have only two minor comments to make.

I should first like to welcome the fact that the first paragraph opens with the words “Each State has the obligation ...”, which properly reflects the fact that States are already obliged not to commit crimes against humanity under international law. According to the speech made by the

Chair of the Drafting Committee on 22 May this year, this was precisely the goal of this wording. In contrast, paragraph 2 starts with the words “Each State undertakes to ...”, despite the fact that States are already obliged to prevent and punish wrongful acts of this kind, when committed on their territory. The current wording of paragraph 2 should adequately convey this idea and this could be done by an opening phrase worded similarly to paragraph 1. Moreover, the fact is that the word “undertakes” makes its own point, for the reasons explained in paragraph (8) of the commentary to this article. In this context, and in order to reconcile the goals sought by the two different wordings, paragraph 2 could start with the words “Each State has the obligation and undertakes to ...”.

The second comment on this article, also concerning paragraph 2, relates to a translation error. In the English version, the second phrase is between commas because it is a non-restrictive relative clause (“crimes against humanity, which are crimes under international law, ...”). The Spanish version, using the subjunctive mood in a restrictive relative clause, refers to those crimes against humanity that are crimes under international law. The indicative mood should have been used, with surrounding commas (“, *que son crímenes según el derecho internacional*,”).

Regarding draft article 5, on the principle of *non-refoulement*, my delegation welcomes the deletion from paragraph 1 of the reference to “territory under the jurisdiction of” another State. The point of this rule is not to prevent a person being sent to a specific physical location but to prohibit handing a person over to the control of another State when there are substantial grounds for believing that the person would be subjected to a crime against humanity. The Commission’s decision to add the reference to international humanitarian law at the end of paragraph 2 is also welcome. However, the legal provisions are applicable only in contexts of armed conflict and the paragraph should therefore conclude with the words “...human rights or, as appropriate, international humanitarian law.”.

Draft article 6 refers to criminalization under national law and provides a very good summary of the measures that States should take to ensure the proper punishment of the various forms of participation in the commission of crimes against humanity. In paragraph 3, the Commission on second reading introduced a welcome simplification of the wording requiring superiors to be held accountable, without affecting the essential goal of the text. Even though at first sight elimination of the references to effective control might seem problematic, it should not pose problems, since the current paragraph clearly states that, in order not to be held responsible, superiors should take “all necessary and reasonable measures in their power”.

Some minor issues require attention. The last sentence of paragraph 3 refers to the responsibility of superiors who have not acted diligently “to punish the persons responsible”, if crimes against humanity have been committed. That wording was somewhat vague, since it did not specifically require the crimes to have been committed by subordinates. In addition, the reference to “the persons responsible” covered varying degrees of criminal participation and it might be debatable whether a superior would be responsible for such crimes if he or she had meted out due and exemplary punishment to all those responsible but, because of the circumstances of the case, had not done so with regard to one or more accomplices, instigators or

even abettors. That did not seem to be the intention of the drafters, especially since the latter categories of persons (except abettors) would remain covered by the criminal responsibility specified in paragraph 2, since the superior himself or herself would not always have the means to perform such a wide-ranging task and since the procedure would not be strictly essential in order to monitor subordinates' behavior. It might therefore be better for the superior alone to be held criminally responsible for failing to punish subordinates identified as perpetrators of the crime, as was the case in article 7, paragraph 4, of the Statute of the International Tribunal for the former Yugoslavia. For these reasons, my delegation would suggest that the last part of paragraph 3 should be revised to read "or, if their subordinates have committed such crimes, had not taken all necessary and reasonable measures in their power to punish the perpetrators."

With regard to the Spanish translation of paragraph 3, the phrase "*cuando hubieren sabido o debido saber*" should be replaced by "*si hubieren sabido o hubieren tenido razones para saber*", for consistency with the above-mentioned article of the Statute of the International Tribunal for the former Yugoslavia.

Paragraph 6 of draft article 6 refers to the obligation to establish appropriate penalties for these wrongful acts. If these draft articles are to become a convention, it should be expressly stated that, for the purpose of fulfilling this obligation, States should not impose the death penalty for crimes against humanity.

On article 7, my comment relates only to the Spanish translation. I would suggest that the first paragraph should read "*Todo Estado adoptará las medidas necesarias para instituir su jurisdicción respecto de...*" This wording echoes that used in article 9 of the 2006 Convention for the Protection of All Persons Against Forced Disappearance and article 5 of the Convention Against Torture.

