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Chair: Mr. Luna (Vice-Chair) . . . . . (Brazil)

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18-18285 (E)

In the absence of Mr. Biang (Gabon), Mr. Luna (Brazil), 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 IX, X and XI of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Ms. de Wet** (South Africa), referring to the topic "Protection of the environment in relation to armed conflict", said that one of the preconditions for the full realization of the right to self-determination of peoples living under colonial and foreign occupation was the protection of the environment for their benefit. Her delegation therefore appreciated the Commission's work in clarifying the rules and principles of the law of armed conflict in relation to protection of the environment and recognized the value of its contribution to both codification and progressive development of the law in that area. However, the Commission should not confine its work either to the law of armed conflict or to the law of occupation; rather, it should study the interface between the law of armed occupation, on the one hand, and international human rights law and international environmental law, on the other, in order to reflect the full gamut of legal norms for protecting the environment during occupation.

3. The Commission should also not over-emphasize conflicts between international environmental law and the law of occupation, as there was much complementarity between them, notwithstanding the assertion that the law of occupation was the applicable *lex specialis* during occupation. Examples of such complementarity were the obligation of the Occupying Power to respect the laws in force in the occupied territory; the obligation to restore and ensure public safety; the obligation to ensure sufficient hygiene and public health standards; and the prohibition against the destruction of property. The Commission should highlight such complementarities and should acknowledge the growing appreciation that other bodies of law were not wholly displaced by the applicability of international humanitarian law or the law of occupation as the *lex specialis*.

4. Turning to the draft principles provisionally adopted by the Drafting Committee at the seventieth session, she noted the omission in draft principle 19, paragraph 1, of the reference to "adjacent maritime areas", which had appeared in the draft principles proposed by the Special Rapporteur in her first report. While her delegation appreciated the Drafting Committee's rationale that the omission had been necessary for clear and concise legal drafting, it wished to emphasize the critical importance of protecting the oceans as part of the natural environment, and would support a clarification in the commentary that the protection of the relevant areas of the oceans fell within the ambit of the draft principles. It appeared that the condition that the relevant harm must be likely to prejudice the health and well-being of the population of the occupied territory limited the scope of the draft principles. While welcoming the inclusion of the broader term "well-being" in lieu of the enumeration of human rights relevant to environmental protection, her delegation encouraged the Commission to consider extending the category of persons entitled to the benefit of environmental protection from "the population of the occupied territory" to include also "future generations". The principle that an Occupying Power should respect the laws and institutions of the occupied territory should also include respect for and continued implementation of the international environmental law commitments of the occupied territory. Her delegation also believed that the principle of the right to self-determination and sovereignty over natural resources of peoples living under colonialism and foreign occupation should find expression in the outcome of the Commission's work.

5. Subsequently, when considering specifically the principles governing non-international armed conflicts, the Commission should bear in mind the increasing convergence of norms applicable to international and non-international armed conflicts and recognize that they could have an equally severe impact on the environment. Her delegation supported proposals that the Commission address issues of responsibility, liability, compensation and reparations for harm done to the environment during armed conflict and occupation, particularly in terms of the "polluter pays" principle and possible enforcement measures. It might also usefully consider the applicability of the precautionary principle in situations of armed conflict and occupation.

6. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the focus by the Special Rapporteur on procedural aspects was a positive development, particularly since the question of procedural compliance regularly formed the basis of legal challenges. An element of objectivity would thus be introduced, aimed at reducing politicization and abuse of criminal jurisdiction. The issue of immunity was politically sensitive, as it bore on the very essence of sovereignty. A careful balance must

therefore be struck between protection of the well-established norm of immunity of representatives of States from the jurisdiction of foreign States and avoidance of impunity for serious crimes.

7. South Africa supported the view that the procedural aspects of such immunity should not be restricted to the exceptions listed in draft article 7 but should apply to all draft articles on the topic; it agreed, however, that a distinction should be drawn between the procedural aspects relating to immunity *ratione materiae* and those relating to immunity *ratione personae*. With regard to timing, her delegation also agreed that immunity should be considered at an early stage and that the application of immunities could be determined during the phase of investigation, while noting the practical implications that arose during that phase. While the commencement of an investigation on the basis of which an arrest warrant might later be issued did not in itself violate the principles of immunity and inviolability, as three of the judges of the International Court of Justice had found in a joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, practical challenges arose, in that no measures could be taken to prevent a person from leaving a State's jurisdiction pending an investigation into the applicability of immunity. That placed the State in a predicament, in that it might not be able to prevent a person from leaving who might indeed be subject to its jurisdiction.

8. Her delegation concurred that a guiding factor in determining whether acts were affected by immunity should be whether any act of authority by the forum State would hinder the person concerned in the performance of his or her duties. While the Special Rapporteur contended that the courts of the forum State were competent to decide on the applicability of immunity, she also acknowledged the possibility that other State organs or authorities might also express their views, depending on the national law involved. In that regard, the prosecuting authorities of a foreign State might play an integral role and have wide discretionary powers in deciding on the applicability of immunities, although such wide powers could result in the selective application of immunity and in abuse. Her delegation urged that, in crafting the draft articles, the Special Rapporteur reflect upon the practical challenges that might arise and that had not yet been comprehensively considered.

9. **Ms. Gorasia** (United Kingdom) said that her delegation remained unconvinced of the need for new treaty provisions on the topic "Protection of the environment in relation to armed conflicts" and agreed that the Commission should not seek to modify the law of armed conflict or the law of occupation. It also considered that the scope of the topic should not be broadened to include its interrelationship with other legal fields, such as human rights. It looked forward to the preparation of commentaries by the Special Rapporteur in 2019, which it expected to be narrower in scope than the report itself.

10. Regarding the work on "Succession of States in respect of State responsibility", the United Kingdom reiterated its concerns about the challenges facing the Commission, given that there was little by way of State practice to guide it in that area. The additional practice highlighted in the Special Rapporteur's second report (A/CN.4/719) was context-specific and must be viewed in its historical, political and even cultural context. The United Kingdom also urged against the Special Rapporteur relying unduly on academic writings, especially where they might be used as the basis for the inclusion of draft articles based on "new law" or progressive development of law. It agreed with the Special Rapporteur that a general theory of non-succession should not be replaced by another similar theory in favour of succession. It also agreed that a more flexible and realistic fact-sensitive approach was required for succession but was not convinced that existing law or State practice supported the idea apparent in the draft articles that a general underlying theory of succession should be influenced by whether or not the predecessor State continued to exist. It cautioned against draft articles that were based on practical and policy considerations, rather than on existing practice or law.

