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Chair: Ms. Kremžar (Vice-Chair). . . . . (Slovenia)

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18-18134 (E)

In the absence of Mr. Biang (Gabon), Ms. Kremžar (Slovenia), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

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

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

2. **Mr. Gumende** (Mozambique) said that the Commission had contributed significantly to the development and codification of international law, carrying out the mandate of the General Assembly set out in Article 13 of the Charter of the United Nations. Although other forums contributed to the development of international law, the Commission's work had proven to be of the greatest relevance to the international community at large. Through its diverse membership and dialogue with Member States, the Commission continued to play an important role in the progressive development and codification of international law and the advancement of the rule of law at the international and national levels. The seventieth anniversary of the establishment of the Commission was a historic occasion for all Member States to review its valuable work and mandate within the United Nations system. The interaction between the Sixth Committee and the Commission had contributed greatly to mutual dialogue on all legal matters concerning the international community. There was room for improvement, however. The time between the publication of the Commission's report and its consideration by the Sixth Committee was insufficient for delegations to examine the complex topics on the Commission's agenda. The gender imbalance within the Commission's membership was another matter of concern.

3. Turning to the topic of peremptory norms of general international law (*jus cogens*), he said that certain fundamental values of the international community were universal and therefore non-negotiable: no derogation from them was permitted, including by way of special agreements. Such norms preceded all others within the international legal order and therefore restricted State sovereign authority. *Jus cogens* norms included principles set out in the Charter of the United Nations such as the prohibition of the use of force between States and the right to self-determination, as well as the prohibition of slavery, racial discrimination, torture and genocide. Although there were different opinions regarding their exact content, sources, means of identification and application, no State or international organization could legally violate them. Several legal instruments contained references to *jus cogens* norms, and the 1969 and 1986 Vienna Conventions on the law of treaties stipulated that a treaty was void if it conflicted with a peremptory norm of general international law. States and international organizations should cooperate to bring to an end any breach of *jus cogens* and should not recognize as lawful a situation created by such a breach, or render aid or assistance in the maintenance of such a situation. Moreover, if States or international organizations violated *jus cogens* norms, they could not invoke any circumstance, including necessity or force majeure, as justification for their wrongful conduct.

4. **Ms. Argüello González** (Nicaragua) said that the topic of provisional application of treaties, contemplated in article 25 of the 1969 Vienna Convention on the Law of Treaties, was an important one in view of its practical utility for energizing negotiations among States. The Special Rapporteur's fifth report (A/CN.4/718 and A/CN.4/718/Add.1) and the third memorandum by the Secretariat reviewing State practice in respect of bilateral and multilateral treaties (A/CN.4/707), were useful sources of information on that topic.

5. In line with her country's Constitution, the approval of the National Assembly was required for an international treaty to have legal effect inside and outside of Nicaragua once the treaty came into force. Such approval was required even for the provisional application of a treaty, as in the case of the provisional application of the 2010 International Cocoa Agreement and the commercial provisions of the Association Agreement between Central America and the European Union. Therefore, although the provisional application of treaties could be of practical value, that aspect needed to be balanced against the need to fulfil the requirements of domestic law with respect to treaties; otherwise, it would be a signal to States that they should disregard their own laws.

6. A treaty that was being provisionally applied did not automatically have the same effect as a treaty that had undergone an internal process of ratification or accession, following which the State became a contracting party with all the legal effects that that implied. That said, the 1969 Vienna Convention contained numerous articles that reflected customary law and, although Nicaragua was not a party to that treaty, it considered in general terms that the provisional application of a treaty was terminated with the entry into force of that treaty; similarly, the provisional application of a treaty with respect to a State would be terminated

when that State gave notice of its intention not to become a party to the treaty. It would also seem logical for the provisional application of any treaty to be compatible with existing law, not only for legal reasons, but also for practical ones, since the provisional application of a treaty was normally prompted by the need or desire to implement the agreement in question without delay, which would not be possible if it was incompatible with domestic law. The Commission should also consider other issues related to provisional application that were covered in the 1969 Vienna Convention, including error, fraud, corruption and coercion.

7. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan), referring to the topic "Protection of the atmosphere", said that his delegation welcomed the Special Rapporteur's approach to dealing with the interrelationship between protection of the atmosphere and other relevant rules of international law and wished to underline the inextricable linkage between protection of the atmosphere and the oceans. In 1982, the United Nations Convention on the Law of the Sea had established the basic framework for dealing with the ocean environment and the duty of States to cooperate to protect and preserve it. Since then, new and serious threats to the oceans had emerged in the form of sea-level rise, increasing acidity, floating plastics and many others. His delegation also welcomed the recognition of the fact that special consideration should be given to persons and groups that were particularly vulnerable to atmospheric pollution and atmospheric degradation. The invocation of the fundamental principle of intergenerational equity which had been recognized in the jurisprudence of the International Court of Justice, namely that the global commons were held in trust for the benefit of future generations, was most pertinent.

8. The purpose of draft guideline 9 (Interrelationship among relevant rules) was to ensure the harmonization and systemic integration of the rules of international law relating to the protection of the atmosphere with other relevant rules of international law. In order for the draft guideline to apply, however, there would need to be pre-existing rules of international law on the protection of the atmosphere, but since there was no generally applicable international treaty in that field at present, the draft guideline lacked the backing of international practice. While it might have some utility for theoretical purposes, it did not offer much practical value. Draft guideline 9 therefore suggested an unworkable solution, which disregarded precisely those rules on the interpretation of treaties to which the second sentence of paragraph 1 explicitly referred. The rules of the 1969 Vienna Convention applied to treaties individually. They did not aim at reconciling, by means of interpretation, an indefinite number of substantively incompatible instruments which might be binding on different groups of parties to treaties. Paragraph 2 addressed the problem of harmonization of legal instruments in a much more realistic manner and represented the only workable element of draft guideline 9.

9. With regard to the topic "Provisional application of treaties", his delegation continued to believe that the Special Rapporteur should study the regime of reservations, invalidity of treaties, termination and suspension arising out of a breach, and cases of succession of States. It was generally agreed that the provisional application of treaties produced legal effects. However, his delegation underlined the importance of qualifying the scope of those legal effects and of differentiating them, where necessary, from those derived from the entry into force of the treaty. The important question was whether the breach of an obligation arising from the provisional application of a treaty entailed the international responsibility of the concerned State. His delegation agreed with the Special Rapporteur that the breach of a norm did not necessarily lead to its abrogation, still less as a sanction on the State that committed the breach. A material breach, in conformity with article 60, paragraph 2, was required. Of course, that assumed a "material breach" of the treaty that was being applied provisionally, in other words, a breach of an essential provision, as referred to in article 60, paragraph 3 (b), since such provisions were directly related to the very roots or bases of the contractual relationship, thereby calling into question the value or possibility of continuing such relationship. In that case, the conditions set out in article 60 would be activated in order to terminate or suspend the provisional application of a treaty. The International Court of Justice had found that only a material breach of the treaty itself, by a State party to that treaty, entitled the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law might justify the taking of certain measures, including countermeasures, by the injured State, but it did not constitute a ground for termination under article 60. Thus, a trivial violation of a provision that was considered essential might constitute a material breach for the purposes of article 60 of the 1969 Vienna Convention.

10. With regard to the expected result of the consideration of the topic by the Commission, his delegation supported the preparation of guidelines, together with the possible formulation of model clauses. That would be subject to the stipulation, first, that the

guidelines should be accompanied by commentaries offering clarification of their content and scope and, second, that any evolving model clauses should be flexible enough so as not to prejudge either the will of the parties involved or the vast repertoire of possibilities that had been observed in practice with respect to the provisional application of treaties.

11. Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), he said that the phrase "as far as possible" should be removed from paragraph 3 of draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)). That change would avoid opening the door for exceptions in the event that a treaty was to be interpreted in a manner inconsistent with or contrary to *jus cogens*. In that regard, it was important to respect the rules of interpretation set forth in the 1969 Vienna Convention and customary international law.

12. To his delegation, draft conclusion 11, paragraph 1, must mean only one thing: a treaty was invalid if, at its conclusion, it was in conflict with a peremptory norm of general international law (*jus cogens*), and no part of the treaty could be severed or separated. Paragraphs 1 and 2 should be re-drafted in order to clarify that there should be no exception to that rule.