Article 9 gives quite a good indication of the preliminary measures that States should take whenever they become aware that a person suspected of having committed the crimes concerned is present in their territory. In the Spanish version of the second sentence in paragraph 1, the words "*y se mantendrán...*" should be replaced by "*pero se mantendrán...*" in order to conform to the English text, which uses the word "but". Otherwise the meaning is distorted. Regarding paragraph 3 of this article, concerning the obligation to report the findings of the inquiry to other States, I note the Commission's intention to include the words "as appropriate", for the reasons indicated in paragraph (3) of the relevant commentary. However, I believe that this wording gives unlimited discretion to the State which has proceeded to conduct the inquiry. It would be better to state the general rule as the requirement and to add one or more exceptions, such as those noted in the above-mentioned paragraph of the commentary.

Draft article 10 establishes the obligation known as *aut dedere aut judicare*, which is essential to preventing impunity for commission of crimes against humanity. Its existing wording is reasonably satisfactory but should be slightly adjusted in order to clarify that this obligation will not be considered to be met when a person is extradited for a wrongful act other than a crime against humanity.

In draft article 11, on fair treatment of the alleged offender, the inclusion of the reference to international humanitarian law is welcome. For the reasons given in connection with draft article 5, it would be advisable to include the words “as appropriate”, just before mentioning this branch of international law. In addition, in the last sentence of paragraph 2(a), the words “is willing to protect that person’s rights” should be replaced by the words “may be willing to protect that person’s rights”.

Draft article 12, on the rights of victims, witnesses and others, is a balanced provision of appropriate scope that principally establishes basic conduct to be adopted by all States in order to treat victims appropriately. Paragraph 3 refers to the crucial issue of reparations, without which there can be no effective and lasting restoration of the rule of law and without which it will be impossible to create the necessary conditions for preventing these serious wrongful acts. My delegation welcomes the inclusion of this paragraph in the draft articles, as well as the fact that the text approved on second reading clarified which States are obliged to provide reparations. The Commission will have an opportunity to explore this question in greater detail when it takes up the item “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, included in the Commission’s long-term programme of work at the proposal of Professor Claudio Grossman Guiloff.

Draft article 13 governs extradition for crimes against humanity. It is designed to facilitate and establish uniform rules on the subject, but does not establish an obligation to extradite. My delegation very much welcomes the new paragraphs added to this draft article during the second reading, and in particular paragraph 12. The goal is to facilitate extradition of alleged offenders to the State in which they committed the crimes against humanity. This is clearly desirable, since that State will be the one most affected by the occurrence of these wrongful acts. In the Spanish version, paragraph 12 should start with the words “*El Estado requerido dará debida consideración a la solicitud...*”.

It should also be remembered, when the time comes to conclude a multilateral convention on the basis of these draft articles, that this article should be applicable only between the States parties to the treaty concerned and that this will require clarification of the language in paragraph 1. With this comment, I shall conclude my specific remarks on the wording of the draft articles and move to the last part of my statement on this item.

After having considered the excellent goals and features of these draft articles and certain specific aspects that could require future modifications, I shall refer to the recommendation which the International Law Commission made regarding these draft articles and to my delegation’s position in this regard.

As noted in paragraph 42 of the Commission’s report on its seventy-first session, on 5 August 2019 that body recommended “the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries” on the basis of the draft articles on the prevention and punishment of crimes against humanity.

The basis for this recommendation is clearly stated in the general commentary on the draft articles included by the International Law Commission on page 22 of its report for the

current year. These draft articles would play an important role in the strengthening of international criminal law. The aim is to establish the individual accountability of persons engaging in criminal conduct that is the most serious for the human race. Unlike the other two crimes under international law that have traditionally resulted in the establishment of international criminal tribunals (genocide and war crimes), there is no treaty on the prevention and punishment of crimes against humanity. A convention on this subject would do much to help its States parties to adopt or maintain suitable measures to achieve these goals in which the international community has a basic stake and which are important in preventing the emergence of threats to international peace and security.

In addition, as I noted at the beginning of my statement, a convention on this subject would provide better tools for States to investigate and punish these wrongful acts at the national level. This would reduce the need to resolve such situations through international mechanisms or tribunals such as the International Criminal Court.

In addition to these considerations, the draft articles have excellent features. They specify obligations conducive to the attainment of its goals and, in several instances, are sufficiently flexible to allow States to fulfil those obligations by various means. The Commission's draft articles thus provide a good basis for the negotiation and conclusion of a multilateral convention.

Consequently, since there is no reason not to conclude a convention on this subject, my delegation considers that the recommendation of the International Law Commission should be accepted. It therefore considers that the Sixth Committee should recommend to the General Assembly the convening an international conference of plenipotentiaries to draft a convention on the prevention and punishment of crimes against humanity, to be negotiated on the basis of these draft articles.