11. With regard to the debate on the scope of possible exceptions to the general rule of non-succession, her delegation agreed that the Special Rapporteur should clarify the extent to which each of the draft articles codified customary international law or, alternatively, would constitute progressive development of international law or new international law. It also agreed that a draft article should be added to make clear that the draft articles would only apply in the absence of any agreement between the parties, including the State injured by an internationally wrongful act. Such agreements in themselves should not be relied on to infer general rules regarding the effects of succession on State responsibility. The United Kingdom, while retaining an open mind as to the utility of the work, considered that it would be difficult to reach broad agreement among States on the topic, given the dearth of existing practice and the case-by-case approach taken by States when faced with questions of the succession of States in respect of State responsibility. Where practice existed, it was usually the product of

negotiation and agreement between the relevant States, rather than the existence of an underlying general rule.

12. Regarding the topic "Immunity of State officials from foreign criminal jurisdiction", which the United Kingdom continued to consider of great practical significance, a clear, accurate and well-documented proposal by the Commission would be valuable but was still a distant goal. The Special Rapporteur's sixth report (A/CN.4/722) was a preliminary report which reiterated the need to address the procedural aspects of immunity and discussed a number of general procedural matters. There remained, however, a divergence of opinion on how those procedural aspects should be addressed and their relationship to the proposed exceptions to immunity, reflecting the different views as to whether exceptions or limitations to immunity, in particular in relation to crimes under international law, were appropriate. The United Kingdom regarded those procedural elements as inseparable from the substantive elements in that context and, while welcoming the identification of some of the issues to be addressed by the procedural safeguards, looked forward to the elaboration of draft articles following the Special Rapporteur's seventh report.

13. It remained vitally important for the Commission to clearly indicate those draft articles which it considered to reflect existing international law and those it considered to represent progressive development of the law. The United Kingdom would also welcome a renewed focus in the seventh report on the basis in international law for the exceptions to immunity proposed in draft article 7. That basis remained unclear and it was important for there to be a consensus on topics of such importance.

14. **Mr. Eidelman** (Israel), referring to the topic "Protection of the environment in relation to armed conflict", said that Israel remained of the view that some of the draft principles on the topic adopted by the Commission did not represent the current state of the law but reflected, rather, progressive development. Despite the significance of the different legal regimes considered in the Special Rapporteur's first report (A/CN.4/720 and A/CN.4/720/Corr.1) – international environmental law, law of armed conflict, and international human rights law – it should be borne in mind that they were completely different from one another, each being designed for a specific purpose and involving its own considerations and including, accordingly, a unique and appropriate set of rules which, of course, Israel respected. The Commission should therefore take a more cautious approach with respect to the interrelation between those different regimes.

15. Israel welcomed the statement by the Special Rapporteur that the Commission should not seek to change international humanitarian law relating to occupation; any such development of humanitarian law, if necessary, should be pursued within the appropriate legal framework. Since, moreover, a legal discussion on the protection of the environment in relation to armed conflict was likely to include attempts to address controversial issues and terms, it was doubtful whether the Commission was the appropriate forum for the settlement of such issues.

16. With regard to the draft principles provisionally adopted by the Drafting Committee at the seventieth session and contained in document A/CN.4/L.911, he said the principled position of his delegation was that while the law of armed conflict was not designed to protect the environment per se, it did require some environmental protection by limiting environmental harm prejudicial to the health and well-being of the civilian population. In draft principle 19, paragraph 2, the word "significantly" should be added before "prejudice", in order to maintain a proper balance between the prevention of significant harm to the environment and the prevention of significant prejudice to the health and well-being of the population. Draft principle 19, paragraph 3, did not reflect the current state of the law and, for that reason, should not be adopted by the Commission. It would be preferable, rather, for the Commission to adopt the text originally proposed as draft principle 19, paragraph 2, by the Special Rapporteur in her first report, as it was more reflective of *lex lata*. Draft principle 20 should reflect existing international law and be better aligned, in particular, with the text of the Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land (the Hague Regulations), article 55 of which concerned inter alia the issue of the use of natural resources by an Occupying Power. The Occupying Power was instructed in that article to safeguard the capital of the properties and administer them in accordance with the rules of usufruct. Draft principle 20 seemed to impose additional requirements and elements going beyond the current state of law.

17. Turning to the topic "Succession of States in respect of State responsibility" and noting that available State practice in that regard was limited, diverse, context-specific and often politically sensitive, he said that Israel shared the concern expressed by members of the Commission as to its suitability for codification. He reiterated the basic position of Israel that the Commission should focus its work on the codification of international law, as reflected in State practice, and that States had primacy over other actors operating in

the international legal arena. His delegation also agreed that the Commission should not rely unduly on academic writings and the work of the Institute of International Law when seeking to reflect and codify the state of the law accurately.

18 While it was too early to determine the final form of the project, it should be of a discretionary nature and be subsidiary in character to agreements between States, including the injured State of an internationally wrongful act. His delegation therefore supported the proposal that a provision be added expressly to that effect. Lastly, Israel agreed with the proposal of the Special Rapporteur that the Commission should consider changing the title of the topic to "State responsibility problems in cases of succession of States".

19. On the topic "Immunity of State officials from foreign criminal jurisdiction", Israel commended the cautious approach adopted by the Special Rapporteur. While it was important to combat impunity, the legal principle of immunity of State officials from foreign criminal jurisdiction was as imperative as ever; it was firmly established in the international legal system and had been developed to protect State sovereignty and equality, prevent political abuse of legal proceedings and allow State officials to perform their duties properly. Israel remained very concerned that the draft articles provisionally adopted so far had failed to accurately reflect customary international law on the subject or to adequately acknowledge that fact. In particular, Israel shared the view of many other States regarding the unsatisfactory treatment of the issue of immunity *ratione personae* and the exceptions to immunity *ratione materiae* in draft article 7.

20. On the issue of persons enjoying immunity *ratione personae*, while it was specified in the draft articles that only Heads of State, Heads of Government and Ministers for Foreign Affairs were entitled to such immunity, under customary international law, the category of State officials enjoying such immunity was wider and depended rather on the particular character and necessity of their functions. On the issue of exceptions to the applicability of immunity *ratione materiae*, Israel shared the view that the exceptions stipulated in draft article 7 corresponded neither to customary international law in force nor to any "trend" in that direction. Accordingly, the draft articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction and draft article 7 should be completely altered, if not deleted.

21. That being said, any discussion of exceptions – which, in any event, would be an attempt to propose *lex ferenda* only and was not be encouraged – must be held in conjunction with the discussion of safeguards rather than separately from it. In that context, his delegation welcomed the Commission's suggestion that specific safeguards be developed to address questions arising from draft article 7. It consequently endorsed the Special Rapporteur's suggestion that, when considering the procedural aspects of immunity, the Commission should take into account the need to respect the sovereign equality of States and protect the proper functioning of international relations. It also welcomed the Special Rapporteur's statement concerning the entitlement of a foreign State official to procedural safeguards recognized under international law, particularly international human rights law where applicable, and shared her view that proper consideration of the procedural aspects would reduce the risk of political abuse.

