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Chair: Mr. Katota (Vice-Chair) . . . . . (Zambia)

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16-19166 (E)

In the absence of Mr. Danon (Israel), Mr. Katota (Zambia), Vice-Chair, took the Chair.

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

Agenda item 78: Report of the International Law Commission on the work of its sixty-eighth session (*continued*) (A/71/10)

1. **The Chair** invited the Committee to continue its consideration of chapters X to XII of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

2. **Ms. Lijnzaad** (Netherlands) said that, in applying the principle of protection of the environment in relation to armed conflicts, it was useful to make a temporal division into the periods before, during and after the conflict. The arrangement of draft principles into sections relating to those phases was therefore logical. There had been some debate within the Commission as to whether the link between certain draft principles and the topic as a whole was close enough to justify their inclusion. Her delegation shared that concern. In particular, the relationship of protection of the environment with peace operations and indigenous peoples was perhaps too tenuous. Peace operations could function in situations of armed conflict, but did not necessarily do so. Indigenous peoples had a special relationship with their land and environment, but that fact seemed insufficient to warrant inclusion in the draft principles.

3. It would be preferable for the topic to result in draft principles rather than draft articles, and the terminology of those principles should be consistent with their intended normative status. The use of the terms "shall" and "should", particularly in draft principles 8, 16 and 18, should therefore be more carefully considered; it seemed to suggest that there was an existing obligation under international law, something that was doubtful. For instance, draft principle 16 stated that, after an armed conflict, parties "shall seek to remove or render harmless" toxic and hazardous remnants of war or controls that were causing or risked causing damage to the environment. The Drafting Committee had softened the language proposed by the Special Rapporteur by replacing the words "without delay after cessation of active hostilities" with "after an armed conflict". Nevertheless, it remained open to question whether the principle reflected an existing legal obligation of universal application. The principle appeared to have been inspired by provisions in the amended Protocol II and Protocol V to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons), as amended on 21 December 2001. However, the scope of the proposed principle was considerably larger. Moreover, it was questionable whether the principles set forth in the two Protocols had yet achieved the status of customary international law.

4. With regard to draft principle 18, the Drafting Committee had inserted a new paragraph 2 acknowledging that a State or international organization was not obliged to share or grant access to information that was vital to its national security. That provision had made a significant improvement to the text. Nevertheless, when read together with paragraph 1, the new paragraph suggested that in all other cases there was an absolute obligation to share and grant information; the information set out in the third report of the Special Rapporteur did not, however, warrant such an absolute statement.

5. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the Commission's deliberations showed that the topic remained highly controversial. Her Government believed that the need to fight impunity, while important, did not justify an exception to the principle of immunity. The question of whether a State official enjoyed immunity from foreign domestic jurisdiction was one of forum and procedure. Many factors determined whether immunity would be granted before a domestic court, but the risk of impunity was not among them. Under normal circumstances, ample remedies would be available in the State for which the official performed his or her duties. Moreover, a decision to grant immunity expressly did not contain a pronouncement on whether the State official was guilty; it was merely a question of whether that particular forum was available.

6. Her Government welcomed the trend in international criminal courts towards the prosecution of persons suspected of international crimes, and the

non-availability of the plea of immunity. There was, however, an important difference between the jurisdiction of international courts and that of national courts. The former, including hybrid courts, derived their jurisdiction from the consent of the participating States. The exercise of such jurisdiction therefore did not infringe the sovereign equality of States or the principle that one sovereign power could not exercise jurisdiction over another (*par in parem non habet imperium*). The same could not be said of national courts: consent to jurisdiction of an international court or tribunal could not be taken to imply consent to the jurisdiction of a foreign domestic court.

7. The Special Rapporteur had made a distinction between the immunity of State officials and the immunity of the State itself in relation to international crimes and *jus cogens*. Her delegation disagreed: the former was directly derived from the latter, and the two should be approached in the same way. The plea of immunity *ratione materiae* was unavailable for international crimes, including violations of *jus cogens*, as such crimes could not be official acts. For State officials who enjoyed immunity *ratione personae*, on the other hand, the plea of immunity was available regardless of the accusation.

8. Her delegation was also unconvinced by the analogy between the treatment of *jus cogens* in the articles on State responsibility for internationally wrongful acts and in the work on the immunity of State officials. The articles on State responsibility set out secondary norms that were applicable when establishing and invoking State responsibility for breaches of *jus cogens*. They did not address the question of forum, which was central to the question of the immunity of State officials; the two categories were methodologically distinct.

9. Addressing the topic "Provisional application of treaties", she said that, while conclusions could be drawn by way of analogy, they should be supported by underlying State practice. The question had also arisen of whether reservations made at the time of signature or ratification would also apply when the treaty or any of its provisions was applied provisionally. The Special Rapporteur had pointed out that no treaties provided for the formulation of reservations specifically in relation to provisional application. However, the reason was that many treaties, including the examples mentioned by the Special Rapporteur, already limited the scope of provisional application to specific provisions. Moreover, the law of treaties specified the moment at which States might formulate reservations in accordance with article 19 of the Vienna Convention on the Law of Treaties (1969), namely when signing, ratifying, accepting, approving or acceding to a treaty. Further analysis, including an examination of State practice, was required in order to ascertain whether a reservation made at that stage was also applicable when the treaty or any of its provisions entered into force provisionally.

10. **Ms. Masrinuan** (Thailand) said that her delegation supported the methodology of the Special Rapporteur's third report on the topic "Protection of the environment in relation to armed conflicts" (A/CN.4/700). Any relevant environmental treaty could coexist with the law of armed conflict, and the ongoing study would help to clarify that point. It would be appropriate for the outcome of the Commission's work to take the form of draft principles. That outcome would be consistent with the objective of raising the visibility of the issue. Although cultural heritage was part of the natural environment, it should not be addressed in the draft principles, as it was already extensively regulated through other international norms, including the instruments of the United Nations Educational, Scientific and Cultural Organization (UNESCO). As it was essential to encourage cooperation and information-sharing for the protection of the environment in armed conflict, consultations with agencies directly involved in post-conflict situations, such as the International Committee of the Red Cross (ICRC) and the United Nations Environment Programme (UNEP), would help to formulate a coordinated and informed response.

11. The Special Rapporteur's report on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/701) had made an insightful, scholarly contribution to the understanding of a highly complex and politically sensitive issue. The Special Rapporteur had endeavoured to strike a delicate balance between, on the one hand, the need to maintain stable international relations and the preservation of State equality and, on the other, the need to fight against impunity and provide redress for victims. The distinction between immunity *ratione materiae* and *ratione personae* was useful. A clearer distinction

between the law as it was (*lex lata*) and the law as it ought to be (*lex ferenda*) would also be useful, particularly in relation to the exceptions set out in draft article 7.