Before concluding my remarks on this subject, I should like to state that, as the principal United Nations forum for promoting the progressive development and codification of international law, the Sixth Committee is now particularly well placed to perform this task and to enable States desirous of advancing on the path to multilateralism to do so through the United Nations. Since a convention on this subject will be binding only on those States which become parties to it, my delegation assumes that, if this Committee is generally in favour of accepting the ILC recommendation, States which do not desire to be parties to such a convention will not block the necessary consensus for adoption of a resolution along these lines.

Mr. Chairman,

I shall now refer to chapter V of the report, on peremptory norms of international law (*jus cogens*), which is the responsibility of the Special Rapporteur, Mr. Dire Tladi. At the session under consideration, the Commission had before it the fourth report of the Special Rapporteur, which addressed the questions of regional *jus cogens* and a possible illustrative list. The report cites various sources and its contents provided a very interesting basis for the discussions reflected in the Commission's report, for which my delegation offers special thanks to Professor Tladi.

At the end of its session, the Commission approved a set of 23 draft conclusions on first reading, with the commentaries thereto, which should be read as a whole. I shall now comment on some of them.

I shall first refer to the pending topics considered in the Special Rapporteur's fourth report. Regarding the possible existence of regional *jus cogens* norms, it is noteworthy that the Special Rapporteur himself has been hesitant ever since his first report. He concludes in paragraph 47 of his fourth report that this notion does not find support in the practice of States and that he therefore decided not to propose a draft conclusion on the subject. Although my delegation does not subscribe to all the theoretical reasons invoked by the Special Rapporteur for disregarding the concept of regional *jus cogens*, it does agree that this notion has no support in the practice of States and therefore fully agrees that the draft conclusions should not refer to this question.

As regards the illustrative list proposed as an annex to draft conclusion 23, my delegation considers that the inclusion of an illustrative and non-exhaustive list may be useful for identifying which type of norm would meet the criteria specified in draft conclusion 4. However, such a list must be compatible with the methodology followed in this work by the Commission, which in Part Two deals with the requirements that a particular rule must meet in order to be identified as a peremptory rule of international law. The draft annex indicates that the norms which it contains are those that have been previously referred to by the International Law Commission as having peremptory status but it does not indicate how the requirements which the Commission itself listed in the report to justify that statement were met. In order to resolve that contradiction and in order to retain the list, the paragraph preceding the annex should be amended so as not to require the Commission to examine each of the criteria listed in Part Two of the draft. The paragraph preceding the annex should therefore start with one of the phrases used in paragraph 374 of the report of the Commission's Study Group on fragmentation of international law ("most frequently cited candidates for the status of *jus cogens*").

Some clarifications are required of the items proposed for the illustrative list.

Regarding the right to self-determination, my first point is that, in its commentary on the 1966 draft articles on the law of treaties, the Commission did not recognize the right to self-determination as an example of *jus cogens* but simply noted that this right was mentioned as a possible example by members of the Commission (paragraph (3) of the commentary to article 50). Secondly, the opinions and decisions of the International Court of Justice cited in support of this example in the fourth report and in the articles on responsibility of States for internationally wrongful acts, such as the decision on *East Timor (Portugal v. Australia)*, actually refer only to the *erga omnes* nature of the obligation derived from this right (para. 190). Consequently, as the Special Rapporteur explained in his third report (para. 107), not all *erga omnes* obligations fit into the higher category of *jus cogens*. Moreover, the General Assembly resolutions cited in support of the *jus cogens* character of the right to self-determination actually refer to the fact that it is an important or fundamental right, but not a peremptory norm of general international law (fourth report, para. 110). The fourth report cites only a decision of the German Constitutional

Court explicitly recognizing the *jus cogens* character of the right to self-determination. There is therefore a need for additional references pertaining to this point.

Clarification is needed of the concept of “basic rules of international humanitarian law”. In his fourth report, the Special Rapporteur treats them as synonymous with “principles of humanitarian law”, “principles of international humanitarian law”, “grave breaches” and “prohibition of war crimes” (para. 116). However the terms are not interchangeable. A “war crime” is a grave breach or serious violation of a norm of international humanitarian law and it is generally accepted that the prohibition of these wrongful acts is a *jus cogens* norm. But there are violations of certain principles that do not constitute war crimes, and in such cases it is necessary to determine on a case-by-case basis whether such offences are prohibited by a peremptory norm of international law. For example, a breach of the principle of proportionality involving widespread, long-term and severe damage to the natural environment is a war crime according to the Rome Statute, but only if it is committed during an international armed conflict; if the same breach of the principle of proportionality is committed during a non-international armed conflict, it is not categorized as a war crime in the same Rome Statute. In cases such as this, the basic principle of international humanitarian law in question does not appear to have the status of a *jus cogens* norm.

