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Chair: Mr. Mlynár ..... (Slovakia)
later: Ms. Anderberg ..... (Sweden)

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19-19076 (E)

The meeting was called to order at 3 p.m.

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session (*continued*) (A/74/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI, VIII and X of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

2. **Ms. Rodríguez** (Peru), referring to the topic "Protection of the environment in relation to armed conflicts", said that her delegation found it appropriate that the draft principles adopted by the Commission on first reading covered the protection of the environment before, during and after armed conflict. Of particular note among the principles of general application were draft principles 4 [I-(x), 5], 5 [6] and 8, which called for States to take measures to, respectively, protect areas of major environmental and cultural importance; protect the environment of the territories that indigenous peoples inhabited; and prevent and mitigate environmental degradation in areas where persons displaced by armed conflict were located, while providing relief and assistance for such persons and local communities.

3. Among the principles applicable during armed conflict, her delegation wished to emphasize the applicability of the Martens Clause to protection of the environment in relation to armed conflict; the consideration of environmental issues when applying the principle of proportionality and the rules on military necessity; the protection of areas of major environmental and cultural importance designated by agreement as a protected zones that should be protected against any attack, as long as they did not contain a military objective; and the prohibition of pillage. Her delegation welcomed the inclusion of draft principles regarding situations of occupation.

4. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the discussion of procedural aspects of immunity in the seventh report of the Special Rapporteur (A/CN.4/729) helped to ensure a balance between the sovereign rights of the forum State and those of the State of the official; between the principle of sovereign equality of States and the fight against impunity; and between the right of the forum State to exercise jurisdiction and the rights and guarantees of the official. Her delegation agreed with the Special Rapporteur that the draft articles proposed in her seventh report applied to the draft articles taken as a whole, including draft article 7, which had been provisionally adopted by the Commission. It would be appropriate for the diplomatic channel to serve as the customary channel for States to invoke immunity or communicate a waiver of immunity. Waivers should be clear and express and should include the name of the official whose immunity was being waived and the acts to which the waiver pertained.

5. Her delegation welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the Commission's programme of work and believed that the Commission's proposed method of work and its selection of subtopics were apt. Sea-level rise had serious consequences for low-lying coastal States, endangered the very survival of small island developing States and, ultimately, had clear and urgent implications at the global level.

6. **Ms. Ponce** (Philippines) said that the Commission should approach the topic "Immunity of State officials from foreign criminal jurisdiction" with the aim of balancing respect for the sovereign equality of States and protection of State officials from politically motivated or abusive exercise of criminal jurisdiction, on the one hand, with the recognized need to combat impunity for international crimes, on the other. Accordingly, the procedural safeguards set out in the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729), while welcome, could be further strengthened. Abuse of the exercise of criminal jurisdiction over State officials must also be prevented.

7. Because the Commission's work was intended to codify existing customary international law, it was important that the draft articles be grounded in State practice from diverse regions. Her delegation noted that draft article 12 (Notification of the State of the official), draft article 13 (Exchange of information), draft article 14 (Transfer of proceedings to the State of the official) and draft article 15 (Consultations) were described as proposals *de lege ferenda* constituting progressive development of international law. Her delegation welcomed the reference in draft article 10 (Invocation of immunity), draft article 11 (Waiver of immunity), draft article 12 and draft article 13 to the diplomatic channel as the means of communication to be used by States, which in any case was standard practice for many States, including the Philippines.

8. With regard to future work, her delegation believed that the proposed analysis of the relationship between the topic and international criminal jurisdiction went beyond the scope of the topic. It was also not inclined to support the proposal for a mechanism for the settlement of disputes between the forum State and the State of the official. The proposal to include recommended good practices in the draft articles would

be helpful in guiding State practice, although there were other priorities for the final report of the Special Rapporteur on the topic. Her delegation looked forward to submitting information regarding the practices and regulations of the Philippines with regard to the topic.

9. Her delegation welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the Commission's programme of work. As an archipelagic State with numerous low-lying coastal areas and communities, the Philippines was one of the most vulnerable countries to sea-level rise, which had implications for maritime rights and entitlements. It therefore attached great importance to the topic, particularly as it related to the United Nations Convention on the Law of the Sea, statehood and protection of affected persons. Her delegation therefore supported the three subtopics selected by the open-ended Study Group. It was important for the Study Group to focus on emerging State practice and case law, and solicit input from States; her delegation looked forward to submitting information in that regard. Given the technical and scientific nature of the issue, it would also be necessary to receive continuing input from technical experts and scientists. It would be useful to have more clarity regarding the scope of the study that the Study Group was considering requesting from the Secretariat. The ongoing in-depth work of the Intergovernmental Panel on Climate Change, and its alarming findings, were particularly relevant to the topic.

10. **Mr. Nyanid** (Cameroon), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that immunity was, and should continue to be, a derogation from ordinary law and a privilege allowing officials, by virtue of their status, to be exempt from the jurisdiction of another State. Immunity rested with States, which granted it to their officials so that they could perform their duties as public servants with peace of mind. States were legal persons that acted through individuals; they were not ordinary subjects of law. In international public law, immunity was thus the corollary of the principle of the sovereign equality of States, a point reiterated vividly by the International Court of Justice in its judgment in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, when it stated that it "considers that the rule of State immunity […] derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order".

11. According to the maxim *par in parem non habet imperium*, one sovereign power could not exercise jurisdiction over another, a principle reiterated in article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and by the European Court of Human Rights in its judgment in *Ndayegamiye-Mporamazina v. Switzerland*. Moreover, it was indicated in article 31, paragraph 3 (c), of the 1969 Vienna Convention on the Law of Treaties that, when interpreting any treaty, "any relevant rules of international law applicable in the relations between the parties" should be taken into account. His delegation believed that the Convention could not be interpreted in a vacuum; the principles of customary law concerning immunity should also be taken into consideration. His delegation believed that compliance with the relevant rules of international law fostered courtesy and good relations among States.

12. For his delegation, the jurisdictional immunity enjoyed by the officials of a foreign State was customary in nature and should be absolute. It followed that no State could judge another State, without its consent, for an act carried out in exercise of its sovereignty. Indeed, as was expressly indicated in article 38, paragraph 2, of the Vienna Convention on Diplomatic Relations and article 71 of the Vienna Convention on Consular Relations, a receiving State must not hinder the performance of the functions of diplomatic or consular posts.

13. Because immunity from jurisdiction was an extension of the principle of sovereign equality of States, his delegation reiterated that international subjects could not be subject to jurisdiction by another State in general, much less by institutions established by sovereign States and to which some States were not parties. Such States should not be bound to comply with any obligations under said institutions, in accordance with the *pacta tertiis nec nosent nec prosunt* principle. His delegation therefore dissociated itself from what was clearly an attempt to gradually limit the principle of immunity.

14. The immunity enjoyed by senior officials in international law should be distinguished from immunity under domestic law. It should afford them broad protections, not only while they were in office, but also after they had left office. His delegation believed that senior State officials should enjoy immunity *ratione materiae*, which protected them from foreign criminal jurisdiction for any act carried out in fulfilment of their official functions. Such immunity was functional, in that its effects pertained to official acts carried out on behalf of the State, and should not be specific to senior representatives; it should also extend to any official acting on behalf of the State, irrespective of rank. Such immunity afforded significant protection

to individuals acting in an official capacity, because official acts were considered to have been performed by the State and not by the official. Immunity *ratione materiae* prevented foreign courts from circumventing the immunity of States, because they could not hold a State official responsible for an act for which the State, which itself enjoyed immunity, should not be held accountable. Without functional immunities, courts could exercise indirect control over the acts of another State by prosecuting an official who had acted on that State's behalf, thereby violating the principle of sovereign equality of States.

15. Immunity *ratione materiae* applied to senior officials both during and after their term in office. Immunity *ratione materiae* after the term in office was especially important; while in office, senior officials were in any event covered by immunity *ratione personae*, which extended to all of their acts. A former senior official therefore should not be prosecuted for an official act committed while in office, because the act remained attributable to the State even after the official had ceased to act on the State's behalf. Immunity *ratione personae* for senior officials pertained to their status, rather than to the nature of the action in question. The officials should therefore be covered for all acts they performed.

16. The International Court of Justice had consistently held that senior State officials had absolute immunity from criminal jurisdiction while fulfilling their functions. Such immunity was also enshrined in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations and of the Vienna Convention on Special Missions. Moreover, senior officials also benefited from inviolability, or immunity from any coercive measures. They could, nevertheless, be prosecuted by the sending State, or by the forum State if the sending State waived immunity. However, given that immunity existed for its benefit, only the sending State could decide to waive immunity in the manner set forth in article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 41, paragraph 1, of the Vienna Convention on Special Missions. Senior officials could not waive their own immunity; only the subject of international law in whom it was vested could do so.