12. **Ms. Puerschel** (Germany), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that her delegation was particularly interested in the possible exemptions from immunity set out in the new draft article 7. Her delegation understood that the Commission had yet to discuss the topic in detail. It did, however, wish to reiterate an essential caveat. History had shown that there were crimes for which immunity could not be upheld, and Germany would always be a staunch supporter of exemptions from immunity. However, immunity was an important and well-established legal norm, and the exception was justified only because of the special nature of the crimes concerned. Typically, those crimes were rarely prosecuted by the perpetrator's competent national courts owing to his or her rank in the State hierarchy. They were crimes so grave that failure to bring the perpetrator to justice would be unacceptable and could undermine the credibility of the international legal order. The Rome Statute described them as the most serious crimes of concern to the international community as a whole.

13. There appeared to be broad international consensus on the crimes that justified such an exception. The case law of international courts, particularly that of the International Court of Justice, provided ample evidence of the scope of immunity in international law, including possible exemptions. In its February 2002 judgment *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Court had limited such exemptions to clear-cut cases that lent themselves to universal acceptance. Those findings were consistent with current State practice. It would not be advisable to expand the exceptions beyond what was clearly supported by State practice and *opinio juris*. Any such attempt could destabilize international relations and weaken the existing exceptions by making the category as a whole politically questionable. Cases involving immunity were politically sensitive and required delicate balancing. The rules of *lex lata* had proved suited to the task and must not be jeopardized.

14. Her delegation was not convinced that the Special Rapporteur's report (A/CN.4/701), which had led to the recommendation of a new article 7, addressed those concerns in a satisfactory manner. The report needed to make a clear separation between parts that reflected existing customary international law and parts that sought to develop it. It stated that there was a lack of consensus among States regarding the issue of exceptions and limitations; yet surprisingly, it went on to identify a trend towards such exceptions. The report also analysed how national courts had dealt with the issue of immunity. However, national prosecutors had often refrained from pursuing a case after coming to the conclusion that immunity applied. As a result, there was a systematic lack of case law, and only limited conclusions could be drawn from the number and content of national rulings. The Commission had asked States to provide information on their national legislation and practice with regard to the stage at which immunity was taken into consideration. Her delegation would take that opportunity to reiterate its points, and it urged other States to do the same.

15. The Special Rapporteur's report referred to States that had drawn attention to the need to approach the question of immunity cautiously; but it made no mention of her delegation's statement to that effect, which had been made at the previous session of the Sixth Committee (A/C.6/70/SR.24). Only an impartial and thorough analysis of all relevant State practice could form the basis of recommendations that made a meaningful contribution to the issue. Her delegation would find it difficult to support proposals, such as those contained in draft article 7, that exempted entire categories of offences from immunity. It hoped that the Commission would take those considerations into account when discussing the report and adopting a draft article.

16. **Ms. Telalian** (Greece), addressing the topic "Protection of the environment in relation to armed conflict", said her delegation supported the Special Rapporteur's suggestion that the issue of environmental protection during military occupation should be included in the Commission's work. According to paragraph (7) of the commentary to draft principle 9, the draft principles were aimed at applying to all armed conflicts. However, some of the draft principles, such as draft principle 5, referred specifically to States, and it was unclear to what extent

they applied to non-international armed conflict. Draft principle 2 should be reworded, given that preventive measures should seek not only to minimize, but to avoid damage.

17. The articulation between the law of armed conflict and the general principle of environmental law was intrinsic to the topic and should be addressed accordingly. Paragraph (5) of the commentary to draft principle 9 stated that the law of armed conflict was *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection remained relevant. That statement was a starting point; but the Commission should also examine the extent to which the general principles of environmental law remained applicable in times of armed conflict and how they interacted with *jus in bello* rules.

18. Her delegation questioned the applicability of the prevention principle, which addressed the use of means and methods of warfare with due regard for the protection of the environment and was already reflected in rule 44 of the International Committee of the Red Cross study entitled Customary International Humanitarian Law. It also questioned whether the precautionary principle might provide guidance to a belligerent State in that context. The Commission should provide more information on the meaning of the threshold of "widespread, long-term and severe damage" referred to in draft principle 9 [II-1], paragraph 2, and in article 35, paragraph 3, and article 55, paragraph 1, of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Her delegation intended to submit further written comments on the topic in due course.

19. The sensitive and legally complex topic "Immunity of State officials from foreign criminal jurisdiction" had elicited divergent and often opposing views among members of the Commission. Nevertheless, in view of its great importance for Member States, she urged the Commission to take the opportunity to clarify the issue of exceptions to immunity. The current state of uncertainty was causing tension among States and endangering inter-State relations. The Commission should be mindful of its dual mandate, which included both the codification and the progressive development of international law.

20. In the fifth report on the topic, (A/C.4/701), the Special Rapporteur had rightly argued that it was not possible to identify a customary rule allowing for exceptions or limitations to immunity *ratione personae*, or even to identify a trend in favour of such a rule. In the case of immunity *ratione materiae*, however, the situation was more nuanced, and there was some justification to the concerns raised by Committee members, particularly with regard to the process followed to identify customary international law and the assessment of existing national legislative and judicial practice. While the Special Rapporteur had correctly described the conceptual difference between exceptions and limitations to immunity, she had ultimately decided that the difference was theoretical and not relevant to the draft articles.

21. Parts III and IV of the report contained a number of valuable elements that could help the Commission determine parameters for the topic and propose balanced and workable solutions. The Commission should therefore adopt the systemic approach suggested by the Special Rapporteur. In particular, it should examine the relationships between immunity and responsibility and between immunity and impunity; the gravity of crimes of concern to the international community; the legal dimension of the fight against impunity in respect of certain crimes; the obligation of States to establish broad jurisdiction regarding some of those crimes; and the right of victims of those crimes to have access to justice and reparations.

22. The Commission should also take into consideration the progress that had been made over the previous 25 years in institutionalizing international justice; the connection between national and international courts; the established division of competences in the fight against impunity, particularly in view of the principle of complementarity; and the need for effective two-way cooperation and judicial assistance in that connection. All of those developments constituted an ongoing paradigm shift concerning the issue of exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction in respect of such crimes as genocide, war crimes, crimes against humanity and torture.

23. The previous Special Rapporteur had referred, in the context of draft article 7, to the territorial tort exception, which had also been invoked by the courts of Greece, albeit in civil proceedings. Her delegation believed that that concept warranted further examination, particularly in the context of criminal proceedings.

24. The case of corruption-related crimes was one in which the distinction between exceptions and limitations was relevant. The limited, scarce and diverse nature of national judicial practice showed that national courts had examined the issue mostly from the point of view of limitations to immunity *ratione materiae*, as the acts in question had not been considered to be performed in an official capacity. Paragraph (13) of the commentary to article 2 (f) appeared to confirm that understanding. In view of those considerations, and of the limited and inconsistent nature of national practice, her delegation did not favour including corruption-related crimes in draft article 7.

25. Turning to the topic "Provisional application of treaties", she said that draft guideline 10 was narrowly formulated and did not take into consideration actual practice. There were situations in which recourse to provisional application depended on a treaty provision stating that the treaty would apply provisionally to the extent permitted by domestic law. The draft guideline should be broadened in order to address such situations, which were distinct from the impermissible invocation of internal law as described in article 27 of the Vienna Convention on the Law of Treaties (1969).