13. In paragraph 2 of draft conclusion 20 (Duty to cooperate), it should be explained how a serious breach of *jus cogens* differed from other breaches, and how that distinction added value to the consideration of such a sensitive issue.

14. Draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) conflicted with the established rules regarding the immunities granted to States, Governments, ministers for foreign affairs and senior officials under international law and custom. It also confused the issue of prohibition with that of prosecution. His delegation therefore believed that the draft conclusion should be removed in its entirety.

15. His delegation did not support the idea of preparing an illustrative list of *jus cogens* norms, particularly as it would be very difficult to reach consensus on such a list. Moreover, it might undermine the objectives to be achieved, namely to bring clarity to, and agreement on, the criteria to be applied in identifying peremptory norms. His delegation therefore recommended that a cautious approach should be taken if a decision was made to develop a list of *jus cogens* norms.

16. **Mr. Pirez Pérez** (Cuba), speaking on the topic of protection of the atmosphere, said, with regard to draft guideline 10 (Implementation) that States should take appropriate measures, in exercise of their sovereign powers, to protect the atmosphere, to ensure that environmental impact assessments were undertaken and to cooperate. Such measures should be carried out pursuant to the national constitution and legal system of each State and in accordance with the existing obligations that States already had under international law. With regard to draft guideline 10, paragraph 2, which stated that States should endeavour to give effect to the recommendations contained in the draft guidelines, he noted that the intended meaning of the term "recommendations" should be clarified in the text of the draft guideline, as it could be misunderstood as referring to a separate set of recommendations accompanying the draft guidelines, rather than to those provisions of the draft guidelines that had been formulated using the term "should", as was explained in the commentary. His delegation agreed with the Commission that it would be very complex to address the matter of extraterritorial application of national law by a State as it raised questions with implications for other States and for their relations with each other.

17. As for draft guideline 11, it was a matter of concern that provision of assistance to States had been included in paragraph 2 (a) among the possible facilitative procedures that might be used to achieve compliance, since the wording used could be interpreted as suggesting that assistance was a kind of mechanism for monitoring States that were not complying with their obligations to protect the atmosphere from atmospheric pollution and atmospheric degradation. Meanwhile, in paragraph 2 (b), reference was made to sanctions imposed on non-compliant States, which might include issuing a caution of non-compliance, terminating rights and privileges under the relevant agreements, and using other forms of enforcement measures. The matter should be reviewed, and his delegation would comment on it further, as any compliance mechanism must correspond to the commitments that each State had made under international law. With regard to draft guideline 12, his delegation agreed that disputes should be settled by peaceful means. However, the draft guideline should also contain an express reference to the principle of good faith.

18. Generally speaking, although the Commission's work on the topic of protection of the atmosphere gave only a partial view of environmental issues, it came at an opportune time and could make a vital contribution to the implementation of General Assembly resolution

72/277, entitled “Towards a Global Pact for the Environment”.

19. Turning to the topic of provisional application of treaties, he said that his delegation wished to congratulate the Commission for its adoption on first reading of the entire set of draft guidelines as the draft Guide to Provisional Application of Treaties, incorporating the two new draft guidelines 5 *bis* and 8 *bis* proposed by the Special Rapporteur in his fifth report (A/CN.4/718). The provisional application of a treaty and its entry into force were two separate concepts in the law of treaties. Provisional application was an important tool that enabled States to give immediate effect to all or some provisions of a treaty prior to the completion of all internal and international requirements for its entry into force. That was especially useful when the subject matter entailed a degree of urgency or when the negotiating States or international organizations wanted to build trust in advance of entry into force.

20. With regard to draft guideline 5, the provisional application of a treaty or a part of a treaty always took effect prior to the treaty’s entry into force. Cuba generally commenced provisional application as of the date of signature of a treaty; however, another date could be agreed, so long as it preceded the treaty’s entry into force. As stated in draft guideline 6, from the moment that the provisional application of a treaty was agreed, it produced a legally binding obligation to apply the treaty as if the treaty were in force. Consequently, the breach of an obligation arising under a treaty or a part of a treaty that was provisionally applied entailed international responsibility.

21. Lastly, the draft model clauses proposed by the Special Rapporteur would be useful to States and international organizations in dealing with specific situations and should be included in the draft Guide during the second reading. That said, the model clauses should not become a straitjacket.

22. As for the topic of peremptory norms of general international law (*jus cogens*), in view of its complexity it would be helpful if the Commission could extend the deadline for States to submit information until 28 February 2019.

23. **Archbishop Auza** (Observer for the Holy See) said that the absence of criminal provisions in the domestic laws of States relating to offences prohibited by *jus cogens*, such as crimes against humanity, the crime of apartheid and the crime of aggression, should not be construed as a lack of *opinio juris* in support of a customary duty to exercise national criminal jurisdiction over such offences. Indeed, the lack of national laws providing for the prosecution of crimes against humanity was a matter of utmost concern. Minorities were too often the targets of subjugation, enslavement, forced exile, human trafficking, ethnic cleansing and other crimes against humanity. The Holy See called in the strongest terms for the prevention of such acts, which could not be excused by war or civil strife, and for the prosecution of those who committed them. He also called for the protection of the victims and urged all nations to uphold their duty to protect and support people in vulnerable situations.

24. In line with the 2005 World Summit Outcome document (General Assembly resolution 60/1), each individual State had the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community should assist States with fragile institutions in fulfilling that responsibility and support them in establishing an early warning capability. The international community, through the United Nations, also had the responsibility to protect populations from such crimes whenever a State failed in its responsibility to do so. Early intervention by international actors could prevent atrocities from being committed against civilians. When diplomatic intervention was unable to prevent crimes from being committed, perpetrators must be held accountable. Under the doctrine of *aut dedere aut judicare*, States had an obligation to prosecute crimes against humanity within their borders and to cooperate with each other and with the relevant intergovernmental organizations, which might require the extradition of wrongdoers. Every State must also welcome individuals who were fleeing such crimes. Under the principle of non-refoulement, people must not be returned to places where they would be subjected to crimes against humanity. Refugees and migrants fleeing persecution should be welcomed, protected, helped and integrated. National borders should not dictate the boundaries of humanity.

25. The Holy See encouraged the Commission to continue its efforts to develop a new global convention on preventing and punishing crimes against humanity, with a focus on codifying existing customary law and promoting international judicial cooperation, rather than adding new offences before State practice and *opinio juris* had fully developed, as that would not be conducive to achieving a broad consensus. Such a convention would help the international community to fulfil its obligation to protect populations from crimes against humanity through collective and diplomatic actions.

26. **The Chair** invited the Committee to begin its consideration of chapters IX, X and XI of the report of

the International Law Commission on the work of its seventieth session (A/73/10).

27. **Mr. Valencia-Ospina** (Chair of the International Law Commission), introducing chapters IX, X and XI of the Commission's report on the work of its seventieth session, and referring to chapter IX, on the topic "Protection of the environment in relation to armed conflicts", said that in 2018 the Commission had had before it the first report on the topic by Special Rapporteur Ms. Marja Lehto (A/CN.4/720 and A/CN.4/720/Corr.1). In her report, the Special Rapporteur had addressed the protection of the environment in situations of occupation. She had offered a general introduction to the protection of the environment under the law of occupation and had addressed the complementarity between the law of occupation, international human rights law and international environmental law. She had also proposed three draft principles dealing specifically with protection of the environment in situations of occupation.

28. Draft principle 19 embedded the obligation of the occupying State to protect the environment in the general obligation to take care of the welfare of the occupied territories. Members had supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. It had been suggested that the occupying State had greater latitude to alter environmental legislation than would be permitted under the draft principle as currently worded, particularly to enhance the protection of the population. It had also been suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory.

29. Draft principle 20 had been based on the principle of usufruct as set out in article 55 of the 1907 Hague Regulations and also drew on the principle of sustainable use as its modern equivalent. It provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. Some members of the Commission had expressed support for the use of the term "sustainable use", while others had expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation. It had also been emphasized that an Occupying Power should act for the benefit of the people under occupation, not for its own benefit.

