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Chair: Mr. Gafoor . . . . . (Singapore)

Contents

17-18942 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 175: Observer status for the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean in the General Assembly (A/72/232)

1. **The Chair** said that the General Committee had met on Monday, 23 October 2017, and had decided to allocate a further agenda item to the Sixth Committee for consideration at the current session, entitled "Observer status for the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean in the General Assembly" (agenda item 175). He drew the Committee's attention to document A/72/232, containing the request of the Plurinational State of Bolivia for the inclusion of the new agenda item, as well as an explanatory memorandum.

2. Following consultation with the Bureau, he recommended that the Committee should hold the debate on the new agenda item at the plenary scheduled for Friday, 3 November 2017, after it had received the reports of the Working Group. He took it that the Committee wished to amend its programme of work as proposed.

3. *It was so decided*.

Agenda item 81: Report of the International Law Commission on the work of its sixty-ninth session (*continued*) (A/72/10)

4. **The Chair** invited the Committee to continue its consideration of chapters I to V and XI of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

5. **Mr. Gumende** (Mozambique) said that Mozambique welcomed the Commission's extensive work on the topic of crimes against humanity, which were among the most serious crimes of concern to the international community as a whole. The international community must do its utmost to prevent them from occurring and to guarantee that the perpetrators did not go unpunished, whoever they might be, whether State or non-State actors. The effective prosecution of such crimes must be ensured by all, through measures at the national and international levels and through better international cooperation, including in respect of extradition and mutual legal assistance. It was the duty of every State to exercise its criminal jurisdiction with regard to crimes against humanity. The Commission's work on the topic was an opportunity to mobilize the political commitment of all States in order to apply effective legislative, administrative and judicial measures to eradicate such crimes.

6. It was his delegation's expectation that the final outcome of the Commission's work would be enriched by the contributions of Member States and would take the form of a convention.

7. **Mr. Chakarov** (Bulgaria), referring to the topic "Crimes against humanity", said that his delegation commended the Drafting Committee for addressing situations around the world involving both State and non-State actors and concerning systematic attacks on the civilian population. It welcomed in particular the focus on victims and other affected persons. All States should criminalize crimes against humanity in their internal legislation. The incorporation of that obligation into a multilateral treaty would be an important step forward in dealing with those atrocities and ending impunity worldwide.

8. Referring to the draft articles on the topic adopted by the Commission on first reading, he said that Bulgaria welcomed the non-exhaustive list of offences included therein that were to be recognized as crimes against humanity. Such a list would dispel any misconceptions as to the constituent elements of such crimes and would address the need for a unified approach in defining them. The draft articles filled the gaps in the current international criminal system. Bulgaria urged all States to consider the topic in more detail, bearing in mind that it had been on the long-term programme of work for quite some time.

9. His delegation endorsed the draft guidelines on provisional application of treaties, which consolidated varied contemporary State practice and were consistent with the relevant provisions of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Additional clarification was needed due to the specific nature of provisional application, which took effect before the treaty itself came into force. There was considerable misunderstanding on the subject among practitioners, which meant that the Commission's current and future work was especially relevant.

10. His delegation hoped that the Commission would also consider the memorandum prepared by the Secretariat on State practice in respect of treaties (bilateral and multilateral), deposited or registered in the past 20 years with the Secretary-General (A/CN.4/707), which provided for provisional application, including treaty actions related thereto. His delegation encouraged the Commission to continue its consideration of the topic and hoped that States could draw inspiration from the draft guidelines in their work.

11. **Ms. Muhammad Fuad** (Malaysia), referring to the topic "Provisional application of treaties", said that her delegation commended the Special Rapporteur for his efforts to identify scenarios in which the provisional application of treaties might apply. Those scenarios should be regarded with caution when attempting to illuminate the question of the legal effects of the provisional application of treaties, the relationship between provisional application and other provisions of the Vienna Convention on the Law of Treaties of 1969, and the provisional application of treaties with regard to the practice of international organizations.

12. A number of questions on certain parts of the draft guidelines provisionally adopted so far by the Commission still needed to be addressed. The draft guidelines must provide a clear understanding and interpretation and take into account the practice of States in their internal laws. Her delegation reiterated its comments on the draft guidelines submitted at previous sessions, in particular at the seventy-first session of the General Assembly, and pointed out in that connection that the country's domestic law did not include any express provision that prohibited or allowed for the provisional application of treaties. Malaysia had always introduced appropriate domestic legislation before it ratified any treaty.

13. Draft guideline 10, dealing with the effects of provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties, followed closely the formulation of article 46 of the 1969 Vienna Convention, relating to the competence of States and international organizations to conclude treaties vis-à-vis the provisions of the internal law of States. In that connection, and as the Commission noted in paragraph (2) of its commentary, the draft guideline should be considered together with article 46 and other rules of international law.

14. In her country's experience and practice, the signing of a treaty did not necessarily create a legal obligation when the treaty further required ratification, accession, approval or acceptance, unless the treaty provided otherwise. Each State must ensure that the manifestation of its consent to apply a treaty provisionally was compatible with its internal law. If a State was to adhere to a basic criterion of legal certainty, such determination needed to be made beforehand, and not at a later stage. In any case, Malaysia would only consider becoming a party to an international treaty once its domestic legal framework was in place.

15. In relation to draft guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), it should be noted that while according to draft guideline 9, the internal law of a State or the internal rules of an international organization could not be invoked as justification for failure to perform international obligations arising from provisional application, draft guideline 11 seemed to allow some flexibility in that regard. In that connection, there was no specific form for States to declare the limitations imposed by their internal law. States needed only to clearly state the existence of such limitations in the treaty itself, in a separate treaty or in any other form of agreement in order to provisionally apply a particular treaty in full or in part.

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

17. **Mr. Pavlichenko** (Ukraine), noting that Ukraine had been the victim of aggression by the Russian Federation, said that his delegation emphasized the importance of the issues raised by the topic of crimes against humanity. An investigation conducted by the field mission of the International Partnership for Human Rights in Ukraine had indicated that both war crimes and crimes against humanity had been committed during the ongoing conflict. Establishing a universal legal framework for crimes against humanity had critical importance, given that there was no global convention devoted to preventing and punishing such acts and promoting inter-State cooperation to that end. Ukraine expressed the hope that the draft articles on crimes against humanity would eventually take the form of a convention.

18. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation took note of the disagreement among Commission members on draft article 7 provisionally adopted by the Commission at its sixty-ninth session and the explanations of their dissenting opinions. Domestic case law on the question was not uniform. Domestic courts based their opinions on a case-by-case approach. In some instances, rulings by domestic courts to uphold immunities were politically motivated.

19. With regard to the measures proposed by dissenting members for ending impunity through the prosecution of State officials in their own country before an international court or a foreign court after waiver of immunity his delegation did not believe that any State would act in such a way. In particular, it was unlikely that totalitarian States would be willing to prosecute their Heads of State or issue waivers of immunity for foreign courts. Such countries ensured impunity for their leadership and officials, regardless of the gravity of the offence. The same held for the international courts. His delegation wondered, for example, what would happen if a State was not a party to the statutes of international courts and did not recognize their jurisdictions. Article 34 of the Vienna Convention on the Law of Treaties remained relevant in those cases, and there were no obligations or rights for third States without their consent, apart from the cases referred to the courts by the Security Council. The fact that the draft article was provisionally adopted by recorded vote showed how controversial it continued to be.