26. Her delegation welcomed the fact that, further to suggestions made by delegations, the Special Rapporteur had analysed other provisions of the Vienna Convention that were directly relevant to the topic. That analysis formed a theoretical background against which relevant practice could be understood and evaluated. It was now time for the Commission to undertake a comprehensive study of practice in relation to the topic with a view to arriving at more tangible results. Her delegation therefore welcomed the Commission's decision to request from the Secretariat a memorandum analysing State practice in respect of treaties deposited or registered with the Secretary-General that provided for provisional application.

27. Her delegation believed that the Commission's work should lead to the adoption of concise and practice-oriented draft guidelines, followed by commentaries, in addition to model clauses for inclusion in treaties. It hoped for an early conclusion of the work, which would ultimately promote the stability of treaty relations and respect for the rule of law.

28. **Mr. Mohamad** (Malaysia), addressing the topic "Protection of the environment in relation to armed conflicts", said that the division of the topic into three temporal phases was purely artificial and had been introduced only in order to facilitate the study. His delegation therefore found it difficult to understand the concerns of those members of the Commission who argued that the draft principles lacked demarcation along temporal lines. As work progressed, it would become more difficult to separate the rules that applied to the different phases. His delegation looked forward to seeing how the Commission would further reflect on the overall interaction among conflict phases.

29. The debate on the question of whether there should be a distinction between "environment" and "natural environment" was self-defeating. Environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage. Restricting the application of the draft principles to the natural environment would therefore limit their full potential. Moreover, the two terms had been used inconsistently, and his delegation supported the proposal to revisit them at a later stage.

30. His delegation wished to see some clarification regarding the need to define certain terms under a section entitled "Use of terms". Since the aim of the draft principles was to provide a set of guidelines, it would be too prescriptive to provide legal definitions for certain terms and concepts. Should the Special Rapporteur wish to consider including definitions in the text, further study would first be needed.

31. The draft principles should differentiate between international and non-international armed conflicts; both should be included, but different rules applied to each. Draft principle 12 [II-4] on the prohibition of reprisals had emerged as a point of contention; his delegation hoped that discussion in that area would promote the progressive development of the rule of law.

32. It was also important for the draft principles to make connections with certain established rules of international humanitarian law, including principles and rules on distinction, proportionality, military necessity and precautions in attack, together with the prohibition of reprisals. as had been reflected in draft principles 10 [II-2], 11 [II-3] and 12 [II-4]. Those draft principles should be aimed at ensuring that environmentally sound measures were taken in military or defence planning and operations. That approach also provided some scope for the progressive development of international law, as opposed to codification.

33. Indigenous communities were particularly affected by, and had a significant role to play in, post-conflict remediation efforts. His delegation therefore encouraged further analysis of that issue, with greater emphasis on the post-conflict phase and, in particular, on the obligations of States in addressing the environmental consequences of armed conflict.

34. Turning to the topic "Immunity of State officials from foreign prosecution", he said that, while his delegation welcomed the new draft article 7, the current formulation should be treated with some caution. For instance, the proposed draft article 7, paragraph1, required further deliberation, as existing State practice varied with regard to the definition of the offences in question, particularly torture, enforced disappearances, corruption-related crimes and crimes that caused harm to persons or property. His delegation strongly supported proposals to strengthen action against corruption, a crime that was a growing problem at the domestic and international levels. It was studying the relevant commentary and would submit its comments in writing by the deadline of 31 January 2017.

35. Draft article 7, paragraph 2, should be further clarified; the application of the terms *ratione materiae and ratione personae* in paragraphs 1 and 2 was a case in point. With regard to draft article 7, paragraph 3(b), the relationship between States and international organizations or tribunals required further study: the two categories differed in their legal status, but cooperation between them was vital.

36. Addressing the topic "Provisional application of treaties", he said that the Drafting Committee should ensure that the draft guidelines under consideration took into account States' internal laws and practices. The domestic law of Malaysia was silent regarding the provisional application of treaties. His Government had, however, diligently ensured that the provisions of a treaty were carried out once the treaty had been signed and the necessary legal framework had been put in place.

37. With regard to draft guideline 4, his delegation believed that any agreement for the provisional application of treaties must be expressly provided for, either in the treaty itself or in a separate agreement. In the latter case, the provision enabling States to conclude such an agreement should be explicitly provided for in the treaty. It would be risky to agree to the provisional application of a treaty through a resolution adopted at an international conference, or through any other arrangement among States or international organizations. Resolutions were not normally binding in themselves, and some of the concerned States might not have been directly involved in negotiating them.

38. Draft guideline 6 recalled article 11 of the 1969 Vienna Convention, which provided that the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. In principle, his delegation agreed that a treaty could enter into force in that manner. However, it did not have a definite position on the question, as consent to be bound was subject to the legal framework of Malaysia, which required subsequent ratification by the domestic legislature. His delegation had concerns regarding the effects of provisional application on the rights and obligations of States. It therefore proposed that draft guideline 6 should be further examined by taking into consideration the rights and obligations that arose from a provisionally applied treaty.

39. Draft guideline 7 should be read in conjunction with draft article 6. His delegation believed that provisionally applied treaties were binding only from a moral and political standpoint. However, Malaysia was also guided by article 18 of the Vienna Convention, which stipulated that States should refrain from acts that would defeat the object and purpose of a treaty. The term "legal effects" in draft article 7 should be clarified and further examined: it must be consistent with article 18 of the Vienna Convention. In the light

of the legal procedures in force in Malaysia, his delegation believed that extreme caution should be exercised in determining whether draft guideline 7 was acceptable, as it set forth a significant legal obligation.

40. Draft guideline 8 was vague, as the term "international responsibility had not been explained. Moreover, the draft guideline did not discuss the extent of the international responsibility of a State that agreed to apply a treaty provisionally. The provisional application of a treaty could apply only to certain parts, and therefore was not on a par with a full commitment to the treaty. It would be useful to refer to the articles on responsibility of States for internationally unlawful acts and the articles on responsibility of international organizations.

41. With regard to draft guideline 9, his delegation was guided by article 25, paragraph 2, of the Vienna Convention. The issue of termination upon notification of intention not to become a party should be addressed in greater detail, and the termination of the provisional application must be clearly expressed in order to prevent any doubt.

42. Draft guideline 10, on internal law and the observation of provisional application of all or part of a treaty, was derived from article 27 of the Vienna Convention and should be without prejudice to article 46 of the Vienna Convention. Article 27 addressed observance of treaties, whereas article 46 referred to the provisions of internal law concerning the competence to conclude treaties. In his own country's practice, the signing of a treaty did not necessarily create a legal obligation. However, each State must ensure that the manifestation of its consent to provisional application was compatible with its domestic laws. Any legal effects of provisional application that were intended to go beyond article 18 of the Vienna Convention should be carefully analysed and made very clear. It would also be useful to develop the topic further by taking into consideration States' sensitivities, the contextual differences embedded in the provisions of treaties and the ways in which State practice had responded to such variations.