30. With regard to the principle not to cause harm to the environment of another State, the Commission's members had generally expressed support for the inclusion of the no-harm or due diligence principle in draft principle 21. The interim report of the Drafting Committee, which had provisionally adopted draft principles 19, 20 and 21, could be found on the Commission's website. The Commission had taken note of the three draft principles provisionally adopted by the Drafting Committee. The Commission had also provisionally adopted draft principles 4, 6 to 8 and 14 to 18, as well as the commentaries thereto.

31. In draft principle 4, the Commission recognized that States were required to take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 reflected the fact that States had obligations under international law to enhance the protection of the environment in relation to armed conflict, and also addressed the measures that States were obliged to take to that end. Paragraph 2 covered voluntary measures that States might take to further enhance the protection of the environment in relation to armed conflict.

32. In draft principle 6, the Commission recognized that States should, in view of the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognized that where armed conflict had adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures.

33. Draft principle 7 addressed agreements concluded by States amongst themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. Under draft principle 8, the States and international organizations involved in peace operations in relation to armed conflict were required to consider the impact of such operations on the environment and to take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

34. Draft principle 14 served to reflect the greater consideration that was being given to environmental matters in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements. Draft principle 15 served to encourage relevant actors to cooperate in ensuring that environmental assessments and remedial measures could be carried out in post-conflict situations.

35. Draft principle 16 concerned remnants of war in general terms and was aimed at strengthening the protection of the environment in a post-conflict situation

and ensuring that toxic and hazardous remnants of war that were causing or might cause damage to the environment were removed or rendered harmless after an armed conflict. In draft principle 17, the Commission addressed the specific situation of remnants of war at sea, expressly encouraging international cooperation to ensure that such remnants of war did not constitute a danger to the environment.

36. In draft principle 18, the Commission addressed the sharing of and granting of access to information. Paragraph 1 referred to the obligations that States and international organizations might have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict. Paragraph 2 referred to security considerations to which such access might be subject.

37. The Commission would appreciate being provided by States with information, by 31 December 2018, on whether, in their practice, international or domestic environmental law had been interpreted as applicable in relation to international or non-international armed conflict. In particular, the Commission would welcome examples of: (a) treaties, including relevant regional or bilateral treaties; (b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties; and (c) case law in which international or domestic environmental law was applied to disputes in relation to armed conflict. The Commission would also appreciate any information concerning responsibility, liability or reparation for harm caused to the environment in relation to armed conflict, including, inter alia, case law or agreements or arrangements between the parties.

38. Turning to chapter X of the report, on the topic "Succession of States in respect of State responsibility", he said that the Commission had considered the Special Rapporteur's second report (A/CN.4/719), in which he had addressed certain introductory issues, including the legality of succession, the general rules on succession of States in respect of State responsibility, and certain special categories of State succession to the obligations arising from responsibility. The Special Rapporteur had proposed seven draft articles in his second report.

39. Members of the Commission had noted that the scarcity of State practice on succession of States in respect of State responsibility presented significant challenges to the work of the Commission on the topic. Some members had observed that the available State practice was diverse, context-specific and often politically sensitive, and that not many relevant decisions by domestic and international courts and tribunals were available. The Commission had also discussed the possibility of identifying an underlying general rule applicable to the succession of States in respect of State responsibility, according to which State responsibility did not automatically transfer to the successor State, except in certain circumstances. The scope of possible exceptions to such an underlying general rule of non-succession had been the object of considerable debate.

40. The Commission's members had generally expressed their support for draft article 5, which dealt with the issue of legality of succession, providing that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In draft article 6, the Special Rapporteur had set out the general rule applicable to the succession of States in respect of State responsibility, namely the principle of non-succession when it came to the establishment of an internationally wrongful act. With regard to the legal basis of the general rule of non-succession, it had been the view of some members that such a rule derived from the rules on attribution of conduct enshrined in the articles on responsibility of States for internationally wrongful acts, while other members viewed the question of attribution of conduct as distinct from the question of succession to responsibility.

41. In draft articles 7, 8 and 9, which dealt with cases of succession where the predecessor State continued to exist, the Special Rapporteur had addressed respectively the separation of parts of a State, the establishment of a newly independent State and the transfer of part of the territory of a State. The Commission had discussed whether existing State practice supported the exceptions to the non-succession rule included in draft articles 7 and 9. Members had expressed support for draft article 8, although some had questioned the necessity of such a provision.

42. Draft articles 10 and 11 both dealt with situations where the predecessor State had ceased to exist and where the obligations arising from an internationally wrongful act of the predecessor State might pass to the successor State or States. In draft article 10, the Special Rapporteur had addressed the two situations of merger of States and incorporation of a State into another existing State. In draft article 11, he had addressed the dissolution of a State, underlining the role of agreements that should be negotiated in good faith by successor States. In both draft articles, the Special Rapporteur had established the certainty of legal consequences for all internationally wrongful acts, thus preserving the rights

of injured parties. Several members of the Commission had remarked, however, that the Special Rapporteur had espoused a general presumption of succession to responsibility that was inconsistent with the general rule of non-succession in respect to State responsibility and that there was not sufficient State practice in support of such a presumption.

43. The Commission would appreciate being provided by States with information on relevant practice by 31 December 2018, particularly any examples of: (a) treaties, including relevant multilateral and bilateral agreements; (b) domestic law relevant to the topic, including legislation implementing multilateral or bilateral agreements; (c) decisions of domestic, regional and subregional courts and tribunals addressing issues involving the succession of States in respect of State responsibility.

44. With regard to chapter XI of the report, on the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission had considered the Special Rapporteur's sixth report (A/CN.4/722), in which she had summarized the debates in the Commission and the Sixth Committee on draft article 7 (Crimes in respect of which immunity *ratione materiae* does not apply), provisionally adopted by the Commission in 2017, and initiated consideration of the procedural aspects of immunity from foreign criminal jurisdiction. The Special Rapporteur had focused on the timing of the consideration of immunity; the acts of the authorities of the forum State that might be affected by immunity; and the identification of the organ competent to decide whether immunity applied. The report did not include any new draft articles. It was anticipated that the Special Rapporteur would complete the analysis of procedural issues in her seventh report, to be submitted in 2019, in which she would consider: (a) the invocation of immunity; (b) waiver of immunity; and (c) procedural safeguards related to both the State of the official and the foreign official concerned, including safeguards and rights that must be recognized in relation to such an official. When it had concluded its consideration of those issues and the related draft articles, the Commission would complete its first reading of the draft articles on the topic; it expected to do so in 2019.

45. As the Commission had commenced its debate of the sixth report late in the session, it would continue and complete that debate during its seventy-first session. Members had confirmed the continuing importance of the topic for States and had focused their comments on three areas. First, in connection with draft article 7, the Commission's members had commented on the circumstances of its adoption by a vote, and the impact that would have on the Commission's working methods and its future work. Some members had been of the view that the discussion of procedural aspects of immunity provided an opportunity to continue examining the remaining concerns about the draft article, while others doubted the feasibility of addressing those matters through procedural safeguards.

46. Second, members had welcomed the Special Rapporteur's analysis of procedural issues and had indicated that they looked forward to the draft articles that would be presented in the seventh report. It had been generally agreed that the Commission could consider the question of timing and offer valuable guidance on the basis of existing case law and practice. With regard to the acts of the forum States to which immunity applied, the Commission's members had generally agreed that the three categories set out in the Special Rapporteur's sixth report – detention, appearance as a witness and precautionary measures – required examination. With regard to the determination of immunity, some members, without discounting the role to be played by the executive branch, had agreed with the Special Rapporteur that the courts of the forum State should determine whether immunity existed and, if so, whether there were exceptions to such immunity. It had been suggested, however, that the Commission consider the procedural requirement that any exercise of jurisdiction over an official should be subject to a decision of a higher court and not the lowest court.

47. Third, the members who spoke had expressed the view that procedural safeguards and guarantees were crucial to the successful completion of work on the topic. It had been noted that a distinction had to be drawn between safeguards ensuring individual due process and other guarantees under international human rights law, and safeguards that aimed at protecting the stability of international relations and avoiding political and abusive prosecutions. Both aspects required treatment and it had been suggested that, for safeguards to be meaningful, they should not only address the consequences of the denial of immunity of the State official in the forum State generally, but also their consequences in the specific context of draft article 7.