20. His delegation took note of the list of crimes in draft article 7, and it commended the approach of using a list of international treaties that defined such crimes in order to avoid the need for the Commission to elaborate its own definitions. Ukraine also took note of the Commission's decision not to include the crime of aggression in the list, but believed that immunity *ratione materiae* should not apply to that crime since it was the most serious of crimes under international law.

21. **Mr. Bazadough** (Jordan) said that his delegation supported the draft articles on crimes against humanity provisionally adopted by the Commission, given the number of persons exposed to such crimes. That was an essential step towards putting an end to impunity. A convention should be drafted to close the gaps between the different international agreements and conventions on the most serious crimes in international law, of which crimes committed during non-international conflicts were the most prevalent. It was therefore necessary to create a legal mechanism to ensure the prevention and punishment of those crimes at the international level and through cooperation between States. The draft articles were in line with and reinforced the Rome Statute, and allowed States parties to comply with their obligations under the Statute in full.

22. Draft article 2, regarding the obligation of States to prevent and punish crimes against humanity, was of utmost importance. It should be recalled, however, that under international law, States themselves did not commit crimes; rather, they bore civil responsibility for crimes against humanity committed by their nationals. Thus, the criminal responsibility for those crimes lay with individuals, including representatives of the States.

23. Jordan welcomed the definition of crimes against humanity in draft article 3, since it was similar to the definition in the Rome Statute, but also included additional essential elements, the most important of which was the criminalization of the crime of apartheid. His delegation endorsed draft article 6 [5], which called on States to criminalize such acts under their domestic law and to punish the perpetrators thereof. That would help to ensure harmony between national laws and end impunity.

24. Jordan supported the principle of *aut dedere aut judicare* set out in draft article 10 [9], which was a key element of international criminal law for preventing impunity, even when alleged perpetrators were on the territory of a State party that did not exercise criminal jurisdiction over them. His delegation also endorsed the provisions regarding the need to protect victims and witnesses, as set out in draft article 12, something that was missing from other international conventions and agreements on the most serious crimes in international law. The draft article was an important addition that reflected the latest developments in international criminal law. Jordan fully supported the principle of reparation for material and moral damages to victims of crimes against humanity, and it proposed the establishment of a fund for that purpose.

25. The wording of draft article 5 (Non-refoulement) did not deprive States of the right to repatriate nationals of a State at war provided they were returned to an area in which peace and stability reigned and their lives were not at risk. The text constituted progressive development of international law, since currently there was no customary law on refoulement in the case of crimes against humanity.

26. On draft article 13 (Extradition), his delegation suggested the insertion in paragraph 4 of wording that required States to conclude agreements for the extradition of criminals, since such an obligation was lacking in the text.

27. **Mr. Dos Santos Pereira** (Timor-Leste) said that, as a democratic, sovereign, independent and unitary State based on the rule of law, Timor-Leste was fully aware that international law was essential for the realization of sustainable development, the consolidation of peace and security and the protection of all human rights and fundamental freedoms at the national and international levels. As such, its legal system was in line with the principle of international law pursuant to which international conventions, treaties

and agreements, once ratified, became a part of the national legal framework.

28. Concerning the topic "Crimes against humanity", Timor-Leste, as a State party to the Rome Statute and a signatory to the Universal Declaration of Human Rights, fully supported all international legal instruments adopted and measures taken with regard to such crimes, as defined in draft article 3, which was in line with article 7 of the Statute of the International Criminal Court. Through its Penal Code and other laws, Timor-Leste regulated crimes against humanity and harmonized the provisions of its legislation with those of international agreements, including the obligation to prevent and criminalize such crimes under national law, as set out in draft articles 4, 6 [5] and 7 [6]. It had introduced legislation on international criminal justice cooperation, including the facilitation of extradition referred to in draft article 13. In its view, however, extradition should be in accordance with reciprocal agreements between States parties. In 2015, in line with draft article 8 [7] (Investigation), Timor-Leste had established a national agency responsible for the investigation of serious organized and complex crimes.

29. His delegation also supported draft article 14 (Mutual legal assistance), given its importance for investigations, prosecutions and judicial proceedings in relation to those types of offences. Timor-Leste supported in principle the finalization of the draft articles as an international legally binding instrument aimed at preventing crimes against humanity and ending impunity for the perpetrators.

30. **Ms. Requena** (Observer for the Council of Europe) said that the Council of Europe attached great importance to actions taken und national legislation to put an end to impunity for crimes against humanity. Indeed, the Council of Europe had been one of the first bodies to address the prevention of impunity for such crimes with its European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 1974.

31. With regard to the Special Rapporteur's third report (A/CN.4/704), she said that in addressing the issue of victims, witnesses and other affected persons, the Special Rapporteur referred in footnote 236 to the Council of Europe Directorate General of Human Rights Guidelines on the protection of victims of terrorist acts, adopted by the Committee of Ministers on 2 March 2005. The Guidelines had been recently revised to incorporate four lines of action: implementing a general legal framework to assist victims, providing assistance to victims in legal proceedings, raising public awareness of the need for societal recognition of victims, including the role of the media, and involving victims of terrorism in the fight against terrorism. The Guidelines highlighted the measures to be taken by member States to support and protect the fundamental rights of any person as well as, in appropriate circumstances, their close family members, who had suffered direct physical or psychological harm as a result of a terrorist act. An equally holistic approach should be adopted when addressing draft article 12 (Victims, witnesses and others) of the draft articles on crimes against humanity adopted by the Commission on first reading.

32. With regard to the question of monitoring mechanisms and dispute settlement, the Council of Europe thanked the Secretariat for its memorandum on information on existing treaty-based monitoring mechanisms which might be of relevance to the future work of the International Law Commission (A/CN.4/698), and which cited the European Court of Human Rights as an example of a regional monitoring mechanism in Europe. In its case law, the European Court of Human Rights had dealt with the issue of extensive time lapses between the commission of crimes against humanity and their prosecution. In *Kolk and Kislyiy v. Estonia*, for example, the Court, in declaring the application inadmissible, had found that the acts of which the applicants had been accused in 2003 under the national criminal code had been expressly recognized as crimes against humanity in the Charter of the Nuremberg Tribunal of 1945. In its case law on other international crimes, the Court had found that those who had committed war crimes during the Second World War did not have a human right for their crimes to be statute-barred, and had noted a number of international conventions prohibiting statutory limitations for war crimes. The Council of Europe suggested that some of the decisions of the European Court of Human Rights should be included in the next report on the topic.

33. Concerning the topic of provisional application of treaties, the Council of Europe welcomed the memorandum prepared by the Secretariat on State practice in respect of treaties deposited or registered with the Secretary-General (A/CN.4/707), and it suggested the inclusion of examples of provisional application of specific treaty provisions from the Council's long-standing practice in that field. Paragraphs 20 and 33 of the memorandum referred to the provisional applicability of certain provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms by separate agreement ("Madrid Agreement"), and to Protocol 14 bis. The Council of Europe also drew attention to article 17 (Provisional application) of the Convention on the Elaboration of a European Pharmacopoeia.

34. Another unusual example concerned the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, which had recently entered into force. Article 7 of that Protocol provided for the setting up of a network of 24-hour-a-day national contact points to facilitate the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism. With a view to applying that article provisionally, the Committee of Ministers, at its 126th ministerial session, held on 18 May 2016, had "called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), pending its entry into force". As a more recent example, when the Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons would be opened for signature on 22 November 2017, the signatories would have the possibility to declare under article 5 of the Amending Protocol that they would apply the provisions of the Protocol on a provisional basis. Thus, the Council of Europe had a rich practice in the provisional application of treaties and therefore attached great importance to the Commission's work in that area.