43. **Mr. Pham** Ba Viet (Viet Nam), speaking on the topic "Protection of the environment in relation to armed conflicts" and referring to the draft principles proposed by the Special Rapporteur in relation to the pre-conflict phase, said it was clear that the proposal for environmental regulations and responsibilities to be incorporated into status of forces and status of mission agreements and peace operations had given rise to disagreements within the Commission. Further studies concerning relevant State practice and effectiveness were therefore needed in order to substantiate the need to include such a provision.

44. Concerning the issue of remnants of war on land and at sea, as addressed in draft principles III-3 and III-4, his delegation welcomed the reference to the provision of international technical and material assistance. In order for those principles to be effective, there must be a clear indication of the State or entity that bore primary responsibility for dealing with minefields, mined areas, mines, booby-traps and other remnants of war. The principles should therefore be reformulated to reflect the concept that, in an armed conflict, the belligerent party that introduced substances harmful to the environment should bear the legal consequences of its actions. Moreover, in the aftermath of the said conflict, that party should be responsible for searching for, clearing and destroying the remnants of war that it had left behind. In cases where those remnants continued to have a negative impact on the natural environment, the belligerent party should also bear the responsibility for restoring the environment.

45. His delegation was concerned at the inclusion of the rights of indigenous peoples in draft principle IV-1, since that matter was of little relevance to the context of armed conflicts. Moreover, the issue of indigenous peoples was handled differently from State to State. In particular, States varied in their definition of such peoples and, in some States, the concept did not exist. The inclusion of draft principle IV-1 might in practice cause more problems than it attempted to resolve.

46. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", it should be noted that the concept of immunity from criminal jurisdiction originated in customary international law. In order to ensure a balance between the benefits of granting immunity to State officials and the risk of impunity, the corresponding rules needed to be codified carefully with due regard to the principles of sovereign equality and non-interference in the domestic affairs of States, as well as the maintenance of international peace and security. The draft articles

should enshrine those principles and reflect the codification of established norms.

47. The exceptions to criminal jurisdiction warranted further debate. The Commission should clarify the concept of "acts performed in an official capacity". It was ill-advised to link the criminal nature of an act to the representative nature of such act, since, in practice, the criminality of an act did not affect or determine whether an act was performed in an official capacity. Moreover, careful consideration should be given to the view that international crimes could not be considered as acts performed in an official capacity, and the crimes that constituted international crimes should be more clearly defined. In that regard, his delegation noted the opinion expressed in the International Court of Justice case concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, according to which only serious international crimes could not be regarded as acts performed in an official capacity. There was a distinction to be made between "international crimes" and "serious international crimes", since the former covered a broader spectrum of criminal acts.

48. On the topic "Provisional application of treaties", his delegation concurred with the overall idea that the provisional application of a treaty was capable of giving rise to legal obligations and that, as set out in draft guideline 8 provisionally adopted by the Drafting Committee, the breach of an obligation arising under a treaty or a part of a treaty that was provisionally applied entailed international responsibility. However, the extent of the legal consequences arising from the breach of a provisionally applied treaty required further study. In particular, if the responsibility arising from the breach of such a treaty was exactly the same as that arising when the treaty in question was in full effect, it would render States unable to invoke their internal law to justify the breach. Furthermore, if the legal consequences were equivalent in both cases, States would also have less motivation to ratify or approve an international treaty. His delegation therefore welcomed the Commission's decision to request from the Secretariat a memorandum analysing State practice in respect of treaties, deposited or registered in the last 20 years with the Secretary-General, which provided for provisional application, including treaty actions related thereto.

49. With regard to draft guideline 4, concerning the forms through which provisional application of a treaty might be agreed, his delegation was of the view that a decision to apply a treaty provisionally should first and foremost be taken by the concerned States themselves. Any other means of deciding such provisional application would be a departure from article 25 of the 1969 Vienna Convention. Moreover, an agreement reached by means of a resolution adopted by an international organization or at an intergovernmental conference could unnecessarily infringe the sovereignty of States. Further consideration should therefore be given to the issue, including by examining international practice in that regard.

50. **Ms. Horvat** (Slovenia), speaking on the topic "Protection of the environment in relation to armed conflicts", said that the multifaceted nature of the topic, involving an appreciation of the specificities of environmental law and its interplay with the laws of armed conflict, called for a comprehensive analysis of the applicability of relevant principles and rules of international law in the context of the proposed draft principles and required a distinction to be drawn between international and non-international armed conflicts. Her delegation welcomed the incorporation of suggestions reflecting progressive development, although the Commission needed to adopt a careful and thorough approach in that regard, taking into consideration the feasibility of the proposed solutions in the context of the topic. To that end, collaboration with experts and practitioners in the fields of both environmental law and the law of armed conflict would be useful in examining certain questions, as had been the case concerning the topic of the protection of the atmosphere.

51. With regard to the newly proposed draft principles, her delegation's comments were provisional, since the accompanying commentaries were not yet available. Slovenia agreed that it would have been helpful if the Special Rapporteur's report had contained an analysis of the relevant materials upon which each draft principle was based, since that would have provided a greater focus and a clearer understanding of the basis for the proposed wording. Appropriate attention should also be given to identifying clearly the placement of various provisions according to the relevant temporal phases.

52. Her delegation welcomed the inclusion in draft principle 4, as provisionally adopted by the Drafting Committee, of the obligation to take effective preventive measures in all temporal phases, as required under international law. It also welcomed the inclusion of a call for States to take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict. Concerning draft principle 6, Slovenia noted the special position given to the protection of the environment of indigenous peoples in the context of an armed conflict; however, the status accorded to the connection between those peoples and the environment warranted further explanation. Her delegation recognized the importance of including the issue of remnants of war, including remnants of war at sea, in the draft principles, and welcomed the reformulation reflected in draft principle 16, bearing in mind that the draft principle on remnants of war as initially presented by the Special Rapporteur had been framed too narrowly, focusing mostly on explosive remnants.

53. Non-State actors were not included in the scope of draft principle 18, which addressed sharing and granting access to information; however, the possible role of such actors in that regard should be examined, since non-State actors could possess, and be in a position to share, relevant information that was essential to facilitate remedial measures after an armed conflict. Additional clarification would also be useful concerning the possibly restrictive scope of the phrase "in accordance with their obligations under international law", in draft principle 18, paragraph 1.

54. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation commended the Special Rapporteur for her thorough and systematic work on limitations and exceptions to immunity, which was probably the most challenging aspect of the topic and an issue of particular importance to States. Given the preliminary nature of the Commission's discussion on the Special Rapporteur's fifth report (A/CN.4/701), her delegation would reserve its more detailed comments for the following session. A cautious approach to the issue, involving a detailed examination of State practice, *opinio juris* and trends in international law, was warranted. The procedural aspects of immunity should also be considered, including the necessary safeguards against possible misuse.