48. The Commission would welcome any information that States could provide by 31 December 2018 on their national legislation and practice, whether of a judicial, administrative or any other nature, concerning procedures for dealing with immunity, in particular the invocation and waiver of immunity. Information on mechanisms for communication, consultation, cooperation and international judicial assistance that States might use in relation to situations in which the immunity of State officials from foreign criminal jurisdiction was being or might be examined by their

national authorities would also be helpful. Similarly, the Commission would find useful any information that international organizations could provide on international cooperation mechanisms which, within their area of competence, might affect the immunity of State officials from foreign criminal jurisdiction.

49. He recalled that, in accordance with established practice, the Commission had suspended its consideration of the topic "Crimes against humanity", having completed the first reading of a full set of draft articles and a preamble on that topic during its sixty-ninth session, to give States an opportunity to review the outcome and to provide in-depth comments ahead of the second reading. Comments from States were greatly valued by the Commission, which examined them very carefully. He encouraged States to submit written comments by 1 December 2018, so that the second reading could take place in 2019.

50. **Ms. Anderberg** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Commission and the new Special Rapporteur were to be commended on the progress made on the topic of protection of the environment in relation to armed conflicts and the decision to build on what had been done previously, culminating in the provisional adoption of draft principles 4, 6 to 8 and 14 to 18 and the commentaries thereto. Doing so had helped the Commission to avoid duplication of work and would facilitate the conclusion of the topic. The Special Rapporteur's wise decision to focus her first report on one aspect of the topic – the protection of the environment in situations of occupation and the complementarity between the law of occupation, international human rights law and international environmental law – had enabled the Commission to move the topic forward.

51. Commenting on draft principles 19, 20 and 21, as provisionally adopted by the Drafting Committee, she welcomed the use of the more generic term "Occupying Power", in place of "occupying State". It should be made clear in the commentaries, however, that the draft principles could be applicable in situations where an international organization temporarily administering a territory under a mandate from the United Nations Security Council might be considered an Occupying Power, as it had many of the same responsibilities. It was regrettable that the Drafting Committee had chosen to omit in draft principle 19 (General obligations of an Occupying Power) the reference to "any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights", as originally proposed by the Special Rapporteur in her first report. The management of maritime areas was important for legal and environmental reasons. Furthermore, inadequate environmental management could endanger the health and well-being of the people dependent on the area. It was not certain that such concern would be addressed by the combination of paragraphs 1 and 2 of draft principle 19 read together, with an explanation in the commentaries. She nevertheless welcomed the Drafting Committee's intention to address human rights elements in the commentaries.

52. The Nordic countries welcomed draft principle 20, the wording of which reflected both the rights and obligations of an Occupying Power under the law of armed conflict and the importance of ensuring sustainable use of natural resources and minimizing environmental harm, and they looked forward to seeing the legal explanations elaborated in the commentaries. With regard to the use of the term "significant harm" in draft principles 19 and 21, the Commission should consider aligning the terminology with other draft principles and its previous work. The Special Rapporteur's well-elaborated reasoning on the concept of due diligence should be reflected in the commentaries.

53. As for future work on the topic, the Nordic countries supported the Special Rapporteur's plan to address in her next report the protection of the environment in non-international armed conflicts and questions concerning responsibility and liability for environmental harm in relation to armed conflict; however, it would be preferable if, rather than including detailed principles of responsibility and liability, she were to refer more generally to existing rules and principles. The Nordic countries hoped that the Special Rapporteur's subsequent report would enable the Commission to complete its first reading in 2019 and to adopt the draft principles on second reading in 2021, as envisaged in the Commission's plan of work for the remainder of the quinquennium.

54. Turning to the topic of succession of States in respect of State responsibility, she said that the seven new draft articles proposed by the Special Rapporteur gave a preview of the intended structure of the project. The Nordic countries were pleased that the Special Rapporteur had taken into account in his second report the comments made by delegations in the Sixth Committee; such transparent and inclusive cooperation between the Commission and the Committee was valuable. The Nordic countries agreed with the Special Rapporteur that the general theory of non-succession should not be replaced by one favouring succession; a more flexible and realistic approach was needed instead.

55. With regard to the parts of the draft articles that had been provisionally adopted by the Drafting Committee, the Nordic countries were pleased that the subsidiary nature of the draft articles had been clearly articulated through the inclusion of the new paragraph 2 in draft article 1, which provided that the draft articles applied in the absence of any different solution agreed upon by the States concerned. There was also some merit in the inclusion in the draft articles of a provision on the legality of succession modelled after the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. With regard to the debate over whether the rationale underlying the two Vienna Conventions applied in the context of the topic at hand, the Nordic countries shared a certain uneasiness as to whether draft article 5 might provide an advantage to unlawful successor States, by "exempting" them from responsibility. It agreed with the Drafting Committee that such concern could be addressed by indicating in the commentaries that issues of State succession might arise in complex situations where the legality of succession was contested and that in such situations the general rules of State responsibility would apply to unlawful successor States. Including illegal situations within the scope of the draft articles would mean that unlawful successor States could benefit from the rights relating to State succession. It came as no surprise that there was a need for thorough debate regarding the Special Rapporteur's proposal for draft article 6, as it was central for defining the relationship of the topic to the articles on responsibility of States for internationally wrongful acts. The draft article as provisionally adopted by the Drafting Committee still needed to be further redrafted, for greater textual clarity, and it was possible that, ultimately, it would not be needed as a logical premise for the subsequent articles. State succession being a rare occurrence, there was limited State practice available. Therefore, the Commission should take a prudent approach and avoid rushing forward in its work on the topic.

56. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, she said that the Nordic countries found the summary of the debates in the Sixth Committee and in the Commission on draft article 7 and the discussion of procedural aspects of immunity contained in the Special Rapporteur's report (A/CN.4/722) to be useful in terms of advancing the Committee's consideration of the topic. It was imperative that the Commission strike a balance between the fight against impunity for serious international crimes within the sphere of national jurisdictions and the need to preserve a legal framework for stability in inter-State relations. Rules pertaining to immunity before international courts played an important role; in particular, article 27 of the Rome Statute of the International Criminal Court provided that official capacity was irrelevant in relation to criminal responsibility under that Statute. It was the unequivocal view of the Nordic countries that rules of immunity should not apply in national jurisdictions in relation to the gravest international crimes. They reiterated their support for draft article 7, as provisionally adopted by the Commission at its sixth-ninth session, and agreed with the inclusion of genocide, crimes against humanity and war crimes in the list of crimes exempted from immunity *ratione materiae*.

57. The Nordic countries supported the Special Rapporteur's intention to analyse the procedural aspects of immunity. A proper consideration of such aspects could provide legal clarity to the forum State and the State of the official and help to ensure that procedural safeguards under international law were respected. The Nordic countries generally supported the Special Rapporteur's approach to the three procedural aspects of immunity covered in the report. On the issue of timing, they agreed that it was not easy to define what was meant by "an early stage". Procedural safeguards would help to avoid the politicization and abuse of the exercise of criminal jurisdiction with respect to foreign officials and must therefore be protected under international law, in particular international human rights law. The Nordic countries appreciated the Commission's clear intention to address that particular issue as part of its consideration of the procedural aspects of immunity. Their delegations supported the Special Rapporteur's future workplan and looked forward to examining the complete set of draft articles pertaining to procedural aspects in her next report. They encouraged the Commission to seek to reach consensus on the most difficult aspects of the topic, as that would create the best possible conditions for its work and for seeking guidance from Member States.

58. **Ms. Kalb** (Austria), referring to the topic of protection of the environment in relation to armed conflicts, said that, in her first report, the Special Rapporteur had addressed a core issue concerning the relationship between international humanitarian law and international environmental law. Her Government agreed with the Special Rapporteur's view that that relationship should be determined using the same approach as that taken in considering the relationship between international humanitarian law and human rights.

59. Referring to the draft principles provisionally adopted by the Drafting Committee, she said that in

draft principle 19, paragraph 1, it was unclear which additional obligations beyond respect for relevant applicable international law could be derived from the duty to take environmental considerations into account. It was her Government's understanding that an Occupying Power was obliged to apply rules of international environmental law binding upon it to the occupied territory as well, unless that effect was excluded by the rule in question.

60. With regard to draft principle 20, her delegation concurred with the view expressed by some Commission members that the exercise of the right to administer and use natural resources in an occupied territory should aim not only to minimize, but also to prevent, environmental harm. However, if the Occupying Power was permitted to use the resources in question, that permission must be understood to have been granted under international law. Therefore, the qualifier phrase "for the benefit of the population and for other lawful purposes" was redundant and should be deleted; a reference to the applicable rules of international law should be included instead.