35. **Mr. Murphy** (Special Rapporteur for the topic "Crimes against humanity") said he had gathered from the comments made that there was strong support in the Sixth Committee for the Commission's work on the topic, and he had taken due note of the many suggestions on ways of improving on the 15 draft articles, preamble and annex.

36. **The Chair** invited the Committee to consider chapters VI and VII of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

37. **Mr. Nolte** (Chairman of the International Law Commission), referring to the commemorative events to be held during the seventieth anniversary of the Commission, said that no additional resources could be provided from the United Nations regular budget, but those events would inevitably entail costs. It would be important to ensure the participation of some 12 experts from around the world, and who would not be State officials, to provide well-researched input into the debate during the anniversary events. Voluntary funding was essential, and he understood that a formal request for such funds would be made at a later stage, but he wished to raise awareness among delegations, including foreign ministry legal advisers, of the need for such support.

38. Introducing chapters VI and VII of the Commission's report on the work of its sixty-ninth session, and referring to chapter VI, on the topic "Protection of the atmosphere", he said that in 2017, the Commission had had before it the Special Rapporteur's fourth report (A/CN.4/707 and A/CN.4/705/Corr.1), which analysed the interrelationship between international law on the protection of the atmosphere and other fields of international law, in particular international trade and investment law, the law of the sea and international human rights law. The Special Rapporteur had proposed four draft guidelines and several preambular paragraphs. The Commission had ultimately decided to merge the four proposed draft guidelines into a single draft guideline 9 and to adopt three preambular paragraphs.

39. Draft guideline 9 dealt with the interrelationship among the relevant rules and set out various techniques in international law for addressing tensions between rules of international law relating to the protection of the atmosphere and other relevant rules. It drew on the 2006 conclusions reached by the Commission's Study Group on fragmentation of international law, which the Sixth Committee had committed to the attention of the General Assembly.

40. Paragraph 1 addressed the identification, interpretation and application of relevant rules with the stated aim of avoiding conflicts between rules, including the rules of international trade and investment law, the law of the sea and international human rights law. The paragraph also drew attention to the principles of harmonization and systemic integration and to articles 30 and 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties.

41. Paragraph 2 encouraged States, when engaged in negotiations on the creation of new rules, to "endeavour to do so in a harmonious manner", and to take into account the systemic relationship that existed between rules of international law relating to the atmosphere and rules in other legal fields.

42. Paragraph 3 provided that "special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise". The Commission did not include a reference to the principle of mutual supportiveness in the text of the draft guideline and explained in the commentary that the preponderance of the support for that principle originated from the World Trade Organization.

43. The three new preambular paragraphs were largely linked to draft guideline 9. The current fourth preambular paragraph noted the close interaction that arose from the physical relationship between the atmosphere and the oceans. It sought to highlight the mutual effect that the atmosphere and the oceans had on each other, including through land-based sources of pollution, ocean acidification, increases in global temperatures and sea-level rise. That last issue was further underlined in the sixth preambular paragraph, which addressed the effects of sea-level rise on low-lying coastal areas and small island developing States. The eighth preambular paragraph, drawing on the principle of intergenerational equity, noted that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account.

44. The Special Rapporteur had indicated that in 2018, he expected to address implementation (at the level of national law); compliance (at the level of international law); and specific features of dispute settlement related to the law on the protection of the atmosphere. He also hoped that the first reading of the draft guidelines would be completed in 2018.

45. With regard to chapter VII (Immunity of State officials from foreign criminal jurisdiction), he said that in 2017, the Commission had continued its plenary debate on the Special Rapporteur's fifth report analysing the question of limitations and exceptions to such immunity (A/CN.4/701), which it had begun in 2016. The question of exceptions to immunity from foreign criminal jurisdiction was of fundamental importance in general international law. In 2017, the Commission had conducted an intense and thorough debate on the matter, in particular on whether an exception to immunity *ratione materiae* from foreign criminal jurisdiction was recognized under customary international law if it was alleged that a foreign State official had committed certain crimes, such as genocide, crimes against humanity, war crimes, torture or enforced disappearances, or whether there was at least a trend to that effect, and whether such an exception would be desirable as progressive development.

46. The Special Rapporteur's report, together with the proposed draft article 7, had elicited diverse and often opposing views. Some members had supported the Special Rapporteur's position that the practice of States and their courts demonstrated a trend towards providing for limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, and agreed with the systemic approach adopted in the report. Other members had contested that the evidence provided in the fifth report supported such a trend. They had expressed the view that draft article 7 did not codify existing law (*lex lata*) or necessarily express the desirable progressive development of the law (*lex ferenda*), except possibly in relations between those States which were prepared to conclude a treaty to that effect. Moreover, several members had considered that the issue of limitations and exceptions to immunity needed to be treated together with the procedural aspects of immunity, safeguarding against possible abuse in national criminal proceedings. Other members had maintained that those aspects could be dealt with separately. The debate was summarized in the Commission's report on the work of its sixty-ninth session (A/72/10). Following the debate, the Commission had decided to refer draft article 7, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

47. The Drafting Committee had decided to propose draft article 7 with some amendments. Some members of the Drafting Committee had been opposed to sending the draft article back to the plenary for adoption at that stage. Eventually, the Commission had provisionally adopted draft article 7 by a recorded vote of 21 to 8, with 1 abstention. Since the Commission usually adopted its texts by consensus, in that case a number of members of the Commission had exceptionally made statements in explanation of their votes. A summary of those statements could be found in the summary record of the Commission's 3378th meeting, held on 20 July 2017 (A/CN.4/SR.3378). The text of and commentary to draft article 7 as provisionally adopted by the Commission were contained in the Commission's report.

48. Paragraph 1 provided a list of crimes under international law to which immunity *ratione materiae* from the exercise of foreign criminal jurisdiction "shall not apply". In the Commission's view, the crime of genocide, crimes against humanity and war crimes, which constituted the most serious crimes under international law, should be the core elements of the list. The crimes of apartheid, torture and enforced disappearances had been included as separate categories, as they were subject to separate treaty regimes. For reasons specified in the commentary, the Commission had decided not to include the crime of aggression in the list. Some members who had voted in favour of the adoption of draft article 7 had indicated that the crime of aggression should have been included. Some members would have also included other crimes, such as the crimes of slavery, corruption, human trafficking, piracy and international terrorism. Paragraph 2 specified that, for the purposes of draft article 7, the crimes mentioned in paragraph 1 were to

be understood as defined in the treaties enumerated in the annex to the draft article.

49. The Commission had placed draft article 7 in part 3 of the draft articles on immunity *ratione materiae* to emphasize that the limitations and exceptions in the article did not apply to immunity *ratione personae*. Moreover, it had included a provisional footnote to the headings of parts 2 and 3, signalling that it would consider the procedural provisions and safeguards applicable to the draft articles at its seventieth session.

50. In advance of her sixth report, to be submitted in 2018, on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur had conducted open-ended informal consultations during the past session. The procedural aspects were essential, and the Commission would therefore appreciate being provided with information by States by 15 January 2018 on their national legislation and practice, including judicial and executive practice, with respect to the following issues: (a) the invocation of immunity; (b) waivers of immunity; (c) the stage at which the national authorities took immunity into consideration (investigation, indictment, prosecution); (d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity was or might be considered; and (e) the mechanisms for international legal assistance, cooperation and consultation that State authorities might resort to in relation to a case in which immunity was or might be considered.