17. The immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs – the so-called troika – was particularly important. The immunity of the Head of State derived from the principle of *par in parem non habet imperium*: no sovereign could judge another, as the two figures were on an equal footing. Such immunity should be extended to the two other members of the troika, their functions having come to assume an importance equivalent to that of the Head of State, as the International Court of Justice had recognized in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* cases.

18. Moreover, as was shown by State practice and had been recognized by the Court in the *Arrest Warrant* case, the principle that Heads of Government and Ministers for Foreign Affairs benefited from immunity *ratione personae* had also become a rule of customary international law. His delegation's view was that the *ratio legis* for the immunity of senior officials lay in their functions. In the *Arrest Warrant* case, the Court had invoked functional grounds to justify extending the immunity of senior State representatives to the Minister for Foreign Affairs, solely on the grounds that the Minister needed to be protected in order to properly fulfil his functions.

19. **Mr. Musayev** (Azerbaijan), addressing the topic "Protection of the environment in relation to armed conflicts" and the draft principles adopted by the Commission on first reading, said that, in its commentary to Part Four, the Commission had explained that the law of occupation was applicable to situations that fulfilled the factual requirements of effective control of a foreign territory irrespective of whether the Occupying Power invoked the legal regime of occupation and whether the occupation resulted from a use of force. However, his delegation believed that when addressing the protection of the environment and property rights in an occupied territory, the distinct characteristics of the occupation should be taken into consideration.

20. International law specified that territory could not be acquired by the use of force. The prohibition on the use of force contrary to the Charter of the United Nations was a peremptory norm of international law, and was recognized as such by the international community of States as a whole. In situations of coercive or belligerent occupation, the authority of an Occupying Power was not derived from the will of the territorial sovereign and its people. It was wrong to suggest that an Occupying Power could administer an occupied territory as a "trustee"; that term presupposed a position of trust, which did not exist between belligerents in wartime. The relevant provisions of the law of occupation were intended to ensure the survival and welfare or, alternatively, the health and well-being of the civilian population under occupation. The Occupying Power, as a temporary authority, must respect the essential interests of the territorial sovereign. Paragraph 3 of draft principle 20 [19] (General

obligations of an Occupying Power), and the commentary thereto, were particularly important in that context.

21. An occupation did not transfer sovereignty to the Occupying Power; the legal status of the territory remained unaffected. Actions that were based solely on the military strength of the Occupying Power, and not on a sovereign decision by the occupied State, were prohibited under international law. The Occupying Power thus had no authority to make permanent changes to the occupied territory. Indeed, the provisions of article 43 of the Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land (Hague Regulations) entailed a powerful presumption against any change in the occupant's relationship with the occupied territory and population, and in favour of maintaining the existing legal system. Admittedly, the occupant was permitted to "restore and ensure" public order, and the distinction between doing so and modifying the legal system was not always clear, especially in extended occupations. It was, nevertheless, certain that an occupant did not have a free hand to alter the legal and social structure of the occupied territory, and that any form of "creeping annexation" was forbidden.

22. The presumption in favour of the maintenance of the existing legal order was strengthened by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), particularly article 64 thereof, in which it was indicated that the Occupying Power could subject the population of the occupied territory to provisions that were essential in order to enable the Occupying Power to fulfil its obligations under the Convention. However, that stipulation should be interpreted restrictively; the meaning of "provisions" that were "essential" was clear and significant, entailing not only that, except for those provisions, which were not characterized as laws, the legal system of the occupied territory was unaffected, but also that the test for the legitimacy of the imposed measures was that they were "essential" for the purposes enumerated. Accordingly, his delegation noted that, in the commentary to draft principle 20, it was stated that "the Occupying Power is not supposed to take over the role of a sovereign legislator", and that "the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations".

23. When civilians were deported in the context of an occupation, the rights and interests of the population expelled from the occupied territory and seeking return to their homes and properties in that territory must be respected. No right, particularly with regard to property and the protection of the environment and natural resources of the occupied territory, could be exercised at the expense of the rights of others.

24. With regard to draft principle 21 (Sustainable use of natural resources), it should be made clear that States had, and should exercise, full sovereignty over their wealth, natural resources and economic activities. As was indicated in the second report of the Special Rapporteur (A/CN.4/728), "the principle of permanent sovereignty over natural resources provides general protection to a State's natural resources, in particular against foreign illegal appropriation". The Occupying State therefore must not exploit the resources or other assets of the occupied territory, or explore new mines in that territory for the benefit of its own territory and population, or further the interests of a local surrogate operating in the occupied territory. Natural resources could not be exploited in order to cover the expenses of an occupation, particularly when the latter was a result of a serious breach of international law, such as a violation of the prohibition on the use of force. The duties of an Occupying Power provided for in the draft principle could in no way be interpreted as creating or enhancing a territorial claim or providing a pretext to prolong an occupation. The draft principle should be considered in conjunction with draft principle 6 bis (Corporate due diligence) and draft principle 13 ter (Pillage) proposed by the Special Rapporteur in her second report (A/CN.4/728).

25. His delegation supported the draft principles on questions related to responsibility and liability for environmental harm in situations of armed conflicts, relating both to States and to such non-State actors as multinational enterprises and private companies present in conflict zones and occupied territories. It also noted the information provided by the Special Rapporteur regarding non-binding standard-setting and national and regional initiatives addressing particular challenges related to the extraction of minerals and other high-value natural resources in areas of armed conflict. Such initiatives should continue to serve as guidance for States to incorporate standards into their national legislation and ensure that they applied to corporations under their jurisdiction that operated in conflict-affected or occupied areas.

26. **Mr. Taufan** (Indonesia), referring to the topic "Protection of the environment in relation to armed conflicts", said that Part Three of the draft principles adopted by the Commission on first reading, concerning principles applicable during armed conflict, was of the utmost importance. Parties to armed conflict had an obligation to make a prudent distinction between

civilian and military objectives, in order to minimize the impact of such conflict on the environment.

27. With regard to draft principle 5 [6] (Protection of the environment of indigenous peoples), his delegation remained of the view that any provisions expressing or creating obligations in relation to indigenous peoples were applicable only to States bound by such provisions. Indonesia did not recognize the concept of "indigenous peoples", as its entire population had remained unchanged since colonization and independence. As a multicultural nation, it did not discriminate against its peoples on any grounds. There was, however, a concept of "customary law community", which was firmly enshrined in its Constitution.

28. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation believed that there should be no impunity for grave international crimes. However, given the sensitivity and complexity of the topic, the draft articles provisionally adopted by the Commission required more extensive study and analysis. The topic had implications for the principle of the sovereign equality of States, the fight against impunity for the most serious international crimes, and the diversity of national legal systems. The Commission should seek to strike a balance among those elements.

29. As Indonesia was the world's largest archipelagic State, his delegation believed that the topic "Sea-level rise in relation to international law" was crucially important. Indonesia was losing significant areas of coastal land every year owing to rising sea levels and unsustainable economic activities; yet there was no specific international legal framework to address the problem. Although there had been several studies and discussions regarding the implications of sea-level rise for baselines and maritime boundaries, no common understanding had been reached. His delegation therefore strongly supported the work of the Study Group and its recommendations regarding the topic.

30. **Ms. Melikbekyan** (Russian Federation) said that the protection of the environment in relation to armed conflicts had been sufficiently addressed in international humanitarian law. The draft principles adopted by the Commission on first reading unjustifiably expanded the scope of the topic and contained certain provisions that required further elaboration. They also contained wording that was not used in current international humanitarian law and that should have been avoided. Her delegation noted with satisfaction, however, that the provisions were formulated as draft principles, which underscored the intention to produce only general guidance, rather than a legally binding document. It also welcomed the approach taken by the Special Rapporteur's second report (A/CN.4/728), which was to avoid mixing different branches of international law, such as international environmental law, the law of armed conflicts and international human rights law.

31. Initially, the purpose of work on the topic had been not to consolidate the norms of international law relating to the protection of the environment, but rather to examine their application exclusively in times of armed conflict. Draft principle 1 (Scope), however, stated that the draft principles applied before, during or after an armed conflict. Her delegation wished to reiterate that the periods before and after armed conflicts were considered peacetime, during which the general norms relating to the protection of the environment were fully applicable. Attempts to develop a set of comprehensive rules on environmental protection covering all temporal phases were thus counterproductive.