61. With regard to draft principle 21 on due diligence, her delegation was of the view that it should be brought into line with principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and principle 2 of the 1992 Rio Declaration on Environment and Development. In contrast with those two principles, which were already well established in international law and set no restrictions on the responsibility of States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction, the draft principle, as currently worded, reduced the obligation of an Occupying Power to due diligence.

62. Turning to the topic of succession of States in respect of State responsibility, she said that the examples of State succession given by the Special Rapporteur in his second report were open to different interpretations. With regard to draft article 1, as provisionally adopted by the Drafting Committee, her delegation was of the view that paragraph 2 thereof, which comprised a general clause on the subsidiary nature of the draft articles, was redundant, in the light of the *lex specialis* principle. Instead, the States concerned could be called upon in the draft articles to conclude special agreements aimed at resolving responsibility issues resulting from State succession.

63. Draft article 5, which restricted the applicability of the draft articles to successions of States occurring in conformity with international law, reflected the approach taken in the relevant articles of the 1978 and the 1983 Vienna Conventions on succession of States, and the articles on nationality of natural persons in relation to the succession of States. That approach was acceptable, as it would be difficult, if not impossible, to establish rules for cases of State succession not in conformity with international law, such as the purported annexation of a territory in violation of peremptory norms of international law. It was unclear whether such a situation constituted a case of succession of States at all. What was clear, however, was that States were under an obligation not to recognize such a situation, in line with article 41, paragraph 2, of the articles on State responsibility.

64. With regard to draft article 8 on newly independent States, as proposed by the Special Rapporteur in his second report, her delegation doubted whether there was a need for a separate reference to that category of States. As for draft article 10, paragraph 2, and draft article 11, they had clearly been included to reflect the idea that no unlawful act should remain without responsibility. The Special Rapporteur's solution as set out in those draft articles was not warranted by State practice, however, since most State practice concerned succession to treaties or debts, or explicit acknowledgements of responsibility by the successor State. Consequently, it was doubtful that the proposed draft articles would be acceptable to States. In her delegation's view, the obligations arising from an internationally wrongful act of a predecessor State would be transferred to the successor State only when the successor State acknowledged and adopted the unlawful acts of the predecessor State as its own, in line with article 11 of the articles on State responsibility, or when it was unjustly enriched as a consequence of such an act. It was doubtful, however, whether such transfer of obligations was the consequence of a succession of States; rather, it seemed to be based on other rules of international law.

65. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation appreciated the Special Rapporteur's sixth report. It was, however, regrettable that no new draft articles had been presented by the Special Rapporteur, despite the importance of the topic. With regard to the question of the timing of consideration of immunity, her Government was of the view that immunity did not hamper investigations except as concerned the use of measures of constraint. That view was in line with that of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, according to which the determining factor in assessing whether or not there had been an attack on the immunity of the Head of State lay

in the subjection of the latter to a constraining act of authority. Therefore, as long as investigations were not connected with coercive measures against the person with immunity, they were not violating that person's immunity and were thus not prohibited by international law. As soon as coercive measures were under consideration, however, the forum State and its courts were under an ex officio obligation to take the potential immunity of State officials into account at all stages of the criminal proceedings. At the same time, it was in the interest of defendants and their home States to assist the forum State in the early clarification of potential immunities and to invoke such immunities as early as possible.

66. A suggestion had been made during the Commission's discussion of acts of the forum State that were affected by immunity that the role of the International Criminal Police Organization (INTERPOL) and its practice with respect to its system of red notices required further scrutiny. In accordance with article 80 of that organization's Rules on the Processing of Data, the final decision on measures to be taken in connection with red notices lay with the national authorities, and it was their duty to respect immunity when taking measures of constraint. Therefore, special consideration with regard to the red notices was not warranted. The Special Rapporteur had also proposed analysing in her seventh report the possible impact of cooperation between States and international criminal courts on immunity from foreign criminal jurisdiction. Her delegation did not see a need for the Commission to consider that question, which went beyond the general issues discussed under the topic.

67. **Mr. Luna** (Brazil), referring to the topic of protection of the environment in relation to armed conflicts, said that the law of occupation was an important but extremely complex component of international humanitarian law, as it involved the simultaneous application of various different areas of law. International humanitarian law did not automatically take precedence over international obligations concerning human rights or the environment. Determining the applicable law in situations of occupation required careful analysis of the realities on the ground; it was not simply a matter of applying the principle of *lex specialis*. The Commission should not seek to change international humanitarian or environmental law, or to create new norms. Rather, it should focus on filling gaps in international humanitarian law relating to environmental protection, taking into account recent developments in international law.

68. His delegation agreed with the Special Rapporteur that the Occupying Power had an obligation to respect the legislation of the occupied territory pertaining to the protection of the environment. The principle of permanent sovereignty over national resources was key to the issue. The Occupying Power should act not for its own benefit but rather for the benefit of the people under occupation.

69. The draft principles should take into account the considerable differences that still existed between international and non-international armed conflicts, in particular in terms of the applicable law.

70. Referring to the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session, he said that his delegation had been surprised to see that the commentary to draft principle 4 (Measures to enhance the protection of the environment) referred to a number of somewhat outdated documents, such as the Stockholm Declaration, but made little mention of key texts such as the Rio Declaration on Environment and Development, the Plan of Implementation of the World Summit on Sustainable Development and the outcome document of the United Nations Conference on Sustainable Development (Rio+20), entitled "The future we want". In its future work on the topic, the Commission should take into account the core principles that had guided discussions on sustainable development, as reflected in those more recent documents.

71. With regard to draft principle 8, the term "peace operations" might cause confusion, as it could be understood to refer to a wide range of activities, from duly authorized United Nations peacekeeping operations to actions of dubious legality. While international humanitarian law was applicable regardless of the causes or legality of an armed conflict, the specific norms applicable might vary depending on the nature of the operation in question. The terminology used in the draft principles and the commentaries thereto should reflect the Commission's understanding, as expressed in the commentary to draft principle 8, that not all peace operations had a direct link to armed conflict. The Commission should, for example, adhere to agreed language by referring to the "carbon footprint" of operations, in line with the terminology used by the Special Committee on Peacekeeping Operations, rather than introducing new terms such as "environmental impact". The evaluations that would be required to assess the impact of a peace operation on the environment were not the same as those that would be necessary to determine its carbon footprint. Furthermore, draft principle 8 might lead to greater fragmentation of international law, as it concerned the

mandates of peacekeeping operations, which were set by other organs of the United Nations. The Commission should not prejudge issues that were being considered in more appropriate forums.

72. **Mr. Radomski** (Poland), referring to the topic "Succession of States in respect of State responsibility", said that the scarcity of relevant State practice made the Commission's work on the topic particularly challenging. There might well be a need to shed more light on the relationship between succession and responsibility; however, the very limited support for treaties relating to succession was an indication that the elaboration of draft articles might not be the most effective way for the Commission to influence future practice. The Commission should therefore consider giving the outcome of its work a different form, such as summary conclusions.

73. With regard to the draft principles on protection of the environment in relation to armed conflicts provisionally adopted by the Drafting Committee, his delegation fully endorsed the statement in draft principle 19 that the Occupying Power must respect and protect the environment of the occupied territory. It also supported incorporating the principle of not causing harm to the environment of another State into the obligations of the Occupying Power.

74. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that immunity should be considered during the whole criminal procedure, covering the actions of the organs of the forum State before and during the trial. That was the approach taken in his country's Code of Criminal Procedure, according to which criminal proceedings should not be instituted or, if previously instituted, should be discontinued, when the perpetrator was not subject to the jurisdiction of the Polish criminal courts. With regard to the debate concerning the definition of "criminal jurisdiction", his delegation considered that there was no need to define the term for the purposes of the draft articles. However, it would be crucial to reach a common understanding on draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). In that regard, the procedure described in paragraph 324 of the Commission's report would be a good starting point for balancing the need to combat impunity for the most serious international crimes with respect for the principle of sovereign equality.