51. **Mr. Kabua** (Marshall Islands), speaking on behalf of the Pacific small island developing States, namely Fiji, Kiribati, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and his own country the Marshall Islands, said that protection of the atmosphere was an extremely important topic for the international community; for small island countries, it touched on a critical issue: sea-level rise. As noted in the paragraph (1) of the commentary to the preamble to the draft guidelines provisionally adopted by the Commission, one of the most profound impacts of atmospheric degradation was the sea-level rise caused by global warming, which presented an existential threat to small island developing States in the Pacific, including low-lying atoll nations. Pacific small island developing States were among those that contributed the least to global warming, but were in danger of being submerged under rising sea levels within the current century, which would make those islands uninhabitable if drastic measures were not urgently taken to reverse the situation.

52. The Commission noted in paragraph 33 of its report (A/72/10) that it would welcome any proposals that States might wish to make concerning possible additional topics for inclusion in its long-term programme of work, and in paragraph 32 it stated that it "should not restrict itself to traditional topics", but should also consider topics that reflected "pressing concerns of the international community as a whole". The legal implications of sea-level rise was such a topic. It was important to consider, for example, the effect on territorial integrity which shifting baselines might cause as a result of sea-level rise. Addressing that concern was long overdue.

53. The Commission should also consider other, more informal formats or input, including academic discussions, and examine how best to move forward in addressing that complex issue. In dealing with the topic, special consideration should be given to persons and groups that were particularly vulnerable to climate change, including indigenous peoples and local communities.

54. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine, and referring to the topic "Protection of the atmosphere", said that in order to clearly distinguish between programmatic guidelines and legally binding international agreements, it would be preferable not to include in the guidelines on the topic concepts or wordings that were in conflict with existing international agreements on environmental law.

55. Commenting on the draft guidelines provisionally adopted so far by the Commission, he said that the current wording of draft guideline 7 (Intentional large-scale modification of the atmosphere) wrongly implied that geo-engineering measures were in general permissible, whereas the European Union understood that the draft guideline sought to remain neutral on the approval or disapproval of those measures. The European Union continued to advocate the inclusion in the commentary to draft guideline 7 of a reference to the fact that the 150 signatory States to the Convention on Biological Diversity of 1992 had already taken steps to restrict the use of geo-engineering measures insofar as it impacted on biodiversity. Bearing in mind CBD Technical Series No. 66 of the Secretariat of the Convention on Biological Diversity of September 2012, entitled "Geo-engineering in Relation to the Convention on Biological Diversity: Technical and Regulatory

Matters", draft guideline 7 should make reference to the precautionary principle.

56. The Special Rapporteur's fourth report (A/CN.4/705 and A/CN.4/705/Corr.1) acknowledged the evolution of the rather problematic reference to the "special situation and needs of developing countries". The European Union believed that the 2015 Paris Agreement took the more balanced approach by referring to the principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

57. Concerning the interrelationship between the law of the atmosphere and international trade and investment law, the European Union was pleased that the report referred to the Comprehensive Economic and Trade Agreement between Canada and the European Union and its member States, which stressed the need to enhance the mutual supportiveness between trade and environment policies, rules and measures and explicitly acknowledged the right to regulate environmental issues and shared responsibilities in implementing the Paris Agreement.

58. The Special Rapporteur referred in paragraph 30 of the fourth report to aviation activities in the European Union Emissions Trading Scheme within Directive 2008/101/EC in their relation to the rules of the World Trade Organization. It should be noted that the decision by the European Union to temporarily limit the application of the Emissions Trading Scheme to flights of all nationalities of airlines flying between European countries had not been based on its potential non-compatibility with those rules, since the European Union considered the Directive to be in full compliance with international law, including international trade law.

59. As to draft guideline 10 (Interrelationship between the law on the protection of the atmosphere and international trade and investment law), the European Union welcomed the proposed text suggesting that "States should take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere from atmospheric pollution and atmospheric degradation, provided that they shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment, respectively". With regard to the new text of draft guideline 9 (Interrelationship among relevant rules) and the preambular paragraphs as provisionally adopted by the Drafting Committee, the European Union welcomed the link established between protection of the atmosphere and other relevant rules of international law, and the streamlining of proposed guidelines 9 to 12 into a single draft guideline. The new text constituted an improvement.

60. The European Union drew attention to the decision taken by the International Maritime Organization in October 2016 to lower the maximum sulphur content of marine fuels to 0.50 per cent as of 2020, which would significantly reduce atmospheric pollution. However, to ensure compliance with that requirement not only in territorial waters but also on the high seas, port States should actively verify the use of low sulphur marine fuels on ships calling at their ports, in accordance with their obligation to reduce atmospheric pollution pursuant to the International Convention for the Prevention of Pollution from Ships and the United Nations Convention on the Law of the Sea. Thus, with regard to draft guideline 11 (Interrelationship of law on the protection of the atmosphere with the law of the sea), States, and above all flag States, should take active measures to ensure effective implementation and enforcement of the sulphur emission requirements.

61. Concerning the interrelationship with international human rights law, and notably the reference to the direct link between atmospheric pollution and an impairment of a protected right mentioned in the Special Rapporteur's report, a specific reference should be made to the 2013 assessment of the World Health Organization International Agency for Research on Cancer, which had concluded that outdoor air pollution was carcinogenic. Specifically in relation to paragraph 2 of draft guideline 12 (Interrelationship of law on the protection of the atmosphere with human rights law), the European Union believed that poorer parts of the national population should also be mentioned under vulnerable groups of people, since people in poorer neighbourhoods in developed countries also tended to be more affected by air pollution due to their proximity to busy roads, their lifestyles or their limited access to health care.

62. Regarding the preamble, the European Union proposed the inclusion of references to the Montreal Protocol on Substances that Deplete the Ozone Layer and the need to ratify the Kigali Amendment to the Montreal Protocol; to the entry into force of the 2015 Paris Agreement and the need for its swift implementation; to the need to ratify the amended Gothenburg Protocol to the Convention on Long-range Transboundary Air Pollution; and to the need to appropriately reflect the forthcoming political declaration on pollution by the United Nations Environment Assembly, to be held in December 2017 and the Assembly's resolution on air pollution proposed by Canada and sponsored inter alia by the European Union.

63. **Mr. Seland** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said with regard to the topic of crimes against humanity that no rules of immunity should apply in national jurisdictions for the most serious international crimes. The Nordic countries encouraged the Commission to 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. They noted the Commission's desire to proceed cautiously on that complex and contentious topic.

64. The Nordic countries stressed the importance of rules pertaining to immunity before international courts and noted that article 27 of the Rome Statute of the International Criminal Court and article 7 of the Charter of the Nuremberg Tribunal had declared the irrelevance of official capacity in relation to individual responsibility for the gravest international crimes; that should be regarded as part of customary international law.

65. The Nordic countries endorsed draft article 7 provisionally adopted by the Commission. They underlined the importance of including genocide, crimes against humanity and war crimes as crimes for which immunity did not apply, and acknowledged the ongoing debate about the remaining categories. They supported paragraph 2, pursuant to which the crimes under international law referred to in paragraph 1 were to be understood according to their definition in the treaties enumerated in the annex to the draft articles. They would also endorse the inclusion of a "without prejudice" provision.

66. The Nordic countries recognized that the question of limitations and exceptions was related to that of the procedural aspects of immunity. They would support procedural safeguards applicable to decisions taken by independent prosecutors, in order to ensure that all relevant aspects of cases involving claims of immunity were taken into consideration. They remained convinced that robust mechanisms based on the rule of law were important to avoid politically motivated proceedings or an illegitimate exercise of jurisdiction.