32. It was not appropriate to refer, in the context of draft principle 4, to the application of the legal regime for protection of cultural heritage to issues relating to protection of the environment in armed conflict. The use of the term "protected zone" was also inappropriate, as that concept did not exist in modern international humanitarian law. Introducing such a notion was an unwarranted expansion of the concept of "safety zones" provided for in the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflict, and went beyond the scope of the Commission's study. It was also surprising to see the idea of "protected zones" extended to include the lands of indigenous peoples. There was, moreover, no direct link between the legal regime governing the territories that indigenous peoples inhabited, an issue alluded to in draft principle 5, and the topic under discussion.

33. Draft principle 10 (Corporate due diligence) and draft principle 11 (Corporate liability) sought to address simultaneously two very different legal situations. It was hardly reasonable to equate the regulation of activities by a company developing natural resources in the territory of its own State, in which there was an internal armed conflict, and the regulation of similar activities by a company of an Occupying Power in an occupied territory. In the first case, the company was bound by the legislation in force concerning liability for harm and there was no need for additional regulation. In the second case, the company's activities raised questions, for example, as to their lawfulness, that transcended the issue of environmental protection and on which only a handful of States had legislation. Her delegation did not therefore support the inclusion of the two draft principles, although it did not rule out calling

on States to urge companies to assess the risks of their activities in armed conflict areas, including with a view to minimizing potential harm to the environment.

34. Concerning draft principle 8 (Human displacement), as stated in the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non-international armed conflicts, in the event of displacement, all possible measures should be taken in order that the civilian population might be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. That obligation should take priority over any concerns regarding the possible environmental effects of conflict-related human displacement. Instead of requiring States to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict were located, it would be more correct to call on them, along with international organizations and other relevant actors, to take such measures where possible.

35. The Martens Clause, formulated by a Russian diplomat and legal scholar and the subject of draft principle 12, remained a cornerstone of international humanitarian law, but it was not entirely appropriate in the context of protection of the environment in armed conflict. In her report, the Special Rapporteur had departed from the original wording of the clause in an attempt to expand its sphere of application; that could, however, seriously undermine the initial intent of the Martens Clause, namely, the protection of the population. There were no references to the clause in existing international instruments regulating environmental protection. The claim that States supported its applicability in the context of the topic under discussion was thus hardly justified.

36. On the topic of immunity of State officials from foreign criminal jurisdiction, her delegation shared the Commission's wish to find answers to a number of fundamental procedural questions, including when immunity from foreign criminal jurisdiction began to apply; what types of acts of the forum State were affected by immunity from foreign criminal jurisdiction; whether or not it was necessary to invoke immunity, and who could do so; how and by whom the waiver of immunity could be effected; and what effects the waiver of immunity had on the exercise of jurisdiction. Those questions should be considered in their own right and not as ancillary to other issues.

37. The setting down of procedural provisions could not, though, offset the problems arising from the exceptions to immunity proposed in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which the Commission had adopted at its sixty-ninth session by a vote instead of by consensus. Her delegation wished to reiterate its firm position that the exceptions listed in the draft article were not supported by State practice or *opinio juris*. The draft article, far from representing progressive development of international law, sought to erode one of its fundamental norms; that risked creating new sources of tension in international relations owing to the increase in politically motivated attempts to prosecute foreign officials to which such a provision would inevitably give rise. The Commission should resume its consideration of the content of draft article 7 before the draft articles as a whole were adopted on first reading.

38. Her delegation was concerned that draft articles 8 to 16 proposed by the Special Rapporteur in her seventh report (A/CN.4/729) could not be regarded as fully guaranteeing against the prosecution of foreign officials for political motives. In her delegation's view, draft article 8 ante (Application of Part Four), developed and provisionally adopted by the Drafting Committee itself and not proposed by the Special Rapporteur, should be interpreted as confirming that the entire range of guarantees and safeguards applied in respect of any prosecution of a foreign official, including in cases where immunity did not obtain. Any other interpretation of that draft article would run counter to the main goal of such guarantees, which was to prevent abuse, in particular politically motivated prosecutions. In addition, some of the guarantees proposed by the Special Rapporteur, in draft article 16 for example, were of value precisely in cases where immunity was not enjoyed.

39. Her delegation shared the Special Rapporteur's view, which was consistent with the position of the International Court of Justice, notably in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, that, in the case of a person enjoying immunity *ratione personae*, the issue of immunity should be considered by the authorities of the forum State *proprio motu*, without the need to require the State of the official to invoke it, since, even in the absence of such invocation, the forum State was well aware of the nature of the activities of the person. The situation was different in the case of immunity *ratione materiae*, since the functions of the person might not always be known to the forum State and the State of the official therefore had an interest in invoking said immunity. If the State of the official did not invoke immunity *ratione materiae*, even though all the necessary prerequisites were in place, that could be decisive in any determination of immunity.

40. Regarding waiver of immunity, in her delegation's view, in the absence of special norms concerning a waiver of immunity by the States parties to an international treaty, the consent of a State to the exercise of foreign criminal jurisdiction over its officials should not be presumed. That approach would be consistent with the position of the International Court of Justice in the case concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. To conclude otherwise would be to contradict the basic thesis concerning clear and unequivocal waiver of immunity.

41. Her delegation did not agree with the Special Rapporteur that a waiver must be taken to refer to the criminal process and criminal proceedings as an indivisible whole. A State might, for example, waive the immunity of one of its officials to permit that person to give evidence as a witness. However, it could hardly be considered that such waiver would also automatically apply if charges were then brought against the official as part of the same criminal proceedings.

42. Referring to draft article 13 (Exchange of information), she said that her delegation concurred the Special Rapporteur that the procedures set out in international cooperation and mutual legal assistance treaties could be used for the purpose of exchanging information. At the same time, the participation of the State of the official in the exchange of information process should not be construed as recognition of the jurisdiction of the forum State or as an implied waiver of the official's immunity.

43. It was not entirely clear why the Special Rapporteur had decided to limit the grounds for refusing a request for information to threats to sovereignty, security, public order (*ordre public*) or essential public interests of the requested State. The text of the draft article should also include other well-known grounds. For example, a request for information might be refused if it was submitted in connection with a political crime, in the case of prosecution on discriminatory grounds or if the request was inconsistent with the legislation of the requested State.

44. The provisions of draft article 16 (Fair and impartial treatment of the official) could be further strengthened. While the guarantees outlined in the draft article were widely recognized and solidly anchored in modern international law, including international human rights law and international humanitarian law, it would be useful to confirm that they also applied in the case of officials of foreign States.

45. The Russian Federation did not support the Special Rapporteur's plan to consider international criminal jurisdiction under the topic of immunity of State officials from foreign criminal jurisdiction. From the very outset, issues relating to international criminal jurisdiction had been explicitly excluded from the scope of the draft articles. As stated in draft article 1, paragraph 1, provisionally adopted by the Commission in 2013 (A/68/10), the draft articles applied to "the immunity of State officials from the criminal jurisdiction of another State". The Commission had further indicated in its commentary to the draft article that the immunities enjoyed before international criminal tribunals, which were subject to their own legal regime, would remain outside the scope of the draft articles.

46. The Special Rapporteur's proposal regarding the development of a mechanism for the settlement of disputes between the forum State and the State of the official seemed premature. As for the proposal to include recommended good practices in the draft articles, while analysis of State practice was the main task of the Commission, her delegation was not convinced that it would be appropriate in the current instance to single out only some practices as good. The Commission's uniqueness lay in the fact that it represented ideas from all the world's legal systems and gave all regions the opportunity to contribute to the development of international law. Another important feature of the Commission was the lack of politicization and the desire to operate by consensus. It was crucial to uphold those traditions, since the norms of international law, in order to be effective, must inspire a sense of ownership. In that connection, the Commission must give due regard to the views of States. Where States disagreed with any provision of a draft, work on that topic must be continued, even if that meant extending the deadline for the submission of documents to the Sixth Committee. Given the number of unresolved issues, her delegation urged the Commission not to rush to complete the first reading of the draft articles under consideration.

47. **Mr. Islam** (Bangladesh), referring to the topic "Protection of the environment in relation to armed conflicts", said that it was important to ensure that the obligations arising from the Commission's output on the topic did not duplicate or conflict with the obligations arising from other relevant international legal instruments.