75. **Ms. Argüello González** (Nicaragua), addressing the topic of immunity of State officials from foreign criminal jurisdiction, said that the Commission's provisional adoption of draft article 7 (Crimes in respect of which immunity *ratione materiae* does not apply) had intensified the debate on the importance of the procedural aspects that would govern the application of that draft article. It was essential to deal properly with the question of procedural aspects of immunity in order to ensure that the necessary procedural safeguards were in place to minimize attempts to politicize and abuse the exercise of criminal jurisdiction in respect of foreign officials, which were sure to occur in the future. Her delegation therefore considered that all decisions on substantive elements of the topic should be taken alongside the decisions on the related procedural elements.

76. Her delegation wished to draw attention to the fact that the crime of aggression had not been included in the list of crimes in draft article 7. The reasons given for excluding the worst crime that could be perpetrated against a people did not provide a sound legal basis for that decision, and no attempt had been made to argue that the crime of aggression was any less an international crime than the crimes that were on the list. In that connection, the Commission should bear in mind that the judgment of the International Court of Justice, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, was based on customary law, under which aggression was a crime.

77. In general, Nicaragua complied with the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and any other relevant international instruments to which it was a party. Her delegation would provide the Commission with more detailed comments on its national practice with regard to procedures for dealing with immunity at a later date. It reserved its final position on the matters under consideration.

78. **Mr. Svetličič** (Slovenia) said that his delegation was pleased that the Special Rapporteur for the topic of succession of States in respect of State responsibility had taken up the suggestion by Member States to include examples of State succession from outside Europe in his second report. His delegation also welcomed the Special Rapporteur's approach in distinguishing different types of succession in his examination of the legal consequences of internationally wrongful acts. The various legal consequences, such as reparation, compensation and guarantees of non-recurrence, should be analysed separately, where possible.

79. Slovenia had noted with particular interest the section of the Special Rapporteur's report concerning

the applicability of rules of State responsibility, in particular with regard to the attribution of an internationally wrongful act, in cases of succession where the predecessor State continued to exist. In such cases, one of the successor States (the "continuator") continued the legal personality of the predecessor State and was therefore, in legal terms, the same State. As noted by the Special Rapporteur, a general rule of non-succession in respect of State responsibility applied to the continuing State in such cases, but exceptions to that rule were possible. In that connection, his delegation concurred with the Special Rapporteur's view that the rationale behind the rules on the responsibility of an insurrectional or other movement was applicable in the context of the draft articles. The applicability of those rules had been confirmed by European Court of Human Rights and the European Commission for Democracy through Law. His delegation also supported further research into exceptions to the general rule of non-succession, as appropriate, which should also take into account other relevant rules, such as those concerning wrongful acts of a continuing character.

80. **Mr. Horna** (Peru), speaking on the topic of protection of the environment in relation to armed conflicts, said that his delegation appreciated the progress made by the new Special Rapporteur and noted with interest the draft principles provisionally adopted by the Commission to date.

81. With regard to the topic of succession of States in respect of State responsibility, his delegation noted the Special Rapporteur's analysis of situations of succession of States on the basis of the relevant rules and principles of international law and the Commission's articles on responsibility of States for internationally wrongful acts, which, in his delegation's opinion, mostly reflected customary international law. It would likely be appropriate for the outcome of the Commission's work to take the form of conclusions; however, his delegation reserved its final position on that matter.

82. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he said that his delegation appreciated the progress made by the Special Rapporteur in her sixth report and hoped that the Commission would be in a position to adopt the entire set of draft articles on first reading at its seventy-first session.

83. Cooperation and dialogue between the Commission and the Sixth Committee had been key to the success of the Commission's work over the past 70 years. The interaction between the two bodies should reflect their distinct roles. A number of practical steps could be taken to improve that dialogue. First, the Committee could select topics for the programme of work, rather than simply endorsing topics chosen by the Commission. Second, the Committee could improve the guidance it provided to the Commission on how to change its methods of work in order to produce results more quickly. Third, the Chair of the Commission and the Chair of the Committee could hold an informal meeting at the beginning of each session of the General Assembly to discuss the topics that would be put to the Committee for its consideration. Fourth, there should be more informal discussions, including not only the Commission and Member States but also academics. Lastly, the Commission should consider holding part of its session in New York every five years, taking due account of article 12 of its Statute.

84. **Mr. Nakayama** (Japan), speaking on the topic of protection of the environment in relation to armed conflicts, said that his delegation welcomed the new Special Rapporteur's first report and appreciated the careful consideration given by the Commission to the complementarity between the law of occupation, international human rights law and international environmental law. Referring to the draft articles provisionally adopted by the Drafting Committee at the Commission's seventieth session, he said that draft principles 19 (General obligations of an Occupying Power) and 21 (Due diligence) used different terms – "take appropriate measures" and "exercise due diligence", respectively – in a similar context, which could create confusion. In that connection, it was worth noting that the phrase "take all appropriate measures" occurred a number of times in the articles on the law of transboundary aquifers, but "exercise due diligence" did not appear in that text at all. The Commission should carefully consider its choice of terminology and explain the difference between those two terms in the commentaries to the draft articles, making reference to its work on the law of transboundary aquifers and other relevant topics.

85. Turning to the topic of succession of States in respect of State responsibility, he said that while limited State practice made consideration of the topic challenging, the outcome of the Commission's work could be very beneficial if it filled gaps in the law on succession of States. The Commission should collect and analyse a wide range of State practice from the principal legal systems of the world to inform its work.

86. Referring to the draft articles provisionally adopted by the Drafting Committee, he said that Japan welcomed the statement in draft article 5 that the draft articles applied only to the effects of a succession of

States occurring in conformity with international law, which was in line with the two Vienna Conventions on succession of States. His delegation also appreciated draft article 6, according to which a succession of States had no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession. The general rule of non-succession of State responsibility seemed to be widely accepted by the members of the Commission and stipulating that rule would be meaningful in order to clarify the legal basis of the topic. The Commission should continue to take a cautious approach to the topic, giving due consideration to its earlier relevant work on other topics and taking into account the scarcity of State practice.

87. As for the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation reiterated the importance of striking a proper balance between State sovereignty and the fight against impunity. The Commission's work on the procedural aspects of immunity could help achieve that balance. However, it was not yet clear how procedural arrangements would mitigate the risk of exceptions to immunity being abused. It was important to seek practical measures that would prevent such abuse by law enforcement authorities and ensure that the stability of international relations was not undermined. His delegation also noted that the amount of State practice gathered thus far was insufficient. Additional practice should be collected from a variety of regions and analysed with due consideration to the relevant domestic legal system. In its future work on the topic, the Commission should consider draft article 7 in the light of the discussions on the procedural aspects of immunity. It was unfortunate that the Commission had not been able to reach a consensus on the draft article prior to its provisional adoption at the sixty-ninth session. His delegation hoped that the Commission would ultimately be able to adopt all of the draft articles, including draft article 7, by consensus.

88. **Mr. Colaço Pinto Machado** (Portugal), speaking on the topic of protection of the environment in relation to armed conflicts, and expressing appreciation to the Special Rapporteur for her concise and focused report, said that, as confirmed by the discussions on the topic, armed conflict was not exclusively governed by the norms and principles of international humanitarian law. Since the environmental impact of hostilities and other acts related to armed conflict could compromise the full enjoyment of human rights in affected areas for current and future generations, it was important to take into consideration international human rights law, the law of the sea and environmental law when considering the rights and duties of combatant, non-combatant and neutral States in the affected region. Occupation was supposed to be a temporary situation, but even the shortest inappropriate administration of a foreign territory could result in profound and potentially irreversible damage to ecosystems. Natural resources, landscapes, and the health of humans, animals and plants could be jeopardized by policies put in place without a thorough assessment of the environmental effects that they would have on soil, water, the atmosphere and living organisms, which could have an impact on the lives and livelihoods of entire populations long after the occupation and conflict had come to an end. In short, the principles of discrimination and neutrality were violated when the Occupying Power failed to preserve or use in a sustainable manner the natural resources of the occupied territory.