67. The Nordic countries encouraged the Commission to seek to reach a consensus on the most difficult aspects of that important topic, thereby creating the best possible conditions for its work to be taken up further by States.

68. **Mr. Tichy** (Austria) said that he would deliver a shortened statement; the full version could be found on the PaperSmart portal.

69. With regard to the topic protection of the atmosphere and the draft guidelines provisionally adopted so far by the Commission, his delegation considered that paragraph 2 of draft guideline 9 (Interrelationship among relevant rules) could be understood as requiring that new rules for the protection of the atmosphere be compatible with all existing rules of international law; that would impede any new development that substantially differed from existing rules. Such a restriction on the future development of norms should not be envisaged.

70. Draft guideline 9, paragraph 3, rightly demanded special consideration for persons or groups particularly vulnerable to atmospheric pollution and atmospheric degradation. However, such groups not only "may include", but rather "should include" indigenous peoples and people of the least developed countries, low-lying areas and small island developing States. If their inclusion was only optional, they could also be excluded. The demonstrative effect that, according to the commentary, should be reflected by the word "may" was already sufficiently expressed by "inter alia".

71. In paragraph (16) of its commentary to draft guideline 9, the Commission referred to the fact that the World Health Organization had also included people living in mountainous regions among those particularly vulnerable. In that connection, his delegation drew attention to the contribution to the protection of the atmosphere of the Alpine Convention and its Protocols, in particular those on nature protection and landscape conservation and on mountain forests.

72. His delegation appreciated the Commission's work on the important and controversial topic of immunity of State officials from foreign criminal jurisdiction. It was, in principle, in favour of the proposed exceptions and limitations to immunity *ratione materiae*. However, it understood the need to clarify whether they already reflected customary international law or were more of a progressive development character. The Special Rapporteur and the Commission should make further efforts to indicate to what extent the exceptions and limitations under consideration reflected already existing customary international law. Whatever the outcome of the Commission's work on the topic, it would provide essential guidance for national courts and other authorities in assessing whether or not immunity applied.

73. In principle, Austria concurred with the idea expressed by the Special Rapporteur and reflected in paragraph 84 of the report (A/72/10) that the challenge for the Commission was to decide whether to support a developing trend in the field of immunity, rather than

halt such a development. In particular, it shared the view expressed in paragraph 109 of the report that perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts ultimately affected the international community as a whole. Indeed, the purpose of exceptions and limitations to immunity from criminal jurisdiction was to protect human rights and combat impunity, which were fundamental interests of the international community.

74. At the same time, his delegation saw a clear link between exceptions and limitations to immunity on the one hand and efficient procedural safeguards on the other. In 2016, it had suggested that restrictions on immunity should be combined with procedural safeguards in order to avoid misuse and politically motivated criminal prosecutions of State officials in foreign countries. One possible solution would be to create an international mechanism aimed at the prevention of such misuse. Such a mechanism could be based on provisions on interim measures and other urgent procedures before international courts and tribunals, and the proposed immunity restrictions could be made conditional upon the establishment of such a mechanism. However, his delegation was also prepared to consider other procedural safeguards which would guarantee effective prosecution by national or international courts, and in that connection, it looked forward to the Special Rapporteur's suggestions on procedural safeguards in the next report.

75. With regard to the crimes listed in draft article 7, paragraph 1, provisionally adopted by the Commission, in respect of which immunity did not apply, his delegation agreed with the approach of limiting the exceptions to specific crimes under international law. It sympathized with the view that corruption, although it usually involved some official activities, was itself an abuse of an official position for private gain and therefore could not be regarded as an act performed in an official capacity. However, if that interpretation was generally accepted and immunity therefore was not available in cases of alleged corruption, procedural safeguards would also be necessary in that context, as allegations of corruption were especially susceptible to misuse.

76. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that the immunity of State officials from foreign criminal jurisdiction derived from the principle of sovereign equality of States; it was therefore important to distinguish between the rules governing the jurisdiction of national courts and the rules governing immunity from jurisdiction. The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 provided that such immunities were generally accepted as a principle of customary international law. His delegation believed that an international convention on the topic of immunity would enhance the rule of law and legal certainty, in particular in dealings of States with natural or legal persons, and would contribute to the codification and development of international law and the harmonization of practice in the area of immunity.

77. The International Court of Justice, in its advisory opinion concerning the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, had stated that according to a well-established rule of international law, which was of a customary character, the conduct of any organ of a State must be regarded as an act of that State. Accordingly, the expression "State official" should also cover persons or categories of persons who acted de facto upon the instructions or directions of or under the control of a State or persons or categories of persons who exercised elements of governmental authority in the absence of or on behalf of the Government. The immunity from foreign jurisdiction of a country's officials should not be left up to the jurisdiction of another country. In any legal system, whether national or international, the exercise by the State of its jurisdiction was a manifestation of its sovereignty.

78. **Ms. Vaz Patto** (Portugal), referring to the topic "Protection of the atmosphere", said that the impact of atmospheric degradation on society, as well as its prevention, mitigation or even reversal, depended on the ability of human communities to change behaviour at political, technological, economic and lifestyle levels. In terms of legal analysis, it was imperative to address the problem from a "cause and effect" perspective.

79. Portugal reiterated the need for a balanced and positive treatment of the topic. It reaffirmed its understanding that there was an obligation for States to protect the atmosphere. Only by taking joint action would it be possible to meet that growing challenge.

80. Although Portugal agreed with the ideas of "interrelationship" and "mutual supportiveness" between different areas of international law, it still believed that international law should be interpreted and applied in accordance with the relevant principles of international law, as expressed in draft guideline 9 of the draft guidelines on the protection of the atmosphere provisionally adopted by the Commission. Nevertheless, the Commission's current work was an important opportunity to develop guidelines and mechanisms that could lead States to consider adopting common norms, standards and recommended practices

to promote the protection of the atmosphere in the areas of trade and investment law, the law of the sea and human rights law.

81. Her delegation had high expectations for the important topic of immunity of State officials from foreign criminal jurisdiction. Its basis must be a very clear and value-oriented approach. Law was not neutral, and it must reflect the fundamental values of a given society. To best serve the overall interests of the international community, a careful balance must be struck between State sovereignty and equality, the rights of individuals and the need to avoid impunity for serious crimes under international law. To that end, the Commission must identify existing rules of international law, but it must also, as foreseen in its mandate, undertake an exercise of progressive development. In so doing, the Commission must take into account the fact that immunity was an important tool for the conduct of foreign relations, but it should be interpreted and applied within the context of the current trend towards regarding fundamental human values as having a *jus cogens* status.

82. For the above-mentioned reasons, Portugal commended the Commission for having adopted draft article 7, on international crimes in respect of which immunity *ratione materiae* did not apply. However, it believed that, as recognized in the Rome Statute, immunity should also not apply to the crime of aggression; not only was it one of the most serious crimes of international concern, but the rationale behind the inclusion of the other crimes in the list also applied to the crime of aggression. Portugal urged the Commission to revise its position on that question during the second reading of the draft articles on the topic.