22. With regard to the safeguards themselves, Israel attached much importance to the criterion concerning the question of the appropriate national jurisdiction to be exercised over a foreign State official and believed that, in general, there was no room for the application of universal jurisdiction against foreign State officials as a first resort. It would therefore be desirable to discuss the definition of the term "jurisdiction", as used in the draft articles, in order to bring certainty to the kind of jurisdiction affected by the rules of immunity of State officials. Israel would likewise be in favour of a discussion of whether the exercise of jurisdiction over foreign State officials should be subject to a decision by a higher domestic court rather than a lower one. In addition, decisions on those matters should be taken at the most senior levels in the forum State, upon legal advice and after consultation with the State of the State official.

23. Israel also agreed that a communication mechanism needed to be developed between the forum State and the State of the foreign official that would incorporate the principle of subsidiarity or complementarity and be used as standard procedure in the consideration of criminal proceedings against foreign State officials, including at the pre-indictment stage. Such a mechanism would ensure the preservation of immunity in cases where the State of the foreign official determined that the foreign official had acted in the performance of his or her duties. It was crucial that States with the closest and most genuine jurisdictional links, which by default would be the State of the foreign official, be the ones called on to resolve the question of the best and most efficient way to promote the interests of justice. It should be noted, however, that the principle of subsidiarity did not necessarily require the full

exercise of criminal jurisdiction by States with the closest jurisdictional links; they were required, rather, to assess the case at hand and handle it within the appropriate legal framework, possibly but not necessarily in the form of criminal proceedings.

24. Israel agreed that, as part of the safeguards, there should be discussion on how the proper communication between the forum State and the State of the foreign official would be ensured, and also on what mechanisms would enable the State of the foreign official to have its legal position made known and taken into consideration by the forum State. Moreover, Israel welcomed the reference made by some members of the Commission to the role of ministries of foreign affairs in cases where criminal proceedings were initiated against foreign State officials, reflecting the fact that the stability of international relations and the sovereign equality of States could be affected by such situations.

25. Israel supported the Special Rapporteur's conclusion that immunity must be considered by the forum State at the earliest possible opportunity but did not share her view that immunity might not be considered automatically from the start of an investigation. Immunity was a procedural threshold that prevented the initiation of any criminal proceedings, including questioning or investigation, which could not be conducted before the question of immunity was properly examined, including through communication with the authorized representatives of the State of the foreign official concerned. Furthermore, caution was in order with respect to the Special Rapporteur's observations regarding the distinction between immunity and inviolability, as well as the distinction between the person of the State official and assets that might be sought for seizure as part of the criminal proceedings against him or her, so as not to undermine or even nullify the very essence of immunity of State officials from foreign criminal jurisdiction.

26. While it was extremely important in the current context to explore potential safeguards to such immunity, the draft articles as provisionally adopted did not reflect the current state of the law and in fact undermined well-established legal principles that continued to be applicable to, and necessary for, the conduct of international relations in the contemporary world. If the Commission wished to propose the progressive development of the law in a certain direction, then it should be transparent that such was the purpose of the exercise, so that States could react accordingly. If it was seeking to give expression to *lex lata*, then it had missed the mark. In either case, a more detailed and robust engagement with Member States on the topic was necessary for the Commission's contribution to be useful and effective.

27. **Ms. Pürschel** (Germany), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that her delegation commended the Special Rapporteur for presenting a detailed summary of the debate on the topic that had taken place in the Sixth Committee in 2017 in her sixth report (A/CN.4/722). That debate had shown the importance of considering procedural aspects in conjunction with the discussion of draft article 7. Procedural safeguards against the misuse of exceptions to immunity were a vital matter in themselves but had become even more important in the context of draft article 7. It was therefore regrettable that the debate thereon had only been initiated in the sixth report, with several important issues being held over for consideration in her next report, to be issued in 2019. Germany therefore looked forward to the draft articles to be presented in that report, which it hoped would be submitted in good time.

28. Given the limited time available for consideration of the sixth report at the seventieth session of the Commission, the debate on that report would be continued at the seventy-first session. Indeed, several Commission members had stressed the preliminary character of their comments and had reserved the right to comment further on the report at the seventy-first session. Her delegation continued to believe that thorough consideration of all aspects of the topic by all members of the Commission was of crucial importance and must include careful attention to State practice. As for the final outcome of the work, Germany reiterated that any substantial change of international law proposed by the Commission would have to be agreed upon by States in a treaty. Her delegation encouraged the Commission, as it went forward to the next stage in its deliberations on the topic, to be guided by its oft-stated goal of striking an equitable balance between much-needed stability in international relations and the interest of the international community in preventing and setting penalties for the most serious crimes under international law. Germany would remain attentive to the development of the project and encouraged others to do the same.

29. **Mr. Park** Young-hyo (Republic of Korea), recalling his delegation's support for the temporal approach to the topic "Protection of the environment in relation to armed conflicts", with the situations before, during and after armed conflicts being considered separately in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), said that the Special Rapporteur had rightly not attempted to set forth a new methodology but had sought to ensure

consistency in the work completed so far. The Republic of Korea welcomed the discussion in the report on the situation of occupation, which was related to both the armed-conflict phase and the post-conflict phase and did not fall exclusively within either, but needed to be discussed separately for each phase being considered. His delegation agreed with the Special Rapporteur that the aim should be not to change international humanitarian law relating to occupation but, rather, to fill gaps in the law relating to environmental protection.

30. Referring to the draft principles that had been provisionally adopted so far by the Commission, he said that in draft principle 4, the less prescriptive formulation of paragraph 2 aimed at encouraging voluntary measures was suitable because the output on the topic was intended to be in the form of principles. In draft principle 6, the emphasis on the rights of indigenous peoples was also welcome. In draft principle 8, his delegation supported the delineation of its scope to situations where there was a direct link with an armed conflict, to guard against it being interpreted too broadly.

31. With regard to draft principles 14 and 15, it also agreed that the restoration and protection of the environment, post-armed conflict assessments and remedial measures were part of the peace process. In draft principle 18, it supported the emphasis on sharing and granting access to information to facilitate remedial measures after an armed conflict; it was unclear, however, how much and until when that requirement applied to States and international organizations. Lastly, his delegation welcomed the Special Rapporteur's intention to address the extent to which the draft principles applied to non-international armed conflicts in her next report and requested the Commission to examine whether any principles or relevant practices were applicable to both international and non-international armed conflicts.

32. Turning to the topic "Succession of States in respect of State responsibility", he said that, while available State practice was context-specific and politically sensitive, the Commission's work could help fill the legal gap between State responsibility and State succession, while enhancing predictability in the resolution of relevant problems. Noting that, of the seven draft articles proposed by the Special Rapporteur, only two had been provisionally adopted by the Drafting Committee, he said that his delegation believed that specific approaches to different categories of State succession were as important as the establishment of a general rule and regretted that the discussions had not yet led to the adoption of other draft articles. It welcomed, in particular, the adoption of draft article 1, paragraph 2, which stressed the subsidiary nature of the draft articles. While the Commission's work would provide a standard for resolving problems as well as for forming agreements, the proposed provisions should apply only in the absence of an agreement between the parties.