48. Turning to the topic "Sea-level rise in relation to international law", he said that sea-level rise would submerge parts of the territory of many countries, including his own, thereby raising complex issues regarding sovereignty and access to natural resources. Because sea-level rise was expected to change the

existing boundaries of maritime zones, it had political, economic, geological, environmental and security implications at the regional and global levels. In Bangladesh, it was expected to cause significant loss of land, including the world's largest mangrove forest, and massive population displacement.

49. His delegation welcomed the inclusion of the topic in the programme of work of the Commission, the establishment of an open-ended Study Group and the selection of subtopics. It hoped that the Commission would update the Sixth Committee on its findings, and urged all States to provide the Commission with information regarding their practice or to statehood and the protection of persons affected by sea-level rise. His delegation hoped that the work of the Commission would contribute to the codification and progressive development of international law in the context of sea-level rise and support ongoing multilateral political and normative efforts to tackle that issue and climate change more generally.

50. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that procedural safeguards were essential in order to avoid the politicization and abuse of criminal jurisdiction in respect of foreign officials. The Commission should strike a balance between the principle of the sovereign equality of States and the fight against impunity for the most serious international crimes. His delegation looked forward to the completion of the Commission's work and hoped that the comments and observations of Member States would be taken into account.

51. **Ms. Ighil** (Algeria), referring to the topic "Protection of the environment in relation to armed conflicts", said that her delegation would provide fuller comments by December 2020 regarding the draft principles adopted by the Commission on first reading. It supported the temporal approach adopted by the Commission to consider the situation before, during and after an armed conflict, and welcomed the decision of the Drafting Committee to change the title of Part Two of the draft principles from "General principles" to "Principles of general application", bearing in mind that those draft principles would be applicable to several stages of a conflict, including in situations of occupation. Her delegation particularly appreciated the focus of the draft principles on the questions of the use of natural resources during occupation, corporate accountability for the exploitation of the environment, and State responsibility for environmental harm during armed conflicts. Draft principle 8 (Human displacement), although not binding, was commendable in that it established a burden-sharing mechanism to help mitigate the environmental consequences of displacement. Her delegation also welcomed the inclusion of draft principle 18 (Prohibition of pillage). As was indicated in the commentary to that draft principle, pillage of natural resources was part of the broader context of illegal exploitation of natural resources in areas of armed conflict. Her delegation noted with appreciation that the draft principle applied also in situations of occupation.

52. Her delegation was, however, concerned that draft principle 20 [19] (General obligations of an Occupying Power) and draft principle 2l [20] (Sustainable use of natural resources) lacked clarity with respect to a number of key issues. For example, both draft principles could be understood as granting greater latitude to an Occupying Power to use the natural resources of an occupied State or territory. It also wondered about the use of the term "the population of the occupied territory" rather than the term "protected persons" used in article 4 of Geneva Convention IV. In draft principle 21, it should be clearly stated that any exploration or exploitation of natural resources in an occupied territory should take place in accordance with the wishes and interests of the local population, in the exercise of their right to self-determination. The same point should be made in the commentary to draft principle 18, and the current formulation of draft principles 20 and 21 should be reviewed accordingly.

53. Her delegation noted the Commission's decision to retain the term "natural environment" in certain draft principles in Part Three, while using the term "environment" elsewhere in the draft principles. It agreed with the Commission that there was a need to harmonize the terms "environment" and "natural environment", the latter of which was used in treaty law and in customary international humanitarian law.

54. **Mr. Knyazyan** (Armenia), addressing the topic "Protection of the environment in relation to armed conflicts", said that the scope of the Commission's work should include international human rights law. Protection of the environment was closely linked to the exercise of inalienable economic and social rights and free disposal of natural resources by virtue of the right of self-determination. In addressing the issue of illegal exploitation of natural resources in conflict situations, the Special Rapporteur should therefore refer to the economic and social rights of peoples in conflict areas.

55. Certain States were doing their utmost to deny peoples their social and economic rights, to isolate them from the outside world and to deprive them of their means to subsistence, in order to deny their right to self-determination. In the context of its current work, the Commission should thoroughly examine such

attempts to criminalize entire peoples, and should assess the impact of environmental degradation on peoples residing in conflict areas. Attention should also be given to the protection of the environment in conflict areas through de-escalation and confidence-building measures.

56. As for accountability in the context of armed conflict, his delegation noted that, under international law, the legality and validity of legal acts of de facto States depended not on whether the countries were recognized, but on whether the decisions of their courts were consistent with the rights and interests of their inhabitants.

57. **Archbishop Auza** (Observer for the Holy See) said that the work of the Commission on the topic "Protection of the environment in relation to armed conflicts" was timely and necessary. In a significant number of recent conflicts, States had waged war in order to gain access to natural resources, while exploiting those same resources in the process.

58. Referring to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that the immunity of State officials was a crucial, longstanding principle of State sovereignty and international diplomacy that must be respected. However, there were some egregious criminal acts of international concern that never fell within the legitimate activities of a public official and to which immunity should not apply. The absence of a clear distinction between, on the one hand, the immunity of State officials while fulfilling their duties and, on the other hand, legitimate legal concerns regarding suspected criminal activity, could result in immunity being confused with impunity. The challenge was to strike a balance between the privileges enjoyed by State officials and the accountability and propriety that ought to characterize all public servants, and to avoid both impunity and politically motivated prosecutions. The consideration of procedural issues arising from immunity, including timing, invocation and waiver, provided a viable way forward. Close attention should be given to State practice concerning claims of immunity, and to the mechanisms used for communication, consultation, cooperation, and international judicial assistance in situations where immunity arose.

59. His delegation welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the programme of work of the Commission. The topic required more than a merely legal approach. As was the case with the topic "Protection of the environment in relation to armed conflicts", an integrated ethical approach would not only highlight the real-life consequences of rising sea levels, but also provide the international community with guidance on how to develop an appropriate legal response. Discussions on marine and coastal ecosystems must be conducted taking into account the people who relied on them; the human and the natural environment flourished or deteriorated together. For example, the depletion of fishing reserves owing to sea-level changes had a detrimental economic and social impact on small fishing communities. It would therefore be useful to think in terms of what Pope Francis referred to as an "integral ecology", one respectful of the human and social dimensions of nature, and to take an ethical approach based on intergenerational solidarity.

60. **Ms. Escobar Hernández** (Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction") said that she had noted a significant increase in the number of statements made by delegations on the topic compared with the previous session, which was a clear indication of their interest in the work of the Commission and in the topic. She had taken careful note of their comments, concerns, criticisms and proposals, especially on the subject of procedural provisions and safeguards, and would take them all into account when preparing her eighth report.

61. Some delegations had expressed doubts that the draft articles could be adopted on first reading in 2020, but a majority had indicated that they hoped the Commission would be able to do so. She would do her best to ensure that that happened, and also that all relevant issues were properly addressed.

62. **Ms. Galvão Teles** (Co-Chair of the Study Group on sea-level rise in relation to international law) said that the Co-Chairs wished to thank Member States for their interest and support in regard to the topic and its inclusion in the Commission's current programme of work. All the comments made by delegations had been carefully noted.

63. The Study Group intended to remain in close contact with Member States through discussions in the Sixth Committee, interactive dialogues and side events, as well as regional workshops. The Co-Chairs had taken note of States' readiness to contribute information on their practice and submit comments on the specific issues identified in chapter III of the Commission's report (A/74/10). The submission of comments was more pressing for the subtopic of sea-level rise in relation to the law of the sea, since it would be considered by the Study Group at the Commission's seventy-second session in 2020, while the subtopics of statehood and the protection of persons affected by sea-level rise would be under consideration in 2021.

64. The Co-Chairs welcomed the strong support expressed by Member States for the establishment of the Study Group as the method of work, which they had endorsed on the basis of the interdisciplinary and cross-regional nature of the topic. It was important to note that Member States would be able to comment every year on the work as it progressed thanks to the presentation of annual issues papers, the annual report of the Study Group and a summary of that report in the Commission's annual report.

65. **The Chair** invited the Committee to begin its consideration of chapters VII and IX of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

66. **Mr. Kvalheim** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and addressing the topic of succession of States in respect of State responsibility, said that the Nordic countries were pleased to note that, in response to views expressed by Commission members and in the Sixth Committee, the Special Rapporteur had reverted to some general aspects of the topic in his third report (A/CN.4/731). They agreed with the seven methodological points set out in paragraphs 17 to 23 of the report and had found them very useful. They were also pleased that the Commission had made available for scrutiny not only draft articles 1, 2 and 5 which it had provisionally adopted so far but also the commentaries thereto. The early availability of those articles and commentaries was instrumental in facilitating transparent and inclusive cooperation between the Commission and the Sixth Committee.