55. Her delegation reiterated its view that, while the immunity of State officials from foreign criminal jurisdiction was based on the principles of the sovereign equality of States, non-intervention and the interest of States in maintaining friendly relations, it should also be addressed against the backdrop of the growing prominence of legal humanism and the fight against impunity and, in particular, through the prism of the progressive development of international law. The Special Rapporteur had captured that approach by making a clear distinction between the legal regimes applicable to immunity *ratione personae* and immunity *ratione materiae*, and the rationale for each. Her delegation agreed that, in the context of the topic, no limitations or exceptions to immunity *ratione personae* existed under current customary international law. At the same time, it welcomed the conclusion that contemporary international law permitted limitations or exceptions to immunity *ratione materiae* with respect to serious international crimes, based in particular on the need to protect against gross human rights violations and to combat impunity.

56. The Commission's work must stand apart from, but remain consistent with, the regime under the Rome Statute, including with regard to the obligation of cooperation with the International Criminal Court. While the scope of the topic was premised on inter-State relations, the work needed to take into account specific elements relevant to the topic in the context of international criminal justice, where exceptions to immunity could be established through the conclusion of an international treaty or inferred from a Security Council decision.

57. As for the topic "Provisional application of treaties", her delegation appreciated the work undertaken by the Special Rapporteur to date. However, additional work was required if comprehensive coverage of the topic were to be achieved. Concerning the relationship of provisional application to other provisions of the 1969 Vienna Convention, her delegation agreed that several articles could apply to a provisionally applied treaty by way of analogy. However, while general agreement seemed to exist within the Commission that a provisionally applied treaty produced legal effects as if it were actually in force, that did not necessarily imply that all articles of the 1969 Vienna Convention relating to treaties in force applied in the same manner to

provisionally applied treaties. It was her delegation's understanding that such agreement among Commission members was related to the binding effect of treaty provisions during their provisional application and did not rule out the possibility that the application of other articles of the 1969 Vienna Convention could be excluded or modulated during that period.

58. For example, article 25 of the 1969 Vienna Convention constituted a self-contained regime with regard to termination, which was a core element of provisional application reflecting its temporary status. As the Commission had noted in its report (A/71/10), the diplomatic conference leading to the 1969 Vienna Convention had incorporated the termination clause in article 25 rather than relying on the general termination provisions included in the Convention. Furthermore, the question of a material breach, under article 60 of the Vienna Convention, had been carefully and correctly analysed in a recent arbitral award, as stated by the Commission (see A/71/10, para. 281, and A/CN.4/SR.3325, p. 9).

59. On the other hand, her delegation considered that articles 27 and 46 of the Vienna Convention did apply to provisional application, since they were directly linked to the binding effect of the treaty. Thus, one criterion for determining the manner in which other articles of the Vienna Convention applied to provisionally applied treaties could be their relation to the binding effect of such treaties as if they were actually in force, with possible adjustments to be made taking into consideration their provisional nature.

60. Her delegation welcomed the inclusion of cases of succession of States in the Special Rapporteur's report (A/CN.4/699). In addition to the fact that the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties illustrated the practical utility of provisional application of treaties, as the Special Rapporteur had acknowledged, the issue of the succession of States should be considered in order to explore whether potentially useful conclusions could be drawn from the 1978 Vienna Convention to facilitate a general understanding of provisional application as a concept of international law in the wider sense, not limited only to the 1969 Vienna Convention on the Law of Treaties. For example, it would be helpful to understand whether article 27, paragraph 1, and article 28, paragraph 1, of the 1978 Vienna Convention reflected the fact that, as a general feature of provisional application, a State could either expressly agree to apply a treaty provisionally or by reason of its conduct be considered as having so agreed, or whether that feature of provisional application was limited to the specific case of treaty succession.

61. Some Commission members had already expressed the opinion that one State had been considered to have agreed, by reason of its conduct, to provisional application of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Similarly, a somewhat different regulation of the termination of provisional application in the 1978 Vienna Convention could be considered to confirm the view that article 25, paragraph 2, of the 1969 Vienna Convention did not express a customary rule with respect to provisional application.

62. In draft guideline 10, her delegation welcomed the emphasis placed on the general obligation not to invoke internal law as justification for non-compliance with international obligations. However, the formulation of the draft article should take into account the limitation clauses used in State practice, in the sense that article 27 of the 1969 Vienna Convention applied to provisionally applied treaties without prejudice to the provisions of the relevant treaty. Thus, if a treaty allowed for limitation clauses, the application of article 27 could be limited to the extent that such a limitation was allowed.

63. **Ms. Zeytinoğlu Özkan** (Turkey) said that, although Turkish law did not allow for the provisional application of treaties, the Commission's study on that topic provided a useful source of information and guidance for all States. Provisional application offered a practical way of meeting treaty obligations in cases where it was not desirable, for political or technical reasons, to await the completion of lengthy ratification processes. It would therefore be useful to clarify draft guideline 7, according to which provisional application of the treaty produced the same legal effects as if the treaty were in force; a comparative analysis of conventional practice might well serve the purpose.

64. Draft guideline 10 would also benefit from clarification as to whether it referred to the fact that a State could not invoke its internal law to justify its

failure to perform a treaty, or whether it concerned provisions of internal law regarding the competence to agree to apply a treaty provisionally. Her delegation welcomed the Special Rapporteur's proposal to prepare model clauses, which could be a useful reference.

65. As for the Special Rapporteur's suggestion to revise the regulations on registration adopted by the United Nations General Assembly in 1946 in order to adapt to them to the current state of practice relating to the provisional application of treaties, it would not in any case be appropriate to use the Vienna Convention on the Law of Treaties as sole reference, since not all Member States were parties to it. Moreover, as only a very small percentage of all treaties registered with the United Nations since 1945 had been subject to provisional application, the need for such a study was questionable; the suggestion should be discussed following the completion of the Commission's work.

66. Turning to the topic "Identification of customary international law", she said that, since the practice of States was the principal factor to be taken into account in determining the existence and content of rules of customary international law, the elements attesting to the formation of such rules needed to be carefully evaluated. In draft conclusion 4, paragraph 2, and bearing in mind the need to set a high threshold on the evidentiary value of the practice of international organizations, a more cautious wording would be desirable, with the word "contributes" being replaced by "may contribute"; that would also be more consistent with paragraphs 2 and 3 of draft conclusion 12. Her delegation concurred with draft conclusion 11, paragraph 2, that a rule set forth in a number of treaties did not necessarily indicate that the treaty rule reflected a rule of customary international law, and with draft conclusion 12 that a resolution adopted by an international organization or at an intergovernmental conference did not of itself create a rule of customary international law.