33. With regard to draft articles 5 and 6 provisionally adopted by the Drafting Committee, his delegation supported the general position on the requirement of international legality of succession and its articulation in a specific provision but considered that the issue was politically sensitive and that some cases would fall within a grey area in terms of evaluating the legality of succession. His delegation supported the general rule of non-succession to State responsibility. Draft article 6, however, did not clearly reflect the general rule of non-succession but merely restated, perhaps unnecessarily, established rules on State responsibility. It should focus, rather, on exceptions to the continuing character of acts after succession, or composite acts. His delegation took note of draft articles 7 to 11, not yet adopted by the Drafting Committee, and again emphasized the importance of categorizing State succession. It looked forward to more in-depth discussion on the specific categories of State succession as an exception to the non-succession principle at the Commission's seventy-first session.

34. His delegation welcomed the sixth report of the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction", on which it would provide comments after completion of the Commission's discussion thereon.

35. **Mr. Scott-Kemmis** (Australia), welcoming the Commission's discussions on the procedural aspects of the issue of immunity of State officials from foreign criminal jurisdiction, said that the timing, invocation and waiver of such immunity should be the primary focus of the Special Rapporteur's seventh report. The draft articles on the topic should codify customary international law and should therefore be distilled from relevant State practice and *opinio juris*. Immunity must not be equated with impunity. While immunity *ratione materiae* had the effect of preventing the prosecution of State officials for international crimes in some circumstances, in some forums, the officials could be prosecuted in their own State, before a competent international court, or in the courts of a third-party State after waiver of immunity if they were accused of international crimes.

36. Australia regretted the continued focus in the Special Rapporteur's sixth report (A/CN.4/722) on the proposed exception to the immunity of State officials

from foreign criminal jurisdiction in draft article 7. Australia remained unable to support that draft article, which had been provisionally adopted by a vote in the absence of a consensus, and continued to share concerns that, in its current form, the draft article did not reflect any real trend in State practice and, still less, existing customary international law. While the international community could and should do more to ensure that State officials who committed international crimes were held to account, draft article 7 was not an appropriate means of addressing the issue and might even distract from the Commission's valuable work in codifying customary international law. Draft articles on the procedural aspects of the immunity of State officials would be most valuable to States where they flowed from rules on such immunity that reflected existing customary international law. To make any progress with draft article 7 in the Commission's future work, it was vital that it be clearly identified as progressive development and not be the focus of the Special Rapporteur's seventh report.

37. **Ms. Leega Piiskop** (Estonia), addressing the topic of succession of States in respect of State responsibility and the draft articles proposed by the Special Rapporteur in his second report (A/CN.4/719), said that her delegation welcomed the inclusion of draft article 5, which provided that the draft articles applied only to the effects of a succession of States occurring in conformity with international law. It was the understanding of Estonia that the illegal acquisition of a territory, or, in other words, illegal annexation, could not generate the effects of succession between the States concerned. Accordingly, her delegation was pleased to note that, in paragraph 85 of the report, it was pointed out that Estonia, Latvia and Lithuania, which had restored their independence during 1990 and 1991, could not be regarded as new States and successors of the Soviet Union, but as identical to those three States that had existed before 1940.

38. In draft article 6, paragraph 4, it could be useful to clarify the extent of the obligations and responsibilities arising from an internationally wrongful act that could be transferred to the successor State. With regard to draft article 7, paragraphs 2 and 3, it would be helpful to have explanations and examples of the expression "if particular circumstances so require". It would also be useful to define or clarify in the commentaries the term "newly independent State", as it would be to know which aspects of the draft articles represented existing State practice and which were to be considered *de lege ferenda*. Her delegation supported the approach proposed by the Special Rapporteur for continuation of work on the topic.

39. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that during the debate on the draft articles contained in the sixth report of the Special Rapporteur, Estonia had suggested that the crime of aggression be included in draft article 7, paragraph 1, among the crimes to which immunity *ratione materiae* did not apply. The suggestion had not received much support and the view had been expressed that any such decision should be taken after the activation of the jurisdiction of the International Criminal Court over the crime of aggression. Since the decision to that effect had entered into force on 17 July 2018, accompanied by an amendment to the Rome Statute of the International Criminal Court, the Commission might wish to return to the issue. The Estonian Penal Code already contained a specific article on crimes of aggression, drafted in accordance with the amended Rome Statute.

40. Furthermore, while her country did not yet have any national practice in respect of procedures on immunity, the Estonian Code of Criminal Procedure could be applied to a person enjoying diplomatic immunity or other privileges prescribed by an international agreement at the request of a foreign State, taking into account the provisions of an international agreement. Under the Estonian Penal Code, crimes of aggression, crimes of genocide, crimes against humanity and war crimes were imprescriptible and any person having committed or been complicit in the commission of such crimes was liable to punishment. Moreover, the Code was so drafted as to be applicable to any representative of any State. All States had a shared responsibility to ensure that the perpetrators of the most serious crimes did not escape justice; immunities should not shield them from accountability.

41. Her delegation agreed that there was a close relationship between the question of limitations and exceptions to immunity and efficient procedural safeguards, and that the distinction between immunity *ratione personae* and immunity *ratione materiae* should be maintained in the context of procedural provisions and, subsequently, of safeguards. With regard to timing, it also agreed that immunity issues should be addressed at an early stage of proceedings, so as not to run the risk of nullifying the immunity rule. The acts of a forum State to which immunity applied, as listed by the Special Rapporteur – detention, appearance as a witness and precautionary measures – were all relevant and deserved further attention. That was particularly true of most of the acts performed during criminal proceedings, as they constituted constraining coercive measures and had a direct influence on the exercise of functions by an official.

42. Lastly, the court of the forum State was the appropriate national authority to decide whether immunity existed or whether there existed exceptions to immunity, although the role of other national authorities, such as investigative authorities or the Public Prosecutor's office, could not be ruled out, particularly at the initial stage of criminal proceedings. The court could request an opinion from other relevant national authorities, for instance ministries of foreign affairs; international cooperation also had a part to play in such matters, with possibly the Security Council having a more active role in referring cases to the International Criminal Court.

43. **Mr. Nguyen** Nam Duong (Viet Nam) said that his delegation commended the Commission for its efforts to build on the work already done on the topic "Protection of the environment in relation to armed conflicts". Viet Nam had been made well aware of the consequences of armed conflicts, including damage to the environment: they had tremendous and lasting impacts not only on the population, but also on fauna, flora, soil, air and water as well as ecosystems. It was decades since war had ended in his country, but its effects were still very visible and clearly felt there. That was also true for all other armed conflicts around the world. Viet Nam therefore supported the Commission's continuing work on the topic to establish State responsibility in dealing with the remnants of war, particularly those related to environmental damage. The Commission's research should complement existing international law on the protection of the environment and laws governing armed conflicts, particularly the 1949 Geneva Conventions and their Additional Protocols.