89. The current legal framework for the protection of the environment in situations of armed conflict had been developed at a time when the knowledge of the environmental impact of armed conflict and the technology available had been very different. Moreover, it did not include specific rules for situations of occupation and thus placed a huge burden on military commanders to interpret the law, which was often unfeasible in the context of belligerent occupation, when swift responses were often required. Nevertheless, any environmental change might have consequences for the exercise of human rights as basic as the right to life, food and safe water. As was made clear in draft principles 19 to 21, the Occupying Power therefore had positive and negative obligations related to the management of the occupied territory and its resources under international law. It must administer the territory in a manner that took into account the essential link between a sustainable environment and the full enjoyment of human rights by the population under its control. The present and future development of occupied areas depended on the sustainable management of its resources by the Occupying Power.

90. The protection of the environment by the Occupying Power was not only for the benefit of the occupied territory and its population, but was in the interest of all humankind, since the environment was a common good of humankind. Draft principle 19 as provisionally adopted by the Drafting Committee emphasized the obligation of the Occupying Power to respect and protect the environment of the occupied territory. That obligation, which derived from customary and conventional law, took into account transnational environmental concerns and universal interests.

91. His delegation looked forward to the analysis of the protection of the environment in non-international armed conflicts in the Special Rapporteur's next report. Given that most conflicts were not international, it would be particularly useful to have a set of draft principles on complex issues related to the responsibility and liability of non-State actors for environmental harm.

92. Turning to the topic "Succession of States in respect of State responsibility", he said that the information currently available was not sufficient to establish the existence of a general rule of non-succession of State responsibility. It was his delegation's view that such an understanding was reflected in the text of draft articles 6 to 11, as proposed by the Special Rapporteur in his second report. The exceptions to the general rule set out in draft article 6 and the specific rules governing the different cases of succession of States covered the majority of known cases of succession, thereby nullifying the content of the general rule. Furthermore, experience showed that States tended to resolve issues concerning responsibility through negotiation, which suggested that there was little need for predetermined rules on the matter. His delegation therefore welcomed the Drafting Committee's addition of a second paragraph to article 1 (Scope) to highlight the subsidiary nature of the draft articles. It also supported the Drafting Committee's changes to draft article 6, which had transformed it from an affirmation of a general rule to a provision on the attribution of responsibility.

93. If would be helpful for the Commission to explain, in the commentaries to the draft articles, the scope and meaning of the expressions "particular circumstances" and "direct link", which appeared in draft articles 7 to 9 as proposed by the Special Rapporteur.

94. His delegation did not object to changing the title of the topic. However, the word "problems" in the proposed new title, "State responsibility problems in cases of succession of States", should be changed, since it had negative connotations. It should be substituted for a more neutral term, such as "aspects" or "dimensions". It was premature to discuss the final form that the work on the topic should take; his delegation preferred to remain open to considering different possibilities for the time being.

95. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", Portugal would reserve its position on the procedural aspects of immunity until a complete set of draft articles on the question was available. His delegation supported the approach to the issue proposed by the Special Rapporteur. Work on procedural aspects was essential to making the immunity framework operational and balancing the need to protect the rights of victims with the need to prevent politically motivated proceedings and the abuse of jurisdiction. In his delegation's view, therefore, the development of procedural safeguards must not result in an undesirable strengthening of the immunity of high-level officials.

96. His delegation welcomed the Commission's provisional adoption of draft article 7. However, the list of crimes in respect of which immunity *ratione materiae* did not apply should be amended to include the crime of aggression.

97. The Commission must take a clear, restrictive and value-oriented approach to its work on such a complex and politically challenging topic. It should aim to balance appropriately State sovereignty, the rights of individuals and the need to prevent impunity. Immunity should not prevent the prosecution of any persons who committed atrocities such as genocide, crimes against humanity, war crimes or the crime of aggression, even if they were Heads of State, Heads of Government and Ministers for Foreign Affairs; the perpetration of those crimes involved a level of non-compliance with international law that could not be tolerated under any circumstances. The debate concerning the immunity of State officials taking place within and outside the Commission was part of a broader debate on the core principles that should form the basis for international social relations and their normative structure in the twenty-first century. In that regard, Portugal was convinced that immunity must not exist as a privilege that undermined individual rights and public order. His delegation encouraged the Commission to conclude its consideration of the crucial issue of procedural aspects and procedural safeguards and to adopt the draft articles on first reading at its next session.

98. **Ms. Hořňáčková** (Czechia), noting that her full statement would be made available on the PaperSmart portal, said that her delegation continued to have doubts about the outcome of the work on the topic "Protection of the environment in relation to armed conflicts". It was still not clear what direction the Commission intended to take, and it was difficult for States to comment on the draft principles without knowing whether they were intended to reflect the current state of international law, provide guidance not firmly grounded in positive law, or both. Furthermore, no definite criteria had been identified for differentiating between the rules on the protection of the environment in relation to armed conflicts and other rules of the law of armed conflict, and it was unclear whether rules concerning the protection of the environment could be taken out of the

context of other rules applicable to armed conflicts without undergoing a change in meaning.

99. Her delegation also had concerns about the Commission's approach in selecting rules from various areas of international law and discussing them in connection with armed conflicts. Some of those rules might already be universally applicable, and discussing them in the specific context of armed conflicts could create the false impression that they did not apply in all situations. Conversely, not all rules relating to the protection of the environment were automatically applicable in the context of armed conflict.

100. Turning to the topic of succession of States in respect of State responsibility and the draft articles proposed by the Special Rapporteur in his second report, she said that with regard to draft article 5 (Cases of succession of States covered by the present draft articles), it was important for the Commission to follow the approach it had taken in relation to other topics concerning succession of States by focusing on the effects of succession occurring in conformity with international law. The reasons for taking that approach had been made clear in the commentaries to the draft articles that had eventually become article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties, article 3 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and article 3 of the articles on nationality of natural persons in relation to the succession of States.

101. Her delegation supported the content of draft article 6 (No effect upon attribution) as provisionally adopted by the Drafting Committee, which was an amended version of paragraph 1 of draft article 6 (General rule) as proposed by the Special Rapporteur. The provision was phrased in very general terms, which meant that, though it primarily covered the attribution of wrongful acts of a predecessor State, it also had to be understood to cover the attribution of wrongful acts of a State which later became a successor State. It was applicable whether or not the predecessor State continued to exist after the succession, and was thus a logical and necessary prelude to paragraph 4 of the draft article as proposed by the Special Rapporteur. Together, those two paragraphs highlighted the contrast between the attribution per se of an internationally wrongful act, which always remained with the perpetrator of the act, and the invocation of secondary rights and secondary obligations stemming from that act, which could potentially involve the successor State or States.

102. Her delegation did not consider the saving clause contained in paragraph 3 of draft article 6 as proposed by the Special Rapporteur to be necessary. An internationally wrongful act of a predecessor State that the successor State subsequently acknowledged and adopted as its own must be considered an act of the successor State and was thus directly attributable to the successor State under article 11 of the articles on responsibility of States for internationally wrongful acts. The relationship between the predecessor State and the successor State was irrelevant in that situation. The issue therefore did not fall under the scope of the current topic, which should address only secondary obligations and secondary rights resulting from an internationally wrongful act of the predecessor State that was not directly attributable to the successor State. Furthermore, the issue of continuing wrongful acts should not be invoked in draft article 6, paragraph 3. That question concerned the extension in time of a breach of an international obligation, which was covered in article 14 of the articles on State responsibility, and must not be confused with the situation addressed in article 11 of those articles.

103. Paragraph 4 of draft article 6 as proposed by the Special Rapporteur was important, as it expressed the underlying philosophy of the draft articles while also indicating that nuances to the general rule would be set out in the provisions to follow. Those provisions should address specific forms of reparation, such as restitution, compensation and satisfaction, rather than simply dealing with the issue of "responsibility" in general terms.

104. As for the topic "Immunity of State officials from foreign criminal jurisdiction", the consideration of the procedural aspects of immunity should be based on a functional, empirical and practical approach. The analysis should be grounded in State practice, treaties on international judicial cooperation and mutual legal assistance in criminal matters, and the case law of international courts. To ensure consistency and harmony in its work, the Commission should bear in mind that the issue of procedural aspects of immunity was related to some of its former, current and potential future work, including on the topics "Obligation to extradite or prosecute (*aut dedere aut judicare*)", "Crimes against humanity" and "Universal criminal jurisdiction".