67. On the topic "*Jus cogens*", she recalled that the inclusion of *jus cogens* in the Vienna Convention on the Law of Treaties was one of the reasons why Turkey had not become a party to that Convention and that, at the Committee's previous session, her delegation had questioned the need for the Commission to include it in its programme of work, given the insufficiency of State practice and the divergence of views regarding its formation and consequences. A prudent approach was therefore required. She noted that some draft conclusions had already been formulated prematurely. The outcome of the work could remain an analysis and a general overview of related conceptual issues.

68. Referring specifically to paragraph 39 of the Special Rapporteur's report (A/CN.4/693), she said that the contestation by South Cyprus of the validity of the Treaty of Guarantee, on the basis of the notion that article 4 of that Treaty was in violation of peremptory norms, was irrelevant. The provisions of that Treaty and the rights and obligations provided therein for the guarantor Powers could not be construed as either confirming or violating peremptory norms or *jus cogens*, notwithstanding any individual statements by States. That part of the report needed to be amended.

69. **Mr. Townley** (United States of America), addressing the topic "Protection of the environment in relation to armed conflicts", said that his delegation remained concerned about the focus on the application of bodies of law other than international humanitarian law during armed conflict and felt that the Commission was not the appropriate forum to consider whether certain provisions of treaties relating thereto reflected customary international law. The mandatory phrasing of several of the draft principles was also a source of concern. It was not appropriate for so-called principles to purport to dictate what States "shall" or "must" do.

70. Several of them indeed went well beyond existing legal requirements of general applicability. For example, draft principle 8 introduced entirely new substantive legal obligations in respect of peace operations that were not to be found in existing treaties, practice or case law, and draft principle 16 expanded the obligations in relation to explosive remnants of war under the Convention on Certain Conventional Weapons to include "toxic or hazardous" remnants of war.

71. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he noted that it did not address immunity of State officials covered by special rules of international law, such as diplomatic, consular or international organization officials or officials on special mission. Concerning the formulation of draft article 7, which excluded any exceptions to their immunity *ratione personae* while allowing exceptions to their immunity *ratione materiae*

for three types of crimes, the Special Rapporteur's approach raised a number of concerns. The draft article did not specify why immunity would not apply to such crimes. It was arguable that corruption-related crimes would not be considered official acts in the first place, but other acts, such as war crimes, would often include acts performed in an official capacity and would therefore exclude immunity owing to their status as serious international crimes. It would be helpful to have a better idea of the conceptual basis for making immunity unavailable for certain crimes so as to be able to assess whether such exceptions were grounded in existing law.

72. On the question of territorial exclusion for immunity, it was not clear why a civil law tort standard was adopted for use in the context of criminal law, nor whether the exception applied to all crimes involving any level of injury to personal property or only to crimes involving serious harm. Why did the defendant need to be in the forum State's jurisdiction at the time of the act for the forum State to exercise jurisdiction? Why would it make a difference if anthrax that caused death or injury in the forum State was mailed from some other State? The Special Rapporteur's report, while thorough, did not adequately support the exceptions to immunity appearing in draft article 7; a further report addressing procedural matters might be expected to clarify such limitations and exceptions to immunity.

73. On the topic "Provisional application of treaties", his delegation agreed with most of the draft guidelines provisionally adopted by the Drafting Committee, as they were consistent with its understanding that "provisional application" in the context of treaty law meant that a State agreed to apply all or part of a treaty prior to its entry into force for that State. Draft guideline 4 gave concern, however, as it might suggest that a State's legal obligations under provisional application might be incurred through some method other than the consent of all the States concerned, contrary to article 25 of the 1969 Vienna Convention. To guard against such an interpretation, paragraph (b) of the draft guideline might be reworded to read "any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, that reflect the consent of all the States concerned". It was also hoped that it would be made clear in draft guideline 3 as provisionally adopted and draft guideline 10 as proposed by the Special Rapporteur that a State might provisionally apply a treaty pending its entry into force for that State, even if it had entered into force for other States, and that a State might agree to provisionally apply a treaty only to the extent that it was consistent with its national law.

74. His delegation was still studying draft guideline 7, according to which the provisional application of a treaty or part of a treaty produced the same legal effects as if the treaty were in force: one way in which that was not precisely true was that provisional application could be more easily terminated. His delegation would also continue to give thought to the complicated issue of whether that draft guideline did indeed mean that all or many of the rules set forth in the 1969 Vienna Convention applied to the provisional application of a treaty as they would if the treaty were in force. His delegation continued to support the suggestion that the Commission should develop model clauses as part of its future work on the topic but was not convinced of the merits of specifically studying the provisional application of treaties that addressed the rights of individuals, as the rules regarding provisional application of treaties did not differ according to their subject matter.

75. **Mr. Sandoval Mendiolea** (Mexico) said that the Commission's work on the topic "Protection of the environment in relation to armed conflicts" answered a need for rules that would be applicable each time a new conflict arose. Treaty-based international humanitarian law did not currently include provisions on protection of the environment in non-international armed conflicts, and State practice appeared insufficient as a basis for customary rules in that regard. It was true, however, that such law, particularly the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), provided for the general protection of civil property in such cases. It would therefore be desirable for the Commission to limit the scope of the draft principles solely to international armed conflicts and to probe more deeply into cases where the environment became a legitimate military target and ceased to have a civil property character.

76. With regard to draft principles I-1, I-3, I-4 and III-1 to III-5, concerning the pre-conflict and post-conflict phases, it might be overambitious to analyse the applicable law in each case since, in addition to international humanitarian law, that would entail an analysis of the principles of international environmental law or international human rights law, making it difficult to apply the corresponding legal framework. Work on the topic should be confined to analysing the law in force during armed conflict; there was no need for a specific regulation on the protection of the rights of indigenous peoples, covered by draft principle IV-1, since, as part of the civil population, they were protected by international humanitarian law under the rule of distinction. As for the form to be taken by the work, the term "draft principles" adequately reflected the intention not to elaborate a new convention.

77. His delegation commended the Special Rapporteur for her fifth report on the complex topic "Immunity of State officials from foreign criminal jurisdiction", to which it attached considerable importance, noting its relevance to the day-to-day application of international law. It would submit written comments to the Commission on the topic.

78. Turning to the topic "Provisional application of treaties", he said that, pursuant to article 25 of the 1969 Vienna Convention and all of its other relevant provisions, provisional application should necessarily be addressed in terms of each specific instrument and not as a self-contained regime. In accordance with that Convention, a State could formulate reservations when indicating its willingness to allow a treaty to produce legal effects, to the extent permitted by the treaty; given that the wish to apply a treaty provisionally reflected a willingness to allow the instrument to produce legal effects, a State could, by analogy, therefore formulate reservations in such a context. In cases where provisional application flowed from a unilateral declaration and rested on the partial acceptance of a treaty, and so long as that did not run counter to its object and purpose, it was difficult to provide for reservations. In any case, it would be interesting to analyse the mechanism for objecting to reservations formulated by other States that had also accepted the provisional application of the treaty regarding which the reservation had been formulated.

79. His delegation agreed with the Special Rapporteur that the application of a provisionally applied treaty could be terminated or suspended if the treaty were violated by the party to which provisional application had been granted; by analogy, article 60 of the Vienna Convention was also applicable. His delegation was also in full agreement with the content of draft guideline 10.