67. It was noteworthy that, in paragraph (2) of the commentary to draft article 2, the Commission defined "succession of States" as "referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". The Special Rapporteur also usefully complemented and clarified the meaning of State succession in the context of State responsibility in paragraphs 26 to 35 of his report. Importantly, the term "succession of States" was not seen as implying automatic transfer or automatic extinction of responsibility.

68. The Nordic countries supported the Special Rapporteur's proposal to organize the draft articles into parts and indicate the scope of each part in draft articles X and Y, and welcomed the clarification that the draft articles covered only internationally wrongful acts for which the predecessor State (or other injured State, if it was the predecessor State that had committed the wrongful act) did not receive full reparation before the date of succession of States.

69. The substantive part of the third report had a perspective different from that of his earlier reports, as it was concerned with the so-called passive aspect of State responsibility; in other words, it discussed reparation for injury resulting from internationally wrongful acts committed against the predecessor State. In that case, the succession of States occurred in relation to the injured State or States, and therefore did not affect the question of international responsibility.

70. There was merit in the Special Rapporteur's proposal to analyse the possible transfer of rights separately from that of obligations. It also seemed to make sense to divide the different categories of succession into two, depending on whether the predecessor State continued to exist after the date of succession.

71. The Nordic countries noted the Commission's discussion regarding the formulation "may request reparation", common to draft articles 12, 13 and 14 as proposed by the Special Rapporteur, and understood why some members had questioned the usefulness of recognizing procedural possibilities without identifying substantive rights and obligations. However, the formulation seemed logical, in light of the Special Rapporteur's general approach, as stated in paragraph 34 of his report that he did not assert any automatic succession to rights and obligations arising from internationally wrongful acts, but rather "the possibility for a successor State to raise the issue of reparation of injury caused to the predecessor State, which is now affecting the successor State, with the wrongdoing State". The Nordic countries might have more to say on that point and the rest of the new proposals once they had matured in the Commission's work.

72. Draft articles 7, 8 and 9, which had been provisionally adopted by the Drafting Committee at the Commission's seventy-first session, seemed to be firmly rooted in the relevant provisions of the articles on responsibility of States for internationally wrongful acts. With regard to draft article 7, the Nordic countries noted that the Special Rapporteur intended to address the issue of composite acts in more detail in his fourth report. Concerning draft article 9, it made sense that the three draft articles originally proposed had been combined into a single draft article for cases of succession of States in which the predecessor State continued to exist. The Drafting Committee had rejected a proposal to use the "may request" reparation formula in the draft article, which dealt with the rights of the injured State, considering it preferable to refer to an

entitlement of the injured State to "invoke the responsibility of the predecessor State". The Nordic countries might wish to comment on that formulation once the Commission had advanced in its work on the proposals for draft articles 12, 13 and 14.

73. Lastly, given that State succession was a rare occurrence and State practice was limited, the Nordic countries encouraged the Commission to continue to take a prudent approach to the topic.

74. Addressing the topic "General principles of law", he said that the Special Rapporteur's first report (A/CN.4/732) provided a solid foundation and complemented the Commission's earlier work on the principal sources of international law. As work on the topic had only just begun, the Nordic countries would make only a few preliminary observations.

75. The Nordic countries agreed with the Special Rapporteur that "… by adopting a cautious and rigorous approach, the Commission could provide guidance to States, international organizations, courts and tribunals and all those called upon to use general principles of law as a source of international law". It was certainly the case that the Commission's work on the topic could prove particularly useful in guiding courts on identifying and applying general principles of law. However, given the applicable sensitivities, especially regarding the question of how general principles of law related to other sources of law, the Nordic countries agreed that a cautious approach was advisable, especially when it came to general principles of law in relation to the applicable substantive law. On the limited number of occasions when the International Court of Justice had referred to general principles, procedural matters, not substantive law obligations, had been at issue.

76. While Article 38, paragraph 1(c), of the Statute of the International Court of Justice was an obvious starting point, it contained an unfortunate reference to recognition by "civilized nations". The Special Rapporteur had proposed replacing "civilized nations" with "States", while Commission members had suggested other formulations. The Commission might need to explore that matter further. Whether statements and resolutions issued by intergovernmental organizations had a place in identifying general principles of law and ascertaining their recognition by the States that were members of that organization was a question to be explored further.

77. The Special Rapporteur had suggested that general principles of law could originate in both national legal systems and the international legal system. Members of the Commission were reported to have unanimously accepted that general principles of law could be derived from national legal systems, but had been less convinced that such principles could also be formed within the international legal system. The Nordic countries agreed with the Special Rapporteur that Article 38, paragraph 1(c), did not exclude the possibility of general principles of law emanating from sources other than national legal systems. The Martens Clause was an example of a principle that had been formed within the international legal system.

78. One of the most difficult issues to be resolved would likely to be differentiating between general principles of law and customary international law. "Recognition" as a requirement for general principles of law, was not the same as "acceptance as law" as an element of customary international law. The Nordic countries noted the Commission's discussion of the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems. The requirement of recognition in relation to general principles of law would need further study.

79. The Commission had requested that States provide information on their practice relating to general principles of law, in the sense of Article 38, paragraph 1(c). The significance of such information for consideration of the topic could not be over-emphasized. There were many academic works on the topic, yet practice, whether of States or of international courts, was not plentiful. In addition, the practice of the International Court of Justice might not be helpful, as the Court seemed to have a preference for using the composite term "general international law", without specifying whether the source of the obligation was customary law or a general principle of law.

80. **Ms. Katholnig** (Austria), referring to the topic of succession of States in respect of State responsibility, said that her delegation noted with regret that the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), under the title "Reparation for injury resulting from internationally wrongful acts committed against the predecessor State", had not been discussed in the Drafting Committee, and had only been commented on in general terms by Commission members in the plenary session. Her delegation also noted that, once again, the Special Rapporteur was pursuing the course of automatic succession in cases where the predecessor State ceased to exist.

81. Her delegation had read with interest the summary of the Commission's debate on draft articles 12, 13 and 14 as proposed by the Special Rapporteur, and noted the ambiguity arising from the wording that successor

States "may request reparation". If understood as permitting successor States to ask for reparation, which might be granted by the responsible States *ex gratia*, her delegation would not be opposed to it and would merely question the value added of such a provision. However, seen in the context of the other rules, it was likely to be understood as a veritable rule of automatic succession to the claims of the predecessor State by the successor State. Such a rule had no basis in international law and should also not be included among the *de lege ferenda* provisions.

82. In spite of the Special Rapporteur's disclaimer in paragraph 16 of his second report (A/CN.4/719) that he "does not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession", he would in fact be replacing the principle of non-succession with a principle of succession if the draft articles were to be adopted.

83. Her delegation believed that matters concerning succession in respect of State responsibility, or more specifically, the legal consequences of international wrongful acts, were fundamentally different from issues concerning succession in respect of treaties, assets and debts. In the latter case, customary international law differentiated between types of treaties, assets and debts and provided for different succession rules. Austria did not believe that any rule claiming there to be an automatic transfer of rights and obligations to successor States where the predecessor State ceased to exist could be identified as *lex lata*, nor that it would be a good candidate for the progressive development of law. If embarking on the issue at all, the Commission should be focusing on analysing specific problems that arose in practice regarding the failure to fulfil obligations stemming from treaties and judgments relating to a predecessor State.

84. Lastly, regarding draft article 15 (Diplomatic protection), Austria believed that diplomatic protection should not form part of the draft articles, since the Commission had already considered the topics of State responsibility and diplomatic protection separately.

85. With regard to the topic "General principles of law", Austria believed that the Special Rapporteur had set the scene properly in his first report (A/CN.4/732) for a thorough discussion of the topic. However, contrary to the view expressed by the Special Rapporteur, it believed that an illustrative list of general principles of law would be a valuable contribution to the Commission's work.

86. Addressing the draft conclusions on the topic, she said that, concerning draft conclusion 1 (Scope), as proposed by the Special Rapporteur, which stated that "the present draft conclusions concern general principles of law as a source of international law", Austria was familiar with the difficulties surrounding the terminology "source of international law". Differing views on its meaning had been put forward suggesting that the will or consent of the rule-makers, mostly States, could also be seen as a source of international law. In order to avoid that discussion in the current context, Austria favoured replacing the words "a source" with a word such as "norms". The Commission should then explain in the commentary that the scope encompassed the creation and evidence of general principles of law.