83. **Ms. Carnal** (Switzerland), commenting on draft article 7 on immunity of State officials, as provisionally adopted by the Commission, said that certain methodological questions needed further clarification. To begin with, the procedural nature of immunity required courts to address immunity as a preliminary matter. In relation to State immunity, the International Court of Justice had stated in 2012 in *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)* that "the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem". According to the Court, a national court would either be required to first establish whether the serious offence in question had been committed in order to determine whether the State could rely on its immunity from jurisdiction. At that point the foreign State would already have been subjected to the other State's jurisdiction. Or, the mere allegation that a grave offence had been committed would be sufficient to deny immunity, in which case even far-fetched proceedings with no grounding in facts would be allowed to continue. In her delegation's view, neither solution was fully satisfactory when it came to criminal proceedings against foreign State officials. It would be useful for the Commission to comment on the matter.

84. Second, the Commission did not distinguish between the various reasons for which a domestic court came to the conclusion that a State official did not enjoy functional immunity from foreign criminal jurisdiction in relation to international crimes. In some cases, courts found that immunity did not apply because of the gravity of the acts in question, while in others it found that the acts in question could not be considered official acts. The distinction was important. Only in the first case would it be appropriate to speak of an exception to an otherwise existing immunity. In the latter case, the acts would fall outside the scope of immunity *ratione materiae* as defined in draft article 6. Whereas the status of the proposed exceptions to immunity *ratione materiae* under customary international law was contested, it was generally accepted that the scope of immunity *ratione materiae* was limited to acts committed in an official capacity.

85. Third, the Commission referred to certain cases in which national courts had tried officials of another State for international crimes without expressly ruling on immunity. Before assessing the relevance of those cases for the purposes of exceptions, it was necessary to clarify whether the immunity of State officials existed independently of its invocation by the State, or whether a lack of invocation could be interpreted as an implicit waiver. For if the State in question had never invoked immunity on behalf of its official, it was not clear whether immunity was not considered an obstacle because international crimes were in question or because the State did not seem to claim it. That last point illustrated why it might be necessary to come back to the individual draft articles and commentaries at a later stage, once all procedural and substantive questions had been addressed.

86. The Commission's mandate included both the codification and the progressive development of international law. It was important to distinguish between the two aspects of the Commission's work as clearly as possible, since its draft articles enjoyed great practical authority and were often interpreted as statements of the law by domestic courts. An article on the exceptions to functional immunity of State officials from foreign criminal jurisdiction, like draft article 7, must be either solidly based on extensive and virtually

uniform State practice and *opinio juris* or be clearly labelled as progressive development of the law. After a careful review of the different sources cited in support of draft article 7, Switzerland was of the view that that high threshold had not been reached. It encouraged the Commission to provide stronger evidence in support of draft article 7 or to indicate unambiguously that it fell within the area of progressive development.

87. **Mr. Alday Gonzalez** (Mexico), referring to the topic "Protection of the atmosphere", said that the scope of the draft guidelines on the topic provisionally adopted by the Commission needed to be clarified in relation to multilateral treaties on the environment. The draft guidelines were understood to be without prejudice to such treaties and to a number of principles of international law, such as the "polluter pays" principle and the principle of "common but differentiated responsibilities". It was important to elucidate which anthropogenic activities that affected the atmosphere came under the application of the draft guidelines.

88. With regard to draft guideline 9 (Interrelationship among relevant rules), the Special Rapporteur had proposed a text that aimed to reconcile possible conflicts of rules between different fields of international law. He considered that there was a body of rules relating to the protection of the atmosphere which might lead to conflicts with international law in other areas, such as international trade law, international investment law, the law of the sea and international human rights law.

89. His delegation endorsed the reference to the conclusions reached by the Study Group on fragmentation of international law, and it agreed with the Special Rapporteur that the different rules should be interpreted and applied systematically, with a view to maintaining the coherence of the international legal system and resolving potential conflicts which might arise between different bodies of law.

90. His delegation also endorsed the reference in guideline 9, paragraph 3, to vulnerable groups together with the need to take their situation into account in a systemic interpretation of international law. In its view, concern with regard to vulnerable groups should not be restricted to the interpretation of rules, but should permeate the entire instrument, given the impact that atmospheric degradation might have on those groups.

91. Mexico welcomed the Special Rapporteur's call for a dialogue with scientists in order to promote an understanding of the technical aspects of the topic, and it looked forward with interest to his discussion of implementation, compliance and dispute settlement relating to the law on the protection of the atmosphere in his next report.

92. On the topic of immunity of State officials from foreign criminal jurisdiction, he said that draft article 7 provisionally adopted by the Commission included apartheid, torture and enforced disappearance in the list of crimes under international law in respect of which immunity from such jurisdiction did not apply, and that a special international legal regime existed for each of those crimes requiring States to adopt the necessary internal measures for their prevention, suppression and punishment. The Commission had decided not to include the crime of aggression in the list, in view of the nature of that crime, which would require national courts to determine the existence of a prior act of aggression by the foreign State.

93. Mexico agreed with the removal of the crime of corruption from the list; on no account should corruption be considered to be an official act, since such acts were committed by State officials for the sole purpose of personal gain.

94. Although the principle of "territorial exception" was not included, his delegation was of the view that certain crimes committed in the forum State were subject to the principle of territorial sovereignty and that, generally speaking, immunity *ratione materiae* could not be invoked for them.

95. Mexico agreed with the Special Rapporteur that the Commission should continue to address the topic from a perspective of both codification and progressive development of international law, in line with the Commission's mandate.

96. The identification of procedural rules regarding the investigation and prosecution of officials who enjoyed immunity was of great interest to Mexico. Such rules were crucial to preventing abuses arising from political conflicts that resulted in undue interference in the activities of State officials and thus were detrimental to due process. His delegation looked forward to a discussion of those aspects in the next report, to be submitted in 2018.

97. **Ms. Robertson** (Australia), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that State immunity was a basic principle of the international legal order, derived from the even more foundational principle of sovereign equality of States. The immunity of State officials from foreign criminal jurisdiction was a corollary of State immunity.

98. The Commission had made a valuable contribution to discussions on the topic, including through the adoption of a number of draft articles. It was, however, regrettable that it had been unable to resolve the issue of

limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction by consensus, and that draft article 7 had been provisionally adopted by a vote. That draft article identified a list of international crimes in respect of which immunity *ratione materiae* was said not to apply. Australia shared the concerns of those members who had voted against the provisional adoption of the draft article, which in its current form did not reflect any real trend in State practice or existing customary international law.

99. Her delegation recognized that the Commission had a dual mandate of codification and progressive development of the law. It agreed with the comment made the previous day by the Chairman of the Commission that, when the Commission elected to advance a proposal that did not reflect existing law, the proposal must be clearly identified as such. Australia encouraged the Commission to adopt that approach as a matter of course.

100. Australia also emphasized the procedural nature of immunity *ratione materiae* and stressed that immunity must not to be equated with impunity. Immunity *ratione materiae* operated to prevent the prosecution of State officials for international crimes in some, but not all, circumstances and in some, but not all, forums. That did not mean that State officials enjoyed impunity. State officials accused of international crimes could be prosecuted in their own State, before an international court with jurisdiction, or in the courts of a third party State after waiver of immunity.

101. Australia recognized that the international community could and must do more to ensure that State officials who committed international crimes were held to account, but draft article 7 was not an appropriate means of addressing that issue. It noted with interest the proposal by some members of the Commission that a treaty-based obligation to "waive or prosecute" should be established. That was a concept deserving of further consideration by the Commission.

102. Her delegation agreed with the comments by the Chairman of the Commission the previous day that that body was in a process of change. Indeed, the audience for the Commission's work was expanding, as Governments, courts and academics now accessed the Commission's work, and the views expressed in the field of international law were more contested than ever. The different forms that the Commission's output took — draft articles, draft guidelines and draft conclusions — were welcome and also served to introduce the Commission's work to new audiences. It might be worth considering additional forms that that work might take in order to reach even more audiences, rather than adding too many new topics to the Commission's programme of work, some of which might be of questionable utility.