44. His delegation also supported the Special Rapporteur's efforts to integrate in her first report (A/CN.4/720 and A/CN.4/720/Corr.1) the law on occupation, international humanitarian law and international environmental law. Accordingly, and while supporting the use of the term "Occupying Power" instead of "occupying State", it would like to see further elaboration on different types of occupation as well as ensuing obligations of environmental protection according to each type of occupation, and would welcome exploration of the obligation to prevent, mitigate and control environmental damage as applied to Occupying Powers.

45. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation had reservations regarding paragraphs 154 and 155 of the Special Rapporteur's second report (A/CN.4/719). The Special Rapporteur's interpretation of the 1995 United States-Viet Nam claims settlement agreement in those paragraphs was incorrect and did not reflect the common understanding of the States parties thereto. Referring to the draft articles proposed by the Special Rapporteur, he drew attention to draft article 6, paragraph 1, the wording of which needed to be revised to reflect the continued application of the rule of non-succession of State responsibility and should therefore read: "Obligation arising from an internationally wrongful act committed before the date of succession of States shall be attributed to the predecessor State unless the successor State accepts to be bound by such obligation".

46. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", and given that such immunity originated from customary international law, the codification of rules on the topic must be undertaken with due consideration of the principles of sovereign equality, non-intervention in the domestic affairs of States and the need to maintain international peace and security. The draft articles should reflect a balance between the benefits of granting immunity to State officials and the need to address impunity and embody established norms in respect of such matters. Accordingly, the exceptions to immunity from criminal jurisdiction warranted further debate so that all the draft articles could be adopted by consensus.

47. Concerning the topic of universal criminal jurisdiction, proposed for inclusion in the Commission's long-term programme of work, his delegation had reservations as to its necessity and viability. Caution was in order. The Commission was currently occupied with other topics concerning criminal matters, such as immunity of State officials from foreign criminal jurisdiction and *jus cogens*.

48. The other topic proposed for inclusion in the long-term programme of work, "Sea-level rise in relation to international law", would touch on one of the greatest challenges currently facing humanity. Sea-level rise had become a global phenomenon and thus created global problems, impacting the international community as a whole. His delegation therefore supported work by a study group on the topic and its inclusion in the long-term programme of work.

49. **Ms. Buner** (Turkey), referring to the topic "Succession of States in respect of State responsibility", said that, in his second report (A/CN.4/719), the Special Rapporteur had referred to "continuing State" and "successor State" as separate criteria for determining exceptions to the principle of non-succession in respect of State responsibility for wrongful acts. Nonetheless, the concepts of continuity and succession had huge political and legal consequences that were inextricable from one another. Throughout history, cases of State

succession had resulted from specific conditions and had been marked by a variety of political and legal arrangements having few common features and therefore not readily lending themselves to conceptualization. The terms "continuing State" and "successor State" themselves were still not clear-cut in meaning and their legal and political characteristics remained doubtful. The debate was still therefore at the theoretical level.

50. One award by an arbitral tribunal did not suffice as a legal basis for the formulation of a rule about the topic, nor indeed for the evaluation of a historical fact with countless ramifications, whether considered through the continuity lens or the succession lens. Similarly, an opinion expressed by an organ mandated by a number of States in a limited area could not be generalized as a principle, or as a confirmation of a principle, of international law without primary evidence of the prior existence of that principle. The example of the *Lighthouses Arbitration* case, cited in paragraph 142 of the Special Rapporteur's report (A/CN.4/719), illustrated such a generalization in respect of the continuity and succession issue. In that case, to which Turkey was not a party, the Arbitral Tribunal's ruling was an individual and partial interpretation of the Treaty of Peace of Lausanne and of the status of Turkey. It should therefore not be reflected as a general principle or be used as a basis for the formulation of a principle, as though it enjoyed general recognition.

51. More detailed comments reflecting her delegation's position on the topics "Protection of the environment in relation to armed conflicts" and "Immunity of State officials from foreign criminal jurisdiction" could be found in her written statement, available on the PaperSmart portal.

52. **Mr. Ahmadi** (Islamic Republic of Iran), referring to the topic "Protection of the environment in relation to armed conflicts", said that his delegation trusted that the draft principles and commentaries thereto to be adopted on the topic would apply to international armed conflict rather than to non-international armed conflict, because both types of conflict were different in nature. His delegation believed that it would be important to define the concept of "occupation" in relation to armed conflicts and to also make it clear whether the reference to occupation would be in accordance with article 42 of the Hague Regulations, or in accordance with the relevant provisions of the 1949 Geneva Conventions, although his delegation would prefer it to be in line with article 42 of the Hague Regulations.

53. The presence of armed forces was only one requirement for occupation; the control of territory without the presence of armed forces also needed to be taken into account. The International Court of Justice had confirmed the definition contained in the Hague Regulations and referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict. Moreover, as was stated in the Special Rapporteur's report (A/CN.4/720), definitions of "armed conflict" and "environment" had already been included in the preliminary report of the former Special Rapporteur (A/CN.4/674 and A/CN.4/674/Corr.1).

54. As some members of the Commission had noted, it should be stated in the draft principles or the commentaries thereto that the law of occupation could apply to international organizations. Under certain circumstances, international organizations could perform similar functions to States, such as controlling and administering a territory. As the Special Rapporteur had indicated, the law of occupation and human rights law should help to inform the principles of environmental protection. The wide range of human rights instruments, their normative status and their concurrent applicability were sufficient to inform the obligations to protect human health from environmental risk and limit environmentally harmful practices. His delegation agreed with the Special Rapporteur that some pertinent draft principles could be usefully applied to situations of occupation. Examples included paragraph 2 of draft principle 6 (Protection of the environment of indigenous peoples), draft principle 15 (Post-armed conflict environmental assessments and remedial measures), draft principle 16 (Remnants of war), draft principle 17 (Remnants of war at sea) and draft principle 18 (Sharing and granting access to information), all of which had been provisionally adopted by the Drafting Committee.

55. His delegation was not convinced that the Commission should work to elaborate draft articles on the topic "Succession of States in respect of State responsibility". Its previous output on related topics, including 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, had not been widely endorsed: States had preferred to settle their disputes through bilateral agreements. For the same reason, his delegation did not believe that the Commission's output could take the form of guidelines. Moreover, as the Special Rapporteur had indicated in his first report (A/CN.4/708), State practice did not provide sufficient principles governing the succession of States in respect of State responsibility. It should be recalled that, when selecting topics, the Commission should ensure that

they reflected the needs of States and were at a sufficiently advanced stage in terms of State practice to permit progressive development and codification.

56. The sixth report of the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/722) addressed certain procedural aspects of the topic. His delegation welcomed the fact that the Special Rapporteur intended to complete her consideration of procedural issues in her next report. That component of the topic was essential in order to ensure that immunities were respected where applicable, something that would in turn safeguard the stability of international relations and ensure respect for the sovereign equality of States. The Special Rapporteur rightly noted that the focus of the members of the Commission with regard to procedural aspects of immunity had shifted towards the need to establish procedural safeguards in order to avoid the politicization and abuse of criminal jurisdiction in respect of foreign officials. From that standpoint, the procedural aspects to be considered should essentially comprise clauses safeguarding the sovereignty of the foreign State.