87. Although the term "principle" could also give rise to different interpretations, as discussed in the Special Rapporteur's report, Austria suggested retaining it, in view of the reference to it contained in Article 38 of the Statute of the International Court of Justice.

88. As to the methodology for identifying general principles of law, Austria agreed that such principles were primarily derived from national legal systems. Under certain circumstances, there might also be general principles of law "formed within the international legal system", as referred to in draft conclusion 3 (Categories of general principles of law). However, it would be problematic to derive "instant" general principles of law from acts of international organizations, such as General Assembly resolutions, even if adopted by consensus. General principles of law formed within the international legal system came into existence only if they were specifically accepted as general principles of law by the international community.

89. The Special Rapporteur's report also contained several references to "principles of international law" and "general principles of international law". However, those expressions were confusing. It was her delegation's understanding that the norms of international law addressed by the current topic had a different meaning from the principles of international law addressed, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. As the International Court of Justice had already confirmed, those principles formed part of customary international law. They must therefore be clearly differentiated from the general principles of law pursuant to Article 38, paragraph 1(c), of the Court's Statute. Accordingly, it was necessary to draw a clear terminological distinction in the draft conclusions and the commentaries thereto between "principles of international law" belonging to

customary international law and "general principles of law" formed within the international system.

90. Concerning the so-called gap-filling nature of general principles of law mentioned by the Special Rapporteur in his report, Austria concurred with the finding in paragraph 324 of the 2006 report of the Study Group on fragmentation of international law (A/CN.4/L.682) that: "The rules and principles of international law are not in a hierarchical relationship to each other. Nor are the different sources (treaty, custom, general principles of law) ranked in any order of priority." It would therefore be incorrect to state that general principles of law were only supplementary or even subsidiary to other sources of law.

91. **Mr. Varankov** (Belarus) said his delegation recognized that the topic of succession of States in respect of State responsibility was highly context-specific and sensitive and that the related issues were generally settled on an ad hoc basis. In that connection, it agreed with the Commission and the Special Rapporteur on the priority to be given to agreements between the States concerned and on the subsidiary role of the draft articles on the topic.

92. In his delegation's view, it would be more appropriate for the outcome of the Commission's work to take the form of guidelines or conclusions, rather than draft articles constituting the basis for an international treaty. At any rate, discussion of that question should not block work on fleshing out the substance of the draft text. As his delegation understood it, the form of the document would depend, in large part, on the extent to which it contributed to the progressive development of international law. Experience had shown that the conclusion of an international treaty on the topic was highly unlikely.

93. His delegation supported the solutions and wording proposed in the draft articles. In particular, it endorsed the idea that the "clean slate" rule should not apply in cases where acts of the predecessor State had caused harm to the territory or population of the newly independent State.

94. The topic of general principles of law seemed very promising in that it had not yet been studied in a systematic way, despite the existence of judicial practice, precedent and doctrine in that area. His delegation supported the Commission's efforts to identify and clarify the legal content of fundamental concepts of general international law. As some members of the Commission had expressed the view that general principles of law had played no significant practical role, serious study of the practice of States and international courts was warranted. It would be interesting to see, for example, what conclusions the Commission reached in respect of the principle of justice, which was frequently invoked in international practice.

95. The three draft conclusions proposed in the Special Rapporteur's first report (A/CN.4/732) seemed acceptable to his delegation. It would be helpful, at some stage, to draw up an illustrative list of general principles of law. The inclusion of such a list would ensure that general principles of law were better understood, notwithstanding the opinion of the Special Rapporteur as set out in paragraph 254 of the Commission's report (A/74/10). A useful analogy in that regard could be found in the Commission's work on peremptory norms of general international law (*jus cogens*); it might also be helpful to follow the practice adopted in work on that topic of using the term "international community" rather than "community of nations".

96. Lastly, his delegation looked forward to the outcome of the Commission's work on such matters as the functions of general principles of law, their identification and their relationship with other sources of international law.

97. **Ms. Samba** (Sierra Leone), addressing the topic "Succession of States in respect of State responsibility", said that while the Commission had completed its work on responsibility of States for internationally wrongful acts in 2001, it had failed to address situations of succession, in particular where a succession of States occurred after the commission of a wrongful act. Succession in respect of State responsibility raised complex legal questions about the circumstances in which a successor State might be found responsible for an internationally wrongful act perpetrated by its predecessor. Although there was some doubt concerning the sufficiency of State practice to guide the topic, especially given that succession solutions tended to be political, diverse and context-specific, the study could still usefully complement the Commission's earlier work on succession in respect of treaties, State property, archives and debts and nationality of natural persons.

98. Regarding draft article 1 (Scope), paragraph 1, of the draft articles provisionally adopted so far by the Commission, her delegation agreed that the draft articles should apply only to the legal effects of a succession in respect of responsibility for internationally wrongful acts. Sierra Leone also appreciated the inclusion of paragraph 2, which rightly underlined the subsidiary and residual nature of the draft articles. States must enjoy a wide margin of discretion and they might even agree to

exclude ordinary rules of responsibility in order to arrive at a mutually acceptable solution.

99. The Commission might wish to consider expanding upon its commentary to draft article 1. For instance, it might be useful to further clarify the relationship between the current draft articles and the articles on State responsibility, and perhaps even the relationship between the current topic and the Commission's earlier outcomes on succession. The Commission might even furnish examples of the types of means deployed to arrive at the different solutions contemplated, which included pacific means of dispute settlement, such as negotiation, which would presumably be more common, but could also take other forms, such as enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice, as provided for in Article 33, paragraph 1, of the Charter of the United Nations.

100. Draft article 5 (Cases of succession of States covered by the present draft articles) clarified that the draft articles applied only to the effects of a succession of States occurring in conformity with international law, and in particular, the principles of international law embodied in the Charter. Her delegation agreed that the provision should not be read as giving any advantage to a State violating international law, as in the case of illegal succession or the unlawful use of force to violate the territorial integrity of another State. At the same time, it might be useful for the Commission to explain in the commentary how the draft article could assist States in the more difficult cases belonging to a "grey" or "neutral" zone, as discussed in paragraph 228 of the Commission's report on the work of its seventieth session (A/73/10).

101. Sierra Leone also broadly supported the Special Rapporteur's flexible approach in relation to the general rule of non-succession. However, her delegation would prefer to see the work develop further before adopting a firm position.

102. As to the final outcome of the topic, a decision to change the current form of draft articles seemed premature. Yet, given the scarcity and sensitivity of State practice, the Commission might wish to consider a softer option, such as draft guidelines or draft conclusions, that acknowledged the need for State flexibility in resolving succession problems politically.

103. Lastly, concerning the discussion on renaming the topic, her delegation believed that the current title appropriately reflected the scope of the topic. It also supported the Special Rapporteur's suggestion for the Commission to return to the issue at a later stage if needed, possibly after the provisional adoption of all the draft articles.

104. Turning to the topic "General principles of law", she said that Sierra Leone agreed with the four issues set forth for consideration by the Commission in the Special Rapporteur's first report (A/CN.4/732). While it would be useful if the Commission could provide examples of widely accepted general principles of law derived from national legal systems or the international legal system, in methodological terms, it might be wiser to avoid drawing up a list of substantive general principles of law. Such an approach would be unsound in relation to the whole field of international law and could take the Commission many years, if not decades.

105. General principles of law were an essential, albeit unwritten, source of international law, pursuant to Article 38, paragraph 1(c), of the Statute of the International Court of Justice. They, along with international conventions and international custom as evidence of general practice accepted by law, were among the primary sources of international law. Even though general principles had not been used by the International Court of Justice to resolve specific disputes, they performed several vital functions in international law depending on the field in question. Among other things, they served as sources of binding legal standards, as gap fillers and as ways of promoting greater coherence and upholding stability in the international legal order.

106. In some areas of international law, such as international criminal law, general principles of law derived from national and international law were particularly important. Their significance was recognized in State practice, as exemplified by article 21, paragraph 1, of the Rome Statute of the International Criminal Court, which directed the Court to apply general principles of law "derived from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards". While the statutes of ad hoc international criminal tribunals, which had preceded the International Criminal Court, had not included a similar provision, a similar reliance on general principles of criminal law in case adjudication was extensively reflected in their case law. The situation was somewhat similar in the practice of the Special Court for Sierra Leone.

107. The Commission could consider going a step further and completing the work on the sources of

international law listed in Article 38 of the Statute of the International Court of Justice by undertaking a study of the last source of international law enumerated in the Article, namely, "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Sierra Leone believed that a study of subsidiary means would meet the criteria for inclusion in the Commission's long-term programme of work.