In more general terms, I shall refer to some of the other draft conclusions adopted on first reading. Regarding the terms used in conclusions 2, 4 and 6, I note that in the original Spanish version all the draft conclusions provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.936) use the expression “*no admite derogación*” to refer to the *jus cogens* norms, whereas the original version of this concept contained in article 53 of the Vienna Convention on the Law of Treaties uses the wording “*no admite acuerdo en contrario*”. The Spanish version in the Commission’s 2019 report reverted to the original wording in the Vienna Convention. This is preferable, because the English wording of draft conclusions 2, 4 and 6 also followed the original Vienna Convention wording (“from which no derogation is permitted”). This translation nuance is important because the English term “derogation” used in article 50 (subsequently article 53) of the Vienna Convention was understood by the Commission to be synonymous with the phrase “to contract out” (para. 1 of the commentary to draft article 50), rendered in Spanish as “*acordar en contrario*”.

Regarding draft conclusion 7, the commentary’s description of the international community as constituting “a very large majority of States” is appropriate, since it is based on the work of the Drafting Committee for the 1969 Vienna Convention and because it requires that the acceptance and recognition must be across regions, legal systems and cultures (commentary (6)). It should be emphasized that the conclusions and commentary should always be read together, as noted by the Special Rapporteur in his commentary (1) to conclusion 1.

Concerning the agreed procedure for declaring a rule of international law to be invalid because it conflicts with a *jus cogens* norm (draft conclusion 21), we welcome the reaffirmation of the freedom to seek a solution through the means of peaceful settlement indicated in Article 33 of the Charter of the United Nations [commentary (7)],

Lastly, I should like to take this opportunity to reiterate some of the points made by my delegation during the last session, including: the clarification that invalidation due to a newly emerged *jus cogens* does not have retroactive effect, as is now correctly stated in the commentary; the possibility of adjusting the provisions of the invalidated treaty in order to reconcile them with the newly emerged *jus cogens* norm, if appropriate; the definition of “unjust” in the case of continued performance of the remainder of a treaty invalidated because of a newly emerged *jus cogens* (draft conclusion 11), which would disturb the balance of rights and obligations created by the treaty, as correctly noted in commentary (7); and consideration of the “Namibia doctrine” on continuation of the legal effects of actions by individuals following the declaration of invalidity, which is appropriately covered in the commentary.

Mr. Chairman,

I shall now refer to chapter XI of the report concerning other decisions of the Commission. In particular, I shall briefly mention the Draft Guidelines on provisional application of treaties, adopted on first reading by the Drafting Committee in 2019, and to annex A of the 2019 report, containing the draft model clauses on the provisional application of treaties, proposed Special Rapporteur Gómez Robledo.

As regards the Draft Guidelines, we welcome the Special Rapporteur’s decision to take as a starting-point the system described in article 25 of the Vienna Convention on the Law of Treaties and we consider that this text will provide very useful guidance in this area to States and international organizations.

It would be useful to clarify whether acts performed by a State in provisional application of a treaty can be considered as “Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” [article 31, paragraph 3 (b), of the Vienna Convention] or whether this refers only to acts performed once the treaty has entered into force.

Paragraph 4 (b) of the Draft Guidelines mentions that provisional application may be agreed by means of a resolution adopted by an international organization or an intergovernmental conference, among other possibilities. In this connection, my delegation considers that such resolutions could be a means of agreeing on provisional application, but only if a prior treaty or other agreement between the parties involved recognizes the use of such resolutions for this purpose. Otherwise the resolution alone would not suffice as a means of agreeing on provisional application.

My delegation also supports draft guideline 12, establishing the possibility that States or international organizations may agree on the same treaty or alternatively on provisional application of the treaty with the limitations deriving from the internal law of the State or organization.

As regards the draft model clauses on provisional application of treaties, we find draft model clause 1 to be appropriate, since it leaves open the possibility that it would be the parties to the treaty that decide whether the treaty will apply from the date of signature or from some

other date, if the treaty will apply provisionally. It is also noteworthy that this clause reserves the right of the States to opt not to apply the treaty provisionally, under an arrangement similar to the opt-out option contained in draft model clause 4, which is a positive measure.

On the other hand, States which did not participate in the negotiation of a treaty are correctly given the option of applying it provisionally under the opt-in arrangement in draft model clause 43.

Lastly, as already stated in connection with draft guideline 12, my delegation welcomes the provision in model clause 5 allowing a State to notify other parties of any limitations on the provisional application of a treaty deriving from its internal law, as this provides a pragmatic and realistic solution to the diversity of legal systems coexisting in the world.

This concludes my statement for today. Thank you.