57. The Commission had provisionally adopted draft article 7 (Crimes in respect of which immunity *ratione materiae* does not apply) at its sixty-ninth session. His delegation was disappointed at the manner in which it had been drafted, and at the repercussions for the working methods of the Commission in future. The substantive flaws of the draft article were such that they could not be remedied through procedural safeguards.

58. **Ms. Gasri** (France), referring to the topic "Protection of the environment in relation to armed conflicts" and the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), said that her delegation supported the proposal not to include a definition of occupation in the draft principles proposed by the Special Rapporteur; the Commission should work within the legal framework that had been agreed thus far. Moreover, some of the developments contained in the report appeared to address issues that went beyond the scope of the topic, such as the general application of international humanitarian law in situations of occupation and the relationship between international humanitarian law and international human rights law.

59. It would, however, be useful to specify the status of the Commission's output on the topic. The Special Rapporteur had suggested that the aim of the draft principles should be to fill gaps relating to environmental protection, and a number of members of the Commission had agreed. That view raised the question of whether all the draft principles constituted progressive development of international law, or whether some of them codified existing customary law.

60. Turning to the topic "Succession of States in respect of State responsibility", she said that the second report of the Special Rapporteur (A/CN.4/719) contained a thorough analysis of the topic and encompassed sources in a variety of languages. That approach was necessary because State practice appeared limited, the specific circumstances of each situation were very important, and politically sensitive issues were often involved.

61. Her delegation agreed with the view expressed in draft article 6 (General rule) of the draft articles provisionally adopted by the Commission that succession of States had no impact on the attribution of the internationally wrongful act committed before the date of succession of States. It was, however, important to take a flexible approach and allow for exceptions to the principle of non-succession to responsibility. At the same time, as several members of the Commission had pointed out, there should be no general presumption in favour of succession in respect of State responsibility. In the light of the paucity of State practice, the Commission might wish to specify in the draft articles whether they constituted codification or progressive development of international law. It would also be appropriate to include a provision stating that the draft articles would apply only in the absence of any agreement among the parties.

62. **Mr. Elshenawy** (Egypt) said that his delegation regretted the Commission's decision to include the topic "Universal criminal jurisdiction" in its long-term programme of work. The issue was still being discussed by the Sixth Committee and the latter had not suggested that the Commission consider it. Indeed, a large number of Member States had expressed their opposition to such a step.

63. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and the draft conclusions adopted on second reading, he said that, as was appropriate, paragraphs 1 and 2 of draft conclusion 4 (Definition of subsequent agreement and subsequent practice) drew on the language of article 31 of the 1969 Vienna Convention on the Law of Treaties. However, his delegation did not agree with the statement in paragraph 3 that a subsequent practice as a supplementary means of interpretation under article 32 of the Vienna Convention consisted of conduct by one or more parties in the application of the treaty, after its conclusion. Article 32 did not in fact mention or define subsequent practice; it followed that paragraph 3 of draft conclusion 4 was not

based on a generally accepted convention or legal principle. Moreover, the reference to the conduct of "one or more parties" meant that a single party could, through its own conduct, establish a new interpretation of the treaty. It would have been more appropriate to align that provision with article 31, paragraph 3 (b), of the Vienna Convention, which referred to subsequent practice in the application of a treaty that established the agreement of the parties regarding its interpretation. Alternatively, a paragraph could have been added to draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty) stating that the conduct of a solitary party was a binding interpretation only in respect of that party and of other parties that had agreed to it.

64. In her sixth report, the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" observed that the courts of the forum State would be competent to give a definitive view concerning the determination of immunity and, in particular, the identification of the organ in the forum State that was competent to consider and decide on the applicability of immunity. She also referred to the need to establish a balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to ensure that the immunity of its officials was respected. His delegation did not agree with that assessment: the question of immunity went beyond the competence of the court of the forum State, and responsibility for combating impunity lay with the national judicial system of the State of the official. Similarly, in paragraphs 282 through 292 of the Commission's report (A/73/10), there was an undue focus on the role of the court of the forum State with regard to immunity, including the determination thereof. The implication was that a court of the forum State could strip a foreign official of immunity while ignoring the sovereign rights of the State of the official.

65. His delegation also objected to the statement made in paragraph 284 of the Commission's report that it appeared impossible to conclude that immunity from jurisdiction must be considered automatically from the start of an investigation, in particular because acts that were a mere investigative nature, as a rule, did not have binding force, nor did they directly affect a State official or the performance of his or her functions. That statement was untenable: individuals to whom immunity had been granted could not be subjected to investigative proceedings.

66. On a more general note, his delegation did not concur with the Special Rapporteur's endeavour to formulate principles that would entail exceptions to the immunity granted to certain State officials. It therefore completely rejected draft article 7, which was not based on any existing international law or custom, or any tangible trend in State practice, or any international legal opinions. It amounted to a proposal for a completely new law, rather than the codification of existing international law or its progressive development. If the Commission wished to propose a new law, there was nothing to prevent it from formulating a model draft article which interested States could consider, including in any treaty that they might conclude. Moreover, there were no clear legal criteria for the determination of the crimes listed in paragraph 1 of the draft article. The list clearly reflected political priorities and was largely based on the Rome Statute of the International Criminal Court, which had not been universally ratified. The Commission should therefore review draft article 7 in whole, and perhaps consider removing it entirely; it could not be accepted in its current form.

67. **Ms. Abd Kahar** (Malaysia) said, in relation to the topic "Protection of the environment in relation to armed conflicts" and the draft principles provisionally adopted so far by the Commission, that the terms "environment" and "natural environment" had been used inconsistently. It would be useful to identify criteria to avoid causing confusion in their use. Moreover, environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage. Her delegation supported the proposal, which had been discussed by the Commission, to revisit the terms "environment" and "natural environment" at a later stage. With regard to draft principle 6 (Protection of the environment of indigenous peoples), the domestic law of Malaysia recognized the special relations between indigenous communities and their precious natural living environments. The Commission should therefore give special consideration to the rights and roles of local communities and indigenous groups, which had a close connection to their natural living environments and whose welfare and livelihood were affected by environmental degradation and remnants of war.

68. As a longstanding contributor to peacekeeping operations, Malaysia supported the objectives of draft principles 8, 14 and 15, which encouraged or required States parties to conflict and other relevant actors, including international organizations, to take certain actions to protect the environment.

69. Draft principle 16 (Remnants of war) did not directly address the issue of responsibility for clearing, removing, destroying or rendering harmless toxic and hazardous remnants of war after an armed conflict; such questions had already been regulated, to some extent, by

the existing law of armed conflict. Her delegation understood that the requirements set forth in draft principle 16 were subject, and without prejudice, to the rules of international law applicable to Malaysia.