108. Her delegation was also proposing such a study in light of the central and unifying role of the Commission in studying general international law questions. Moreover, given the overlap and relationship between paragraphs 1(c) and 1(d) of Article 38, it would be useful for the Commission to take up the subject in the near future and to fully explore the relationships between general principles of law and other sources of international law in a coherent and consistent manner.

109. Sierra Leone supported the approach taken by the Special Rapporteur in his initial assessment of Article 38, paragraph 1(c), whereby he had identified three interrelated elements of general principles of law, namely "general principles of law", "recognized" and "civilized nations". Her delegation also concurred that a two-step analysis might be required for identifying general principles of law derived from national legal systems: first, identifying a principle common to a majority of national legal systems; second, determining whether that principle was applicable in the international legal system. Sierra Leone also supported Commission members who had encouraged the Special Rapporteur to distinguish between "general principles of law" and "general principles of international law", as well as between "principles" and "rules" or "norms".

110. Lastly, Sierra Leone was pleased with the seeming consensus among Commission members that the colonial-era wording of "civilized" and by implication "uncivilized" nations included in Article 38 was inappropriate and outdated. However, until the Statute was amended, it would be preferable to use wording similar to that found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights: "general principles of law recognized by the community of nations". Another possible formulation was "general principles of law derived from the main forms of civilization and the principal legal systems of the world", which was based on article 8 of the statute of the Commission.

111. **Mr. Špaček** (Slovakia) said that, despite the many concerns regarding the topic "Succession of States in respect of State responsibility", its consideration by the Commission could certainly help clarify rules governing the sort of legal consequences of internationally wrongful acts pre-dating State succession, namely, the rights and obligations relating to reparation that had not been fully exercised or fulfilled prior to the date of State succession. Although existing cases of succession of States were diverse, his delegation was convinced that there was State practice that could help the Special Rapporteur and the Commission identify rules governing situations where the legal consequences of internationally wrongful acts remained unaddressed. The Commission's work on the topic should be consistent with the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, as well as the articles on nationality of natural persons in relation to the succession of States.

112. Referring to the draft articles provisionally adopted so far by the Commission, he said that, with regard to draft article 1 (Scope), paragraph 1 accurately reflected the scope of the draft articles. Paragraph 2 was redundant. Slovakia supported the proposed organization of the draft articles into three parts, as well as the proposed titles of Part II (Reparation for injury resulting from internationally wrongful acts committed by the predecessor State) and Part III (Reparation for injury resulting from internationally wrongful acts committed against the predecessor State). That division reflected two different sets of situations in terms of the scope of the draft articles. With that in mind, his delegation concurred with the proposed insertion of draft articles X and Y specifying the scope of the two respective parts.

113. Regarding draft article 5 (Cases of succession of States covered by the present draft articles), Slovakia agreed that the draft articles should apply only to the effects of a succession of States occurring in conformity with international law. It was an important element that also reflected the Commission's previous work on other topics concerning the succession of States.

114. As to the proposed draft article on diplomatic protection (draft article 15), Slovakia concurred that an exception to the principle of continuous nationality in cases of succession of States should be considered, to avoid situations in which an individual lacked protection. However, it was crucial to maintain consistency with the articles on diplomatic protection. Further analysis would be needed to determine how the draft article would interact with the articles on diplomatic protection and whether there even was a need to address the issue in the current draft articles.

115. The final outcome of the Commission's work on the topic should contain clear normative elements. A set

of draft articles would be the most appropriate form of output, and was also the Special Rapporteur's preference. That was, of course, without prejudice to the question of a future convention, which would be decided only after work on the topic had been completed. If the final outcome was draft articles, that did not necessarily mean that States would proceed to the elaboration of a convention, as the Commission's recent practice had shown.

116. Slovakia had noted the Special Rapporteur's ambitious plan to complete the first reading of the draft articles by 2020 or 2021, but agreed with the views expressed during the Commission's session that it should not be hasty in its consideration of the topic.

117. Turning to "General principles of law", he said that Slovakia fully supported the inclusion of the topic in the Commission's programme of work. The work of the Commission and the Special Rapporteur could significantly elucidate the meaning and interpretation of general principles of law in the sense of Article 38, paragraph 1(c), of the Statute of the International Court of Justice.

118. The Statute should be the reference for determining the approach to the topic. Slovakia understood general principles of law to be those recognized and applied generally *in foro domestico*, meaning principles originating in national legal systems and which could be used by the International Court of Justice in cases where traditional sources of international law proved insufficient. Although his delegation shared the view of the Special Rapporteur on the essential role played by general principles of international law, it had not expected them to fall within the scope of the topic, as they had already been codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and either formed part of customary law or were embodied in treaties. Broadening the scope of the topic to include them might therefore be redundant, become a distraction and risk overburdening the final outcome.

119. Concerning the idea of including an illustrative list or examples of principles, Slovakia would welcome the naming of principles generally recognized *in foro domestico*, preferably in the form of an illustrative list rather than through their inclusion as examples in the commentaries. A set of specific examples of well-established general principles of law would certainly increase the relevance and utility of the draft conclusions on the topic and their value for practice.

120. **Mr. Carre** (France), referring to the topic "General principles of law", said that his delegation supported the future programme of work outlined by the Special Rapporteur in his first report (A/CN.4/732). It would be interesting to discuss the final form that the Commission's work should take.

121. His delegation had been surprised to learn that the matter of differentiating between "les principes généraux *du* droit" and "les principes généraux *de* droit" in the French version of the report of the Special Rapporteur had been dismissed so quickly. It remained an important issue and his delegation hoped that the Commission would take advantage of what was a unique opportunity to provide the expected legal clarification.

122. France encouraged the Commission to give due consideration to the wide-ranging nature of legal systems. Since general principles of law were derived from national legal systems and later transposed to the international legal system, it would not make sense for the Commission to take only one legal system into consideration and discard the others simply because it was difficult to access relevant practice concerning such systems.

123. France was in favour of keeping the subject of regional general principles within the Commission's scope of work. While such a decision would require clarification of the relationship between regional general practices and universal general practices, consideration of that issue would provide real value added to the Special Rapporteur's work.

124. The two new topics that had been included the Commission's long-term programme of work ("Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea") were certainly of great interest for the progressive development of international law and its codification. If they were moved to the Commission's current programme of work in 2020, France hoped that the methods of work proposed by the Commission would allow States sufficient time to comment on its annual report, a task that was becoming increasingly challenging because of the short deadlines imposed on delegations.

125. States deployed considerable resources to follow and comment on the Commission's work. The Commission should take into account their limited means, which would in turn improve the quality of its dialogue with States.

126. *Ms. Anderberg (Sweden), Vice-Chair, took the Chair.*

127. **Ms. Pino Rivero** (Cuba) said that the topic of succession of States in respect of State responsibility was crucial to the continuity of the work on the gradual codification of international law. The issues surrounding the responsibility of States in cases of succession should be examined in the context of the articles on State responsibility; in addition, the Commission should maintain consistency, in terminology and substance, with its earlier work and with those articles in particular.

128. Not only was State practice on the topic scarce, it also seemed to be diverse, context-specific and marked by political interests, all of which made it difficult to establish a legal position. There also did not appear to be any rulings of national or international courts or tribunals that could contribute decisively to development of the topic.

129. Cuba attached great importance to the establishment of a general underlying rule applicable to the succession of States in respect of State responsibility, according to which responsibility was not automatically transferred to the successor State, except in specific circumstances. It would be prudent and necessary to clarify the extent to which each of the draft articles being developed represented progressive development or codification of international law.

130. Referring to the draft articles adopted so far by the Commission, she said that her delegation highlighted the incorporation of a second paragraph in draft article 1 (Scope) on the subsidiary nature of the draft articles; in other words, the draft articles would apply only if the parties could not reach an agreement.

131. Cuba considered it necessary to conduct an exhaustive study of the issues regarding responsibility, taking into account each category of succession. Her delegation suggested that the Commission clarify whether *lex lata* or *lex ferenda* was being established in the draft articles it was developing.

132. As to the final form that the Commission's output on the topic should take, a decision could be made at a later stage, depending on how work on the topic evolved.

133. "General principles of law" was an extremely important topic for the Commission, the Sixth Committee and international courts and tribunals. Following the Commission's work on the law of treaties, customary international law and *jus cogens*, it was the only source of law yet to be studied by the Commission and its examination was therefore the next logical step.