105. The debate within the Commission had revealed the importance of addressing immunity issues at an early stage of the proceedings, before restrictive measures were taken that would hinder the official in the performance of his or her duties. However, the Commission also appeared to consider that the determination of immunity depended on the specific situation and the type of immunity concerned. Those issues should be further analysed, on the basis on

existing law and practice. It would also be useful to attempt to clarify the relationship between procedural invocation of immunity *ratione materiae* by the State of the official, waiver of such immunity by that State and the consequences thereof, including the consequences for the civil liability and international responsibility of that State. Case law indicated that when the State of the official acknowledged that the official had acted in the exercise of official functions, that State assumed responsibility under international law and civil liability under the national law of the other State for the official acts in question. When that happened, immunity *ratione materiae* became applicable.

106. Given the limited time available for the consideration of the issue of the procedural aspects of immunity, and its connection to several other topics, the Commission should limit its current analysis to the procedural issues most pertinent to the immunity of State officials. It should leave aside matters such as the application and possible limitations of prosecutorial discretion, which was a general issue of criminal procedure, belonged to the domain of national law and was not directly connected with the legal consideration of the immunity of State officials from foreign criminal jurisdiction.

107. **Mr. Nagy** (Slovakia), referring first to the topic "Protection of the environment in relation to armed conflicts", said that the significant harm often done to national resources and the environment in the context of armed conflict could have long-term and irreparable consequences. As the means of warfare become more advanced, armed conflicts could have new and more devastating effects on the environment. His delegation took the view that the efforts of the international community in that regard should be primarily concentrated on the effective implementation of existing international humanitarian law instruments. However, it also recognized that the legal regime for protecting the environment and natural resources from unjustified damage had not yet been comprehensively considered. The Commission's future work on the topic should focus on the identification of areas where there was a need to fill lacunae in the framework for the protection of the environment in relation to armed conflicts. In that connection, his delegation welcomed the Special Rapporteur's intention to examine in greater depth aspects of the topic concerning non-international armed conflicts.

108. The Commission's work on the important topic of succession of States in respect of State responsibility could help to clarify the rules that governed the legal consequences of internationally wrongful acts that predated succession, namely rights and obligations relating to reparation. The complexity of the topic warranted a cautious approach by the Commission.

109. Referring to the draft articles provisionally adopted by the Drafting Committee, he said that his delegation did not disagree with the content of the new paragraph 2 of draft article 1, which restated the *lex specialis* rule in an effort to highlight the subsidiary nature of the draft articles. However, that paragraph did not fully address the question of the relevance or predominance of treaty provisions in relation to the draft articles. Internationally wrongful acts included not just breaches of international obligations deriving from customary international law but also breaches of treaty obligations, and the treaty in question might contain provisions on responsibility in the event of breach. If such a treaty remained in force pursuant to the rules governing succession of States in respect of treaties, its provisions on responsibility would potentially be applicable. In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, Slovakia had been a successor State of the former Czechoslovakia in respect of a treaty on a joint barrage project with Hungary, and that treaty had contained provisions on the responsibility of the parties in the event of a breach of their treaty obligations. Draft article 1 should be amended to address the relevance of such treaty provisions.

110. His delegation supported draft article 5, in part because of the need to maintain consistency with the way in which the same subject matter had been addressed in the 1978 and 1983 Vienna Conventions on succession of States and the articles on nationality of natural persons in relation to the succession of States.

111. In its future work on the topic, the Commission should remain focused on the identification of ways to assist States in handling the unresolved consequences of internationally wrongful acts predating State succession. The Commission should not attempt to resolve the divergence of views on the concept of devolution of secondary rights and secondary obligations from the predecessor State to the successor State. Referring to the draft articles proposed by the Special Rapporteur, he said that the soft language used in draft article 6, paragraph 4, to provide that the injured State "may" claim reparation from the successor State, was entirely appropriate. His delegation encouraged the Commission to use that same language in draft articles 7 to 12, which currently contained more rigid formulations that could lead to unnecessary doctrinal clashes. For example, the references to the transfer, passing and assumption of secondary rights and obligations presupposed the existence of a legal basis for such automatic devolution.

112. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, it was regrettable that no new draft articles had been provisionally adopted at the Commission's seventieth session. The lack of progress was surprising, given that the topic had been in the Commission's programme of work since 2007 and the Special Rapporteur had now submitted six reports. While the topic was certainly sensitive and complex, and its outcome would have a significant practical impact, it should be possible to find an appropriate balance between State sovereignty and the fight against impunity by giving due regard to State practice. His delegation hoped that the Commission would be in a position to complete the first reading of a complete set of draft articles on the procedural aspects of immunity at its next session.

113. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan), speaking on the topic of immunity of State officials from foreign criminal jurisdiction, said that procedural aspects of immunity played an important part in ensuring respect for immunity, preserving the stability of international relations and upholding the sovereign equality of States. While the Special Rapporteur had not completed her consideration of procedural issues or tackled their interrelationship with substantive issues in her sixth report (A/CN.4/722), it nevertheless represented an important step forward.

114. His delegation agreed with the decision to limit the scope of the draft articles to immunity from foreign criminal jurisdiction. Immunity granted under domestic law and immunity granted under international law did not necessarily have the same nature, function and purpose, nor were they designed to protect the same values and principles. Therefore, the "foreign" proviso, which ultimately led to the principle of the sovereign equality of States and the need for the continued maintenance of sustainable and peaceful international relations, was sufficient to justify the Commission's consideration of the topic of immunity from criminal jurisdiction. Moreover, granting immunity from foreign criminal jurisdiction to certain State officials or representatives did not automatically imply granting them immunity from domestic jurisdiction; in fact, as noted by the International Court of Justice, the exercise of criminal jurisdiction by the domestic courts of the State of the official was one way of ensuring that the procedural instrument of immunity was not automatically interpreted as an instrument that relieved that person of all substantive criminal responsibility.

115. The distinction between immunity *ratione personae* and immunity *ratione materiae* was broadly accepted. The two types of immunity had both significant elements in common and elements that clearly differentiated them from one another. The former included their basis and purpose, which was simply to ensure respect for the principle of the sovereign equality of States, prevent interference in their internal affairs and facilitate the maintenance of stable international relations by ensuring that the officials and representatives of States could carry out their functions without external difficulties or impediments. Consideration of immunity from criminal jurisdiction must necessarily take a functional point of view or approach since the protection afforded to persons who enjoyed immunity was ultimately granted to them by virtue of the functions or tasks that each of them performed within his or her hierarchical official relationship with the State. Those tasks were necessarily different depending on the status of the various categories of protected persons; that would result in different manifestations of the functional nature of immunity and, consequently, in the establishment of a different legal regime for each of the aforementioned types of immunity from foreign criminal jurisdiction. Ultimately, the fact remained that persons such as Heads of State could not be prosecuted by foreign courts under any circumstances; in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the International Court of Justice had held that Heads of State and Ministers for Foreign Affairs enjoyed absolute immunity from arrest or prosecution by foreign courts so long as they remained in office.

116. His delegation noted that the Commission had decided to confine the application of immunity *ratione personae* to the troika of Head of State, Head of Government and Minister for Foreign Affairs. It would have been preferable, as suggested by numerous delegations, for the Commission to consider the extension of immunity *ratione personae* to high officials beyond the troika, in recognition of the reality of today's world.

117. His delegation agreed with the points made in paragraph 2 of draft article 6 (The temporal scope of immunity *ratione personae*) as proposed in the second report of the Special Rapporteur (A/CN.4/661), which stated that the expiration of immunity *ratione personae* was without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs might, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office. It could not, however, support paragraph 1 of draft article 7 (Crimes in respect of which immunity *ratione materiae* does not apply) as provisionally adopted by the Commission, which stated that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction should not apply in relation to certain

crimes. That provision conflicted with the remainder of the draft articles and was inconsistent with the very concept of immunity, unless it was understood to mean that the concerned officials should be prosecuted at the domestic level in their own State.

118. Article 27, paragraph 1, of the Rome Statute of the International Criminal Court provided that immunity or official capacity could not exempt a person from criminal responsibility under the Statute. States that became parties to the Statute were assumed to have waived such immunity. However, the dominant view was that even the Security Council, acting under article 13 (b) of the Statute, could not oblige a State to waive its rights in that regard. Any argument to the contrary would be spurious and wilfully politicized.

119. More detailed comments reflecting his delegation's position on the topic could be found in his written statement, available on the Committee's PaperSmart portal.

The meeting rose at 6 p.m.