70. With regard to draft principle 17 (Remnants of war at sea), her delegation stressed that it was important to secure coastal States' cooperation in efforts to remove the remnants of war. States could have specific rights and duties in that regard, depending on where the remnants were located. Under draft principle 18, Malaysia would be obliged to provide information with a view to facilitating remedial measures after an armed conflict, assuming that the treaties to which it was a party indeed contained such an obligation, and subject to the country's internal laws.

71. Addressing the draft principles provisionally adopted by the Drafting Committee at the seventieth session and contained in document A/CN.4/L.911, she said it would be useful to clarify the term "environmental considerations" used in draft principle 19 (General obligations of an Occupying Power). Although that term was also used in draft principle 11, in that draft principle it was used in the context of *jus in bello*, namely in the consideration of proportionality and military necessity; in draft principle 19, on the other hand, it was used in the context of *jus ad bellum*. Where different standards would apply to the same terms used in different draft articles, those differences should be explained. It would also be useful, in draft principle 19, paragraph 3, to allow for greater latitude for the Occupying Power to improve the environmental laws of the occupied territory where necessary. Local communities should be involved in that process, as they were the custodians and primary stakeholders of any environmental regulation.

72. A number of decisions of international courts had confirmed that the Occupying Power was obliged to comply with its human rights obligations in occupied territories and in respect of people placed under its effective control as a result of occupation. The duty to protect the basic human rights of people under occupation should therefore be the paramount consideration and should be recognized in the general obligations set forth in draft principle 19.

73. Similarly, draft principle 20 (Sustainable use of natural resources), should be based on the principle that the peoples of a given land had permanent sovereignty over their natural resources. It followed that any use of resources by the Occupying Power must be sustainable and must be made in the interests of the occupied territories, as opposed to the strategic goals of the Occupying Power. Her delegation would welcome clarifications as to whether the "other lawful purposes" mentioned in the draft principle were deemed acceptable in the context of an occupation. It might be necessary to clarify further the meaning of the term "lawful purposes", especially in varied and changing circumstances, such as conflict and post-conflict situations. Moreover, the reference that use by the Occupying Power should "minimize environmental harm" was insufficient; it would be preferable to indicate that the Occupying Power should "prevent" environmental harm and destruction of natural resources.

74. Her delegation agreed with the due diligence obligation set forth in draft principle 21 and encouraged the Commission to include a provision ensuring that the Occupying Power would remain accountable after the end of the occupation and would have a duty to reverse any harm caused or compensate the affected territories.

75. Turning to the topic "Succession of States in respect of State responsibility", she said that her delegation supported the view expressed by the Special Rapporteur in paragraph 13 of his second report (A/CN.4/719): although the subject of succession of States was among the most complex in international law, there was a need for international law to serve as a framework capable of ensuring legal certainty and stability in international relations.

76. Referring to the draft articles proposed by the Special Rapporteur in the report, she said her delegation agreed with draft article 5 (Cases of succession of States covered by the present draft articles), as it was consistent with the previous work of the Commission and the Charter of the United Nations.

77. Paragraph 1 of draft article 6 was somewhat ambiguous: it did not state clearly that, in the event of State succession, only the State that had committed an internationally wrongful act should be held responsible for it. The provision should be revised. In draft article 7, the term "secession" included in the title would be best avoided, as it could be interpreted to include unlawful secession, which would be contrary to draft article 5, the purpose of which was to limit the scope of the draft articles to the succession of States in conformity with international law. For the sake of clarity, it would be useful for the term to be defined under draft article 2 (Use of terms), based on 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.

78. With regard to draft article 9 (Transfer of part of the territory of a State), the Special Rapporteur focused his analysis disproportionately on State practice in

European countries. It might be helpful for him to consider analysing State practice in such regions as Asia, Africa and the Americas, and including his findings in future reports on the topic. Moreover, some of the terms used in paragraphs 2 and 3 of the draft article were vague and needed clarification. Similarly, while her delegation could support draft article 10 (Uniting of States), it believed that the Special Rapporteur did not adequately discuss the instances of State succession that had occurred in Asia, Africa and Europe. Moreover, most of the examples of State practice he had cited involved unlawful expropriation. Her delegation proposed that the Special Rapporteur include more examples in his next report for a comprehensive review of draft article 10.

79. Draft article 11 (Dissolution of State) represented the most challenging part of the draft articles and required a cautious approach. Paragraph 1 should be revised to specify which parties should be involved in reaching an agreement regarding the obligations arising from the commission of an internationally wrongful act by the predecessor State; what would be the consequences if such an agreement were not reached; and how responsibility would be apportioned among successor States. Lastly, given the challenges posed by the topic, particularly its complexity, her delegation encouraged the Commission and the Special Rapporteur to consult more proactively with States.

80. On the topic "Immunity of State officials from foreign criminal jurisdiction", she said that her delegation appreciated the fact that its views on draft article 7 provisionally adopted by the Commission, which dealt with crimes under international law in respect of which immunity *ratione materiae* should not apply, had been reflected in the summary of the discussions that had taken place in 2017 concerning that draft article and presented in the sixth report of the Special Rapporteur (A/CN.4/722). As the Special Rapporteur had indicated, Malaysia had objected to the inclusion of torture and enforced disappearances on the list of such crimes. However, she wished to highlight that, contrary to the indication given in the report, her delegation had not expressed any view regarding the inclusion of corruption and the territorial tort exception in the original proposal for draft article 7.

81. Her delegation believed that, in order to avoid depriving the immunity rule of its very essence, issues regarding immunity should be considered at the earliest possible stage of judicial proceedings. With regard to the question of which categories of acts should be affected by immunity, the Special Rapporteur had argued that a determination should be made on a case-by-case basis. While agreeing with that approach, her delegation believed that immunity must be considered before binding measures were taken against the State official.

82. **Ms. Ighil** (Algeria) said that her delegation welcomed the approach taken by the Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts" in her first report (A/CN.4/720 and A/CN.4/720/Corr.1), which addressed the complementarity of the law of occupation, international human rights law and international environmental law. The Commission should also consider examining protection of the environment under the law of the sea.

83. Her delegation supported the three draft principles proposed by the Special Rapporteur for placement in a new Part Four, exclusively addressing the protection of the environment in situations of occupation (draft principles 19, 20 and 21). It also saw some merit in the Special Rapporteur's decision to review the extent to which the draft principles contained in the third report of the previous Special Rapporteur (A/CN.4/700) applied to situations of occupation. In addition to the right to health, other rights that were relevant in the context of environmental protection should also be addressed in the commentaries.

84. In the commentary to draft principle 19, it should be made clear whether the jurisdiction of the Occupying Power included adjacent maritime areas over which the territorial State was entitled to exercise sovereign rights; what was meant by the phrase "entitled to exercise sovereign rights"; and whether the latter included instances in which the occupied State had the ability to conclude agreements for the delimitation of the exclusive economic zone.