134. While the Special Rapporteur's first report (A/CN.4/732) was preliminary and introductory in nature, it might help to lay the foundation for the Commission's future work on the topic and to record the views of the Commission members and States in that regard. It could provide a broad overview of the three main sources of international law. Cuba considered that general principles of law could fill existing gaps in treaty or customary law.

135. It was positive that the Commission members broadly agreed on a number of aspects of the Special Rapporteur's report, such as the need to consider the legal nature of general principles of law as a source of international law and the relationship between general principles of law and other sources of international law, especially customary international law, and the need to identify general principles of law. There was also a common understanding that general principles of international law included the legal principles that were common to national legal systems.

136. Cuba welcomed the Commission's agreement to replace the term "civilized nations" with alternative phrasing. The expression had colonialist connotations and had no place in the current system of international relations, which was based on the sovereign equality of States.

137. As to the outcome of the topic, her delegation agreed that draft conclusions accompanied by commentaries would be an appropriate form. They could provide guidance to States, international organizations, courts and tribunals, and other entities that used general principles of law as a source of international law.

138. More analysis and discussion would be needed to achieve consensus or a common understanding on other aspects. They included general principles of law other than those that could be gleaned from the decisions of the International Court of Justice and the possibility that general principles of law could be derived from international law. The contributions of international organizations, States and tribunals might be helpful in that regard.

139. Despite numerous references to general principles of law in various areas of international law, there was no clear methodology for identifying them. Cuba urged the Commission to continue its discussions in order to determine whether general principles formed within the international legal system could also be considered as general principles of law.

140. Although general principles of law constituted a subsidiary source, it was clear that they were autonomous from other sources. That had been the case ever since they had acquired their own validity and had

been mentioned separately and explicitly in Article 38 of the Statute of the International Court of Justice.

141. Cuba wished to stress that it would be a mistake to establish the so-called responsibility to protect as a general principle of law. The characteristics, rules of application and evaluation mechanisms for such "responsibility" were far from defined and agreed. The concept continued to be a matter of serious concern for many countries, particularly small and developing countries, owing to the lack of consensus regarding and definitions of many of its components, which had been and could continue to be manipulated for political ends. It would therefore be inappropriate to delve further into the concept, unless there was a consensus on its scope, purposes and implications, which would resolve differences in interpretation and ensure its universal recognition and acceptance.

142. In its future reports, the Commission should analyse in more detail the relationship between general principles of law and customary international law, which was sometimes unclear. A rule of customary international law required the existence of a general practice that was accepted as law (*opinio juris*), while a general principle of law must be recognized by States, which suggested that the two sources were different and should not be confused.

143. Cuba welcomed the Special Rapporteur's decision to include in his second report the important issue of the relationship between the functions of general principles of law and other major sources of international law, such as treaties, and noted his intention to include the question of the "recognition" requirement in his third report.

144. **Ms. O'Sullivan** (Ireland) said that the Commission's work on the topic "General principles of law" complemented its work on other sources of international law, such as identification of customary international law and peremptory norms of general international law (*jus cogens*). That had been acknowledged in the Commission's report (A/74/10), where it was indicated that the Special Rapporteur had noted that "there was a consensus on the need to consider the relationship between general principles of law and other sources of international law". In the Commission's work on the topic, careful attention must be paid to the distinction between general principles of law and customary international law, and that distinction must be clearly reflected in the draft conclusions and the commentaries thereto.

145. Ireland agreed that the starting point for consideration of the topic was Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and welcomed the Special Rapporteur's emphasis that that would be made clear in the commentaries. Ireland supported the view that the term "civilized nations" used in that provision was inappropriate and outdated. It therefore made sense that it should not be used in the context of the current draft conclusions and further consideration should be given to the correct term to be used.

146. **Ms. Egmond** (Netherlands), referring to the topic of succession of States in respect of State responsibility, said that limited State practice and the diverse and context-specific nature of the topic made it difficult to draw up clear-cut rules. The recognition of the subsidiary nature of the draft articles on the topic and the priority to be given to agreements between the States concerned, which had been expressly reflected in the draft articles, was an indication that work on the topic was perhaps more within the ambit of progressive development of the law than its codification.

147. Her delegation concurred with the Commission that any work on the topic must preserve the integrity of and be consistent with existing arrangements relating to the topic of State succession and responsibility, in particular the articles on State responsibility and the articles on diplomatic protection. It also appreciated the willingness of the Special Rapporteur to resolve issues of terminology and substance in the Drafting Committee. That would be the yardstick by which the Netherlands would evaluate the outcome of the Commission's work on the topic. At the same time, it was a matter of concern that the Special Rapporteur had attempted to describe both areas of law in a manner that was not completely consistent with the Commission's work on those topics. An example was the definition of diplomatic protection cited in paragraph 86 of the Special Rapporteur's report (A/CN.4/731), which deviated from the definition used in the articles on diplomatic protection.

148. The Special Rapporteur favoured an approach to the topic that excluded both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States. That seemed to be the most logical approach, since any subsidiary rules must be flexible enough to allow for tailor-made solutions in specific situations, precisely because existing practice took the form of context-specific agreements and often also involved non-legal considerations, as had rightly been emphasized by a number of Commission members.

149. The Netherlands aligned itself with the caution expressed by the Commission with respect to the Special Rapporteur's methodology. The vast majority of his

report, and the ensuing conclusions, seemed to be based on doctrine (the teachings of the most highly qualified publicists of the various nations), which was a subsidiary means for the determination of rules of international law. It should not be elevated above sources that reflected customary international law, such as the articles on State responsibility and the articles on diplomatic protection. The Netherlands urged the Special Rapporteur and the Commission to conduct a more thorough investigation into existing State practice and *opinio juris*, instead of relying on doctrine.

150. Referring to the draft articles proposed by the Special Rapporteur in his report, she said that, in paragraph 2 of draft article 12 (Cases of succession of States when the predecessor State continues to exist), the Special Rapporteur had proposed the term "special circumstances" as a condition for a successor State to request reparation from the responsible State where the injury related to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State. By contrast, in paragraph 2 of draft article 14 (Dissolution of States), he referred to a "nexus" between the consequences of an internationally wrongful act and the territory or the nationals of the successor State. Although her delegation recognized the relevance of a link in such situations, the terms used required further clarification.

151. With respect to the application of the rules on diplomatic protection to State succession, her delegation was concerned that the Special Rapporteur seemed to be urging a rethinking of the law on diplomatic protection in his report. Her delegation disagreed with his position that the law on State responsibility and the law on diplomatic protection as developed by the Commission "raised serious issues" in relation to succession of States. In the view of the Netherlands, article 5, paragraph 2, of the articles on diplomatic protection provided for State succession and allowed a successor State to take up the claim of a person who acquired that State's nationality upon succession of statehood. The Commission should not revisit that provision through a draft article under the current topic. The Netherlands therefore did not support draft article 15 (Diplomatic protection), as it constituted an attempt to redefine the law applicable to State succession and diplomatic protection.

152. Addressing the topic "General principles of law", she said that the Netherlands welcomed the proposed list of issues to be considered, as identified by the Special Rapporteur in his report (A/CN.4/732), but noted that general principles were included in Article 38, paragraph 1(c), of the Statute of the International Court of Justice as one of the sources of international law to be applied by the Court in the settlement of disputes. They should therefore be considered a supplementary rather than a subsidiary source of international law. That would suggest that States could be responsible for an internationally wrongful act when acting contrary to an obligation arising from a general principle. However, the Netherlands would appreciate further examination of the question of whether general principles of law could be violated. Her delegation considered that a general principle of law could be violated if, owing to its wide recognition in State practice and the case law of international courts and tribunals, it served as a source of rights and obligations for States. If the Commission agreed with that position, it should nonetheless indicate clearly whether that depended on the violated principle being classified as both a general principle of law and customary international law and/or a rule contained in a treaty.

153. Lastly, the Netherlands supported the formulation of two categories of general principles of law, as reflected in draft conclusion 3: general principles of law derived from national legal systems, and general principles of law formed within the international legal system. Some Commission members had expressed concerns regarding the second category, principally because of insufficient State practice, problems in delineating the limits of the category, and the risk of undermining the requirements for the formation of customary international law. Nevertheless, the Netherlands considered that some general principles of law had originated in the international legal system, a position that was supported by State practice and the case law of international courts and tribunals. The freedom of the high seas was one example of a general principle of international law. It had been introduced in 1609 by the Dutch jurist Hugo Grotius in his book *Mare Liberum* and had been referred to in many written and non-written sources of international law.

The meeting rose at 6 p.m.