103. **Ms. Hong** (Singapore) said that her delegation supported the Special Rapporteur's work on the topic of protection of the atmosphere. International cooperation was at the core of the draft guidelines provisionally adopted by the Commission. It took note of the seventh preambular paragraph, which stated that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account, considering the importance of the concept of intergenerational equity in the environmental context. However, there was also merit in focusing on the adverse impact of atmospheric pollution and degradation on the current generation as well. Consequently, the preamble should also contain a reference to "current generations of humankind".

104. In respect of draft guideline 9, her delegation had no doubt that there was an interrelationship between the rules of international law on protection of the atmosphere and the three areas of law identified by the Special Rapporteur, but it was less certain about potential fragmentation of those rules of law and whether draft guideline 9 was of practical value. The concept of "mutual supportiveness" in paragraph (7) of the commentary to the draft guideline was not clearly defined and was more of a policy-making tool rather than a legal principle. The reliance on "mutual supportiveness" did not improve understanding of any potential fragmentation.

105. Her delegation also had difficulty with paragraph (12) of the commentary, and in particular the "disconnect" between the rules of international law relating to the atmosphere and human rights law. Further consideration was required on whether extraterritorial jurisdiction in respect of human rights obligations should apply in situations of transboundary atmospheric damage.

106. There was practical value in exploring the interrelationship between the rules of international law relating to the protection of the atmosphere and the rules of international trade and investment law. For instance, consideration could be given to schemes that encouraged companies to produce for trade in a sustainable manner which did not cause environmental damage.

107. In respect of the reference in the sixth preambular paragraph to the special situation of low-lying coastal areas and small island developing States due to sea-level rise, her delegation supported the recognition that such

States were more vulnerable to atmospheric degradation and pollution. Their special situation had already been established in the Paris Agreement, and should not be considered controversial.

108. Singapore reiterated its concern that the Special Rapporteur's proposal to deal in 2018 with issues of implementation, compliance and dispute settlement relating to the protection of the atmosphere might be inconsistent with the 2013 understanding.

109. Her delegation was very interested in the topic "Immunity of State officials from foreign criminal jurisdiction". It noted, however, the unusual manner in which draft article 7 had been provisionally adopted by the Commission, namely by a recorded vote. The dissension within the Commission showed that the propositions contained in that draft article could benefit from further consideration.

110. While the temporal scope of immunity *ratione materiae* was not controversial, the material scope would benefit from further study and elucidation. Her delegation was concerned as to whether there was sufficient State practice, in terms of case law, national statutes and treaty law, to justify the codification of the specific list of crimes under international law in draft article 7 for which immunity *ratione materiae* did not apply. If it was the Commission's intention to state a conclusion de *lege ferenda*, that should be clearly articulated.

111. Given the manner in which draft article 7 was currently framed, the Commission should revisit, as a matter of progressive development of the law, the extension of immunity *ratione personae* to high officials beyond the so-called troika (Heads of State, Heads of Government and Ministers for Foreign Affairs), following completion of its work on immunity *ratione materiae*.

112. Singapore had previously suggested a more pragmatic way than a list of crimes to approach the analysis of possible limitations and exceptions to immunity *ratione materiae*, to avoid procedural hurdles. Its full comments were contained in paragraphs 131 and 132 of the summary record of the 27th meeting of the Committee held at the seventy-first session (A/C.6/71/SR.27). Singapore agreed in particular with the view expressed by the Commission in paragraph (8) of its commentary to draft article 7 that it was not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precluded immunity from foreign criminal jurisdiction, and that immunity did not depend on the gravity of the act in question or on the fact that such act was prohibited by the peremptory norm of international law.

113. Singapore sympathized with the concerns expressed by several members of the Commission regarding the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction, and it underscored in that connection the importance of focusing on safeguards to ensure that exceptions to immunity *ratione materiae* were not applied in a wholly subjective manner. The draft articles as a whole required a more in-depth analysis.

114. **Mr. Horna** (Peru) said with regard to the topic of protection of the atmosphere that his delegation underscored the importance of the third preambular paragraph of the draft guidelines on the topic provisionally adopted by the Commission, which noted the close interaction between the atmosphere and the oceans. In addition to the reference, in paragraph (2) of the commentary to the second preambular paragraph, to the first Global Integrated Marine Assessment (first World Ocean Assessment), the Special Rapporteur should also consider drawing on the report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eighteenth meeting (A/72/95); that meeting had addressed the effects of climate change on oceans.

115. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation stressed with regard to draft article 7 the need to distinguish between immunity *ratione personae* and immunity *ratione materiae* with regard to the application of limitations and exceptions. The enjoyment of immunity *ratione personae* was of a temporal nature, and was not subject to limitations or exceptions while the members of the "troika" were in office, whereas there was a trend towards considering limitations and exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction for grave crimes that shocked the conscience of humanity. It was essential to strike a balance between respect for the sovereign equality of States, which was a factor of stability in international relations, and the fight against impunity for heinous crimes. At the same time, it was important to distinguish between the immunity of the State as such and the criminal immunity *ratione materiae* of its officials. Immunity from criminal jurisdiction was of a procedural nature, but could sometimes acquire a substantive character if it became a means of eluding judicial action against impunity.

116. Nevertheless, his delegation stressed the relevance of the aspects of a procedural nature that the Special Rapporteur planned to take up in her next report with a

view to ensuring adequate guarantees when assessing the invocation of immunity from criminal jurisdiction, considering possible limitations and exceptions to such immunity, and avoiding the risks of political manipulation. His delegation added its voice in support of the use of the six official United Nations languages in the Commission's work and in the topics planned for inclusion in its long-term programme of work, namely general principles of law as a source of international law and evidence before international courts and tribunals. The Commission should also consider, as a matter of urgency, the legal implications of sea-level rise.

117. **Mr. Shirole** (India) said with regard to the topic "Protection of the atmosphere" that his delegation thanked the Special Rapporteur for the dialogue on the subject between members of the Commission and scientists, which he had organized.

118. Referring to the draft guidelines provisionally adopted by the Commission, in particular draft guideline 9 (Interrelationship among relevant rules), he said that each field of international law had its own subject matter, scope, conditions and treaty-based legal regime to regulate its activities and related issues. Therefore, in-depth study was required to find areas which the protection of the atmosphere and other fields of international law had in common. In that process, the remit of established treaty regimes in other fields of international law, including their core objective, would have to be taken into account and respected before establishing links to any other field.

119. There was no denying that the atmosphere was a common resource which all States had a duty to protect for current and future generations, and that was even more important for the developing and less developed countries, in particular the island States, which faced the risk of continuing sea-level rise.

120. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", he noted that draft article 7 of the draft articles on the topic provisionally adopted by the Commission listed the crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* did not apply. The Special Rapporteur's methodology was commendable, but she did not provide sufficient treaty practice with regard to limitations and exceptions to immunity. Neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations, both of which expressly contained provisions on immunity for certain categories of State officials in the context of allegations of criminal conduct, contained any such exceptions to immunity.

121. The issues involved in the draft articles were highly complex and politically sensitive, and the Commission must therefore proceed with caution before deciding whether to focus on codification or progressive development with regard to immunity. That would not emerge clearly until the Commission identified consistent State and treaty practice in support of the exceptions in draft article 7. Any new system, if not agreed, would likely harm inter-State relations and undermine the objective of ending impunity for the most serious international crimes.