85. With regard to draft principle 20, her delegation agreed with those members of the Commission who had stressed that occupying States ought to consider sustainability in the administration and exploitation of natural resources. A number of members had emphasized the importance of the concepts of permanent sovereignty over natural resources and of the self-determination of peoples for the draft principles. As many natural resources were non-renewable, it was important to clarify the meaning of the phrase "sustainable use" in order to ensure that resources were not exploited in the absence of transparent, environmental impact assessments and management plans. The issue of liability for unsustainable practices or environmental harm should also be addressed in the final set of draft principles. Her delegation welcomed the principle that natural resources should be sustainably managed for the benefit of the occupied population. It was, however, important to specify the

role of the occupied population in making decisions regarding the use of their natural resources.

86. With regard to draft principle 21, it was important to specify the need for occupiers to exercise due diligence in refraining from performing any acts on their own territory that might cause environmental harm to an occupied territory, where the latter was adjacent to their territory. The draft principles should reflect the fact that domestic decisions taken by the Occupying Power could have implications for environmental protection in the occupied territory.

87. Owing to its complexity and political sensitivity, the topic "Immunity of State officials from foreign criminal jurisdiction" should be addressed with extreme caution. Her delegation found it regrettable that the debate regarding the sixth report of the Special Rapporteur had started later than expected and hoped that it would be completed at the following session of the Commission. The issue of exceptions to immunity *ratione materiae* in the context of draft article 7 continued to require thorough examination. The unusual procedure that had been followed for the provisional adoption of that draft article showed that the issue was highly controversial even among members of the Commission.

88. **Archbishop Auza** (Observer for the Holy See), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Commission had laudably sought to balance the right of the forum State to enforce laws within its jurisdiction, especially over criminal behaviour, with the long-held principle that foreign officials should not be prosecuted for acts committed in an official capacity. The task was a difficult one, given the desire to avoid both impunity and politically motivated prosecutions. The immunity of State officials was a crucial, longstanding principle that must be respected in order to ensure peaceful and friendly relations among States. The sixth report of the Special Rapporteur (A/CN.4/722) had helped advance the understanding of the procedural issues that arose in the context of immunity, including timing, invocation and waiver, all of which were important for an even-handed and transparent handling of immunity. Proper consideration of the topic required careful attention to State practice concerning claims of immunity, not to mention the mechanisms for communication, consultation, cooperation and international judicial assistance that should apply when immunity arose.

89. On the issue of timing, his delegation agreed with members of the Commission that the court of the forum State should consider immunity at the earliest possible time, so that a State invoking immunity and, by implication, the State official, could be afforded some of the core benefits of immunity, such as avoiding disrupting State functions or placing a substantial burden on the State or the accused State official.

90. Concerning the categories of acts affected by immunity, his delegation concurred with the Special Rapporteur that they included any measures expressly directed at an official imposing obligations on him or her that, in the event of non-compliance, could lead to coercive measures. It was not uncommon for foreign courts to attempt to summon public officials to appear before them under subpoena to give testimony in respect of official acts performed by or known to the officials. In those cases, the practice of the Holy See was to invoke, through the diplomatic channel, the immunity *ratione materiae* of the public official concerned, while at the same time offering to provide the forum State with international legal assistance in the best interests of justice, if so requested.

91. The immunity of public officials could even arise in civil cases, if the official was summoned under a subpoena or was asked to make a statement under penalty of perjury. In one particular case, the court of the forum State had been asked to set aside questions regarding an official's public activities and internal official communications, but not those regarding matters of which he had been aware in his private capacity.

92. Procedural safeguards should be in place to prevent abusive or politically motivated prosecutions, which threatened the rule of law. It would therefore be desirable for the authorities of the forum State to inform the State of the official, as early as possible, of their intention to prosecute and to enquire whether that State intended to claim immunity. In practice, however, the State of the official most often became aware of the attempt to exercise jurisdiction only on receiving a request for mutual legal assistance.

93. In a recent case concerning the execution of a request to notify an official of a summons to appear before a foreign court, the Tribunal of the Vatican City State had found that the only apparently wrongful act attributed to the official was one that he had performed in his official capacity. Noting that customary international law granted immunity *ratione materiae* to public officials for those acts performed in the name of the sovereign, the Tribunal had concluded that the request for mutual legal assistance could not be executed.

94. Referring to the draft articles provisionally adopted by the Commission, he said that his delegation supported draft article 7, which outlined crimes in

respect of which immunity *ratione materiae* did not apply. Indeed, the crimes listed therein were egregious criminal acts of international concern that could not be part of the legitimate activities of a public official and therefore immunity should not apply to them. Nonetheless, immunity should not be confused with impunity. At the same time, though, it was essential to define the crimes in respect of which immunity would not apply. In that regard, the proposed reference to the definitions of the crimes set forth in a closed list of treaties appeared to be a good solution. Moreover, the proper application of the exception to immunity set out in the draft article would require active cooperation between the forum State and the State of the official, in light of the principles of subsidiarity and complementarity.

95. Lastly, his delegation supported the suggested plan for future work on the project.

96. **Ms. Ponce** (Philippines), speaking in exercise of the right of reply in reference to a statement by the representative of a certain country concerning the *South China Sea Arbitration, Philippines v. China* case, said that while that country had the privilege to make any statement it wished as a State Member of the United Nations, the comment by its representative regarding an old and settled decision rendered by the Permanent Court of Arbitration was gratuitous. The parties to the case, namely the Philippines and China, were both signatories to the United Nations Convention on the Law of the Sea and therefore recognized the jurisdiction of the Court. In the future, the Court might render a decision favourable to China on a similar issue or another issue altogether. In that event, the Government of China would surely wish for other States to respect that decision, something that the Government of the Philippines would do.

97. The decision had in fact been a victory for international law and for the Convention, in that it did not so much favour the Philippines as definitively describe the legal character of certain maritime features for the benefit of all countries that had similar topographical situations, including China.

98. Although the Philippines might never be in a position to enforce the decision, it would never surrender an inch. The decision was now a matter of settled international law that went far beyond the authority of any country or its Government; the function of law was, after all, to replace confusion with certainty. The victory was not only that of the Philippines but that of all signatories to the Convention. The law was now clear, and the time had come to consider other issues under the Convention.

99. In the Philippines, the country's Secretary for Foreign Affairs had held a very cordial and profound discussion with the Minister for Foreign Affairs of China, who had shown wisdom, sobriety and diplomatic tact in addressing that and other issues. The two officials had agreed to reach a consensus to resolve or bypass their differences with a view to resuming and enhancing the longstanding and mutually beneficial relationship between their sovereign States. That meeting would soon be followed by another, at an even higher level.

100. **Mr. Valencia-Ospina** (Chair of the International Law Commission) said that the meetings at which the Committee had discussed the report of the Commission had been attended by 16 members of the Commission, including several Special Rapporteurs. It should be noted that no financial support was available for their attendance; most had relied on their own private funds.

101. He was pleased that a large number of delegations had taken the floor, representing a range of regional groups and legal systems. He wished to thank delegations for their warm welcome and the staff of the Codification Division for their important work.

The meeting rose at 5.30 p.m.