80. The inclusion of draft guidelines showing the relationship between unilateral declarations and the provisional application of a treaty in the context of internal law would be desirable, as would a clarification in the commentaries on limits to the scope and legal effects of provisional application and provisional entry into force. His delegation welcomed the attention given by the Special Rapporteur to the practice of several universal and regional international organizations and hoped that information would also be included about the practice of other international organizations in order to provide a wider picture.

81. Welcoming the information provided about the large number of treaties containing provisional application clauses registered by the Secretariat, he noted that there was currently no accessible search tool allowing external users to identify treaties containing such causes and said that the different search criteria being used by the Secretariat with respect to actions related to provisional application did not reflect a sufficiently systematic approach to practice. The General Assembly should consider revising the registration regulations to bring their content into line with current treaty practice, particularly in regard to provisional application. Lastly, he welcomed the model clauses on provisional application proposed by the Special Rapporteur; they would be useful to States when negotiating international treaties.

82. **Ms. O'Sullivan** (Ireland) said that her comments on the topic "Immunity of State officials from foreign criminal jurisdiction" would be preliminary in nature, like the current debate. Her delegation welcomed the acknowledgment in paragraph 10 of the commentary to draft article 2 (f) that acts performed in an official capacity must be identified on a case-by-case basis and agreed with the Commission's decision regarding the criteria to be considered. In draft article 7, the Commission should give further consideration to international crimes in respect of which immunity did

not apply, and the procedural aspects to be addressed by the Special Rapporteur in her sixth report should take into account the exceptions set out therein.

83. Turning to the topic "Provisional application of treaties", she recalled that Ireland had been one of the delegations that had urged further analysis of the precise nature of the legal effects created by provisional application and the extent to which they differed, if at all, from the effects created by the entry into force of the treaty. Her delegation continued to believe that further elaboration of the question, based on a detailed review of State practice, would be beneficial to the Committee's consideration of the topic as a whole. The treatment of provisional application in the context of the Secretariat's registration functions and the Secretary-General's depository functions was indeed pertinent to an examination of the topic and worthy of further consideration.

84. Her delegation therefore welcomed the decision to request the Secretariat to prepare a memorandum on State practice in respect of treaties providing for provisional application deposited with the Secretary-General over the past 20 years. That review of State practice might include such issues as the breakdown of registered treaties subject to provisional application as divided between bilateral and multilateral agreements and whether the Treaty Section's practice in displaying information on provisional application depended on whether provisional application was provided for in the agreement itself or had been agreed by some other means and, if so, what information was required. In might also be worthwhile to consider the effect of Article 102, paragraph 2, of the Charter regarding a provisionally applied treaty not registered with the United Nations.

85. **Mr. Fernández Valoni** (Argentina), addressing the topic "Crimes against humanity", said that, as the provisions of draft articles 5 to 10 were based on similar provisions in other international instruments relating to international crimes, particularly the Rome Statute of the International Criminal Court, the topic could continue to be developed without running the risk of contradicting what had already been agreed by the international community. Draft article 5 extended the obligation to prosecute crimes against humanity, an obligation that would no longer be restricted to States subject to such an obligation under international law. As a universal criminal offence, it would be investigated and prosecuted by all States, which must therefore cooperate to that end. He recalled that Argentina was one of a group of countries behind an initiative to adopt a multilateral instrument on legal assistance and extradition for crimes against humanity, war crimes and genocide to which all States were invited to accede.

86. On the topic "Protection of the atmosphere", his delegation welcomed the Commission's work in respect of certain general criteria, such as the obligation to protect the atmosphere and the sustainable, equitable and reasonable utilization thereof, and appreciated its attention to the situation and needs of developing countries in that context. The proposed study in 2017 of the question of the interrelationship of the law of the atmosphere with other fields of international law was to be encouraged.

87. His delegation also welcomed the Commission's attention to the peremptory norms of international law under the topic "*Jus cogens*", noting that they should be addressed with regard mainly to the case law of international and national courts and to the development of doctrine. The Special Rapporteur's first three draft conclusions provided an essential basis for undertaking a study on the nature of, and main criteria for, the identification of *jus cogens* norms. A comprehensive study of the criteria for identifying such norms entailed not only taking into account the practice of national and international courts, but also other sources of international law, as set out in article 38 of the Statute of the International Court of Justice, namely, customary international law, treaties and the general principles of international law.

88. On the topic "Immunity of State officials from foreign criminal jurisdiction", a balance needed to be struck between the codification of customary law and proposals for progressive development, taking into account experience gained through the case law of international criminal courts and national courts in the prosecution of atrocity crimes, so that the latter might not be considered to be acts protected by immunity, whether *ratione personae* or *ratione materiae*.

89. **Mr. Hirotani** (Japan), noting that the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts

(A/CN.4/700) addressed rules of particular relevance in post-conflict situations, said that the Commission's discussion had revealed the complexity and diversity of the issues involved. The current scope of the topic appeared to include both international and non-international armed conflict, but it was difficult to identify principles and rules applicable to both. His delegation hoped that the Commission would examine the scope of the topic carefully and focus on areas where existing rules could be identified so that the final products would be useful to Member States.

90. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that the Special Rapporteur's report (A/CN.4/701) did not provide sufficient evidence that the three identified categories of exceptions to such immunity were already established. Concrete examples in support of her argument on that point would therefore be welcome. His delegation also hoped that the Special Rapporteur would further elaborate on the fundamental issue of the differences between immunity *ratione personae* and immunity *ratione materiae*. Because of the great practical value of the ongoing work on the topic, caution must be exercised in dealing with the limitations and exceptions to immunity.

91. **Mr. Garshasbi** (Islamic Republic of Iran) said that, because of time constraints, his delegation would submit written comments on the topics "Crimes against humanity" and "Protection of the atmosphere" at a later date.

92. Turning to the topic "Protection of the environment in relation to armed conflicts", he commended the Special Rapporteur for her approach, particularly in regard to its temporal basis. Where post-conflict obligations were concerned, his country, which had experienced an imposed war and degradation of the environment through armed conflict, looked forward to considering provisions specifically addressing international responsibility and liability. In draft principle 4, which required States to take effective measures to enhance the protection of the environment in relation to armed conflict, the word "effective", which was subjective and ambiguous, might usefully be replaced by "relevant". Similarly, it was unclear whether, in draft principle 6, paragraph 2, "effective" referred to an obligation of result or one of conduct.

93. Since the aim of the Commission's work on the topic was to fill existing gaps in humanitarian law on the protection of the environment, it was worth noting that the list of vital infrastructure excluded from military targets in article 56 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) was merely illustrative and that the lack of special protection accorded to nuclear electrical generating stations in article 56, subparagraph 2 (b), was inappropriate in view of their dangerous nature. His delegation was also concerned about the expansion of the definition of armed conflict to include non-international armed conflicts: difficulties would ensue in describing the obligations of non-State actors and the threshold of non-international armed conflicts.

94. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation considered such immunity in the performance of official acts to be a direct consequence of the principle of sovereign equality; its recognition by international law was aimed at protecting sovereignty and ensuring peaceful international relations. Immunity *ratione materiae* must be guaranteed to all State officials in respect of acts performed in an official capacity, whether or not they were still in office. Regarding crimes to which immunity did not apply, a distinction needed to be made between crimes under international law and international crimes; the latter, having reached the status of customary international law and as such being widely accepted by the international community, might be included in the list of crimes addressed.

95. Concerning the topic "Provisional application of treaties", his delegation supported the view that provisional application of a treaty might accelerate and facilitate its implementation, notwithstanding article 25 of the 1969 Vienna Convention, which, in its final form, left States free to disregard the possibilities offered thereby, if on constitutional grounds they could not accept to be bound provisionally. Since, moreover, according to that same article 25, the consent of the State exercising its right to provisionally apply a treaty remained central to such application, nothing precluded the formulation of a reservation to the treaty at the time of ratification, acceptance, approval or accession.

96. While the legal regime and modalities for termination and suspension of provisional application did indeed require further clarification, it was doubtful whether all the elements of the Vienna Convention could be inferred by way of analogy for provisional application of treaties. It was also doubtful whether there were grounds in State practice for the full implementation of the international responsibility regime for breach of an obligation arising under all or part of a treaty applied provisionally, irrespective of the content of the provisions applied. Since the raison d'être of the legal institution of the provisional application of treaties was to ensure wider acceptance of the treaty in question by States in respect of which the treaty had not yet entered into force, a stricter interpretation of the rules of international responsibility in such cases could make some signatory States reluctant to have recourse to provisional application; those same States might otherwise prefer to provisionally apply the treaty in good faith and on a voluntary basis.

97. **Mr. Sukhee** (Mongolia) said that the Commission's recommendations had had a notable impact on the legal affairs of Member States, through the successful application in practice of draft articles by national and international courts. His delegation commended the work on the topic "Identification of customary international law": the draft conclusions would further contribute to the application of customary international law as an important source of public international law. The work on the topic "Immunity of State officials from foreign criminal jurisdiction" was also greatly appreciated, particularly the complex and sensitive question of limitations and exceptions. In going beyond international crimes to analyse certain other crimes, such as corruption, the report (A/CN.4/701) was of great importance to the international community.

98. On the question of the Commission's long-term programme of work, his delegation hoped that the topic "Succession of States in respect of State responsibility" would be covered by the Commission in the near future, as it could be expected to fill the gaps remaining upon completion of the corresponding codification exercise.

99. **Ms. Mor** (Israel), addressing the topic "Protection of the environment in relation to armed conflicts", said that it was unnecessary to develop new principles thereon as it was sufficiently addressed under the various rules and standards of the laws of armed conflict, which themselves already struck an appropriate balance in that regard and did not need to have environmental law merged with them.

100. Her delegation nevertheless shared the view that the proposed definition of "remnants of war" in draft principle III-3 was too broad, as it went beyond the definition contained in the Convention on Certain Conventional Weapons; although Protocol V thereto was not binding, there was no justification for broadening the definition, which did not appear to lack any identifiable elements, despite the Commission's comment to that effect. Her delegation did, however, concur with the Commission's criticism of the use of the phrase "without delay" in draft principle III-3; it belonged to the regime of mines, not to that of remnants, and imposed a requirement that went beyond accepted State practice. Similarly, the issue of indigenous peoples' rights, dealt with in draft principle IV-1, went beyond the scope of environmental protection and had no place in the current context.

101. Her delegation also considered it inaccurate and impractical to treat the environment as a whole as a civilian object meriting protection under the rule of distinction during armed conflict. That view, expressed by the Commission in its commentary to draft principle II-1, did not reflect applicable legal standards or the precise definition of what constituted a civilian object. Furthermore, the draft articles failed to define the term "natural environment" and therefore rendered the scope and content of the obligations unclear and open to exploitation.

102. Her delegation welcomed the progress made on the topic "Immunity of State officials from foreign criminal jurisdiction", noting that in the previous year it had produced an additional draft principle on limitations and exceptions. Israel shared the view that there were no clear norms of international law regarding exceptions or limitations to immunity and that there was no trend towards the development of such a norm. Further study of cases where national authorities and courts had accepted claims of immunity of State officials asserted on their behalf by States, including cases involving alleged violations of *jus cogens* norms, would shed light on State practice and

on whether limitations did indeed exist. Further study of State practice regarding new areas in the field of immunity, such as corruption, might also be usefully undertaken in the process of reaching substantive conclusions.

103. Timing was also relevant in that regard, as the question of a State official's immunity from foreign criminal jurisdiction should be considered, both in principle and in practice, at the time of the State's contemplating the exercise of criminal jurisdiction. In recent years, some States, faced with politically motivated applications based on universal jurisdiction, had taken steps to mandate consideration of the issue of immunity at the earliest stage. In order to have a fuller understanding of State practice and identify any possible new trends, further study was required with regard to such early decisions, which were often not made public and would not necessarily be reflected in the case law of national courts. In view of the gaps in the Committee's understanding of State practice, it was premature to ask States to comment on draft article 7, as the issue of immunity must be studied as a whole before conclusions could be reached on limitations and exceptions.

104. On the topic "Provisional application of treaties", she wished to make it clear that the de facto practice of Israel did not generally permit the provisional application of treaties. There were exceptions, however, which included cases where internal requirements for the approval of the treaty were lengthy or where there was an urgent need for the treaty to be applied, and even then such a measure was subject to numerous procedural conditions. Israel did not provisionally apply treaties unless it had previously completed its internal legal procedures necessary for the entry of the treaty into force.

105. **Ms. Krasa** (Cyprus), speaking in exercise of the right of reply in response to the statement by the delegation of Turkey, said that, in accordance with the 1960 Treaty of Establishment, of which Turkey was one of the signatories, as well as relevant Security Council resolutions, the Republic of Cyprus was recognized to all intents and purposes by the international community as the sole legitimate State authority on the island of Cyprus. She referred in that regard to her delegation's statement on chapter IX of the Commission's report (A/71/10) concerning the invalidating effect of *jus cogens* under the Vienna Convention on the Law of Treaties.

106. **Ms. Jacobsson** (Special Rapporteur on the topic "Protection of the environment" in armed conflict) thanked Committee members for their contributions to the debate, both at the current session and in previous years, and all the States that had contributed in writing over the years to the topic "Protection of the environment in relation to armed conflict". Such contributions were crucial for Special Rapporteurs and for the Commission as a whole, whose members studied them and integrated them into their work. She had listened attentively during the current session to the constructive criticism and the suggested amendments put forward and would study them in order to pass on her reflections to the next Special Rapporteur on the topic. She had done what she could to ensure that the new Commission, which was shortly to be elected, could take up the topic directly should it so wish.

The meeting rose at 12.55 p.m.