122. The status and nature of the duty being performed by persons claiming immunity was a factor of key importance at the time of the commission of the offence. There could be a situation in which persons who, although technically belonging to the category of officials with immunity under the domestic law of a country for acts committed during the course of official duty as State officials, might undertake a contractual assignment other than or in addition to the original State official duty. In such situations, factors such as the status of such officials at the time of the commission of the offence, the nature of their functions, the gravity of the offence, international law concerning immunity, victims' interests and the totality of circumstances should be taken into account in determining immunity.

123. **Mr. Hirotani** (Japan), referring to the topic "Protection of the atmosphere", said that his delegation welcomed the comprehensive approach of the Special Rapporteur in dealing with the topic. It was important to identify general norms of international law rather than to rely on individual treaties, which would only lead to fragmentation of norms. Japan therefore welcomed the Commission's provisional adoption of draft guideline 9 (Interrelationship among relevant rules) as a means of avoiding such fragmentation. Japan appreciated the focus in paragraph 1 on the importance of conformity with the relevant rules of international law, including the Vienna Convention on the Law of Treaties of 1969, and the principles and rules of customary international law. It also appreciated paragraph 2, which would avoid future fragmentation of international law by covering situations in which States wished to develop new rules.

124. Paragraph 3 highlighted the plight of those who were particularly vulnerable to atmospheric pollution and atmospheric degradation. Japan was pleased that the obligation set out in that paragraph of special consideration to be given such persons and groups was based on a human rights perspective.

125. The third dialogue session with scientists held during the sixty-ninth session of the Commission had been very useful. That approach could serve as a model

of good practice when the Commission dealt with the legal aspects of scientific topics.

126. His delegation noted with regard to the topic "Immunity of State officials from foreign criminal jurisdiction" that draft article 7 had been provisionally adopted by a recorded vote. That indicated that there had been a fundamental difference of opinion on certain issues, reflecting the difficulty and sensitivity of the topic. The Commission had debated whether limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction constituted an established customary international law or the development of new law. The Commission could not reach common ground on that matter. Although the Commission did not necessarily determine the legal status of the draft provisions, the divergent views could be due to the fact that the Special Rapporteur had not provided convincing evidence to support the conclusions in her report.

127. Further clarification was needed as to the reason for the selection of the crimes listed in draft article 7 as opposed to others not on the list. In particular, it was still unclear whether or not limitations and exceptions to immunity would be restricted to those crimes. It was also necessary to continue observing State practice in order to determine whether the draft article reflected the actual view of the international community.

128. In future work on the topic, close attention should be given to striking a proper balance between State sovereignty and the fight against impunity. The responsibility of States should not be confused with that of individuals; at the same time, it was also important to respect the international legal order, which was based upon the sovereign equality of States. During the current session, there had been discussions on procedural aspects of immunity and safeguards, but it had not been clear what those aspects and safeguards would mean. Japan hoped that the Special Rapporteur's sixth report would provide an in-depth clarification of those issues, together with references.

129. **Ms. Horvat** (Slovenia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said her delegation agreed that the aspect of limitations and exceptions to immunity required a detailed and careful examination which took into account State practice, *opinio juris* and trends in international law. The provisional adoption by the Commission of draft article 7 by a recorded vote attested to the complexity of the question. Given the importance of the topic to States, the subject required thorough consideration. Moreover, as a general rule, the Commission should strive to avoid recourse to a recorded vote when provisionally adopting draft articles.

130. Slovenia reiterated that, while the immunity of State officials from foreign criminal jurisdiction was based on the principles of the sovereign equality of States, non-interference, and the interest of States in maintaining friendly relations, the matter should also be addressed against the background of the growing prominence of legal humanism and the fight against impunity, in particular through the prism of the progressive development of international law and developments in international criminal law.

131. The Special Rapporteur had reflected those aspects by making a clear distinction between immunity *ratione materiae* and immunity *ratione personae*. Slovenia shared the view expressed in the Commission that, while the current status of customary international law did not allow for limitations and exceptions to immunity *ratione personae* in the context of inter-State relations, the opposite trend existed with respect to immunity *ratione materiae* and the most serious international crimes.

132. Slovenia supported the approach defined in draft article 7, paragraph 2, which focused on the "troika", and it stressed that the enjoyment of immunity *ratione personae* was time-bound. It also welcomed the inclusion of a without-prejudice provision in the proposed paragraph 3, which took into account a general obligation to cooperate with international tribunals.

133. Slovenia appreciated, on the one hand, the delicate nature of the issue and the need to strike a balance between the sovereign equality of States and stability in international relations and, on the other hand, the need to prevent and punish the most serious crimes under international law. That balance would be achieved through a prudent approach to dealing with situations in which limitations and exceptions applied, as well as through a thorough examination of the procedural aspects of immunity, including procedural safeguards and guarantees, in order to address concerns regarding possible abuse.

134. The list of crimes to which immunity *ratione materiae* would not apply rightly included the crimes of genocide, crimes against humanity and war crimes. Slovenia noted the decision not to include the crime of aggression in the list at the current time. While appreciating the specific nature of that crime and the fact that the jurisdiction of the International Criminal Court had yet to be activated on the question, Slovenia underlined that the crime of aggression was the most serious crime under international law and that its

inclusion in the list therefore merited reconsideration at the appropriate time.

135. Slovenia noted that the crimes of apartheid, torture and enforced disappearance were included in draft article 7, paragraph 1, as separate categories of crimes under international law, despite their inclusion in the Rome Statute. It understood that the Commission had reached that decision so as to avoid the threshold set in the Rome Statute. The choice of approach in that respect — namely, whether to follow the Rome Statute or to include the three additional crimes as separate categories of crimes — should correspond to the common understanding of the level of gravity of crimes for which limitations and exceptions to immunity would be acceptable to the majority of States. For example, while the Rome Statute had been ratified by more than 120 States, the International Convention for the Protection of All Persons from Enforced Disappearance had been ratified by 57 States.

136. Slovenia also drew attention to the link between that matter and the ongoing discussions within the Commission on the peremptory norms of general international law. Given that *jus cogens* rules were rules from which no derogation was permitted, Slovenia would welcome further examination of whether to consider violations of *jus cogens* norms in the context of limitations and exceptions to immunity.

137. Concerning draft article 7, paragraph 2, her delegation agreed that the scope of the topic did not include the drafting of definitions of crimes, and at the same time appreciated that the Commission was mindful of the principle of legal certainty. While her delegation understood the selection criteria used by the Commission in the draft annex, the limited approach in referring to existing sources of definitions of crimes might appear unusually selective. For instance, the annex did not list the Geneva Conventions and the Protocols thereto. Furthermore, listing the various conventions under specific subheadings, while omitting them from others, could give the impression, for example, that the Rome Statute did not proscribe the crimes of apartheid, torture and enforced disappearance. Moreover, not all States were parties to the conventions listed and not all States had transposed the relevant definitions into their domestic legal order. Her delegation proposed that the idea of an annex should be reconsidered, in terms of both content and format. Alternatively, and perhaps preferably, the Commission could examine whether it might not be more appropriate, as guidance for States, to make a general reference to the sources of the definitions of the crimes as contained in widely accepted and contemporary treaties.

138. Slovenia would welcome additional consideration of the consequences arising out of the differences between monist and dualist legal systems as well as of the matter of the lack of universal transposition of the definitions of those crimes into domestic legal orders in the context of the current topic.

The meeting rose at 6 p.m.