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Chair: Mr. Mlynár . . . . . (Slovakia)

Contents

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The meeting was called to order at 10.05 a.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. Orosan** (Romania) said that, while her delegation supported the temporal approach to the draft principles adopted by the Commission on first reading on the topic "Protection of the environment in relation to armed conflicts", it believed that a better systematization of the principles was still needed. For instance, draft principle 19 (Environmental modification techniques) and draft principle 24 [18] (Sharing and granting access to information) were listed respectively under "Principles applicable during armed conflict" and "Principles applicable after armed conflict", but in fact had a more general application.

3. Her delegation welcomed the provisions that addressed the need to regulate the environmental conduct of non-State actors in conflict and post-conflict areas. Such innovative provisions had the potential, if consistently applied, to secure environmental justice in times of conflict. The draft articles reflected and consolidated a growing set of norms that could be used to tackle environment-related corporate wrongdoing in the context of armed conflict. Owing partly to the complexities involved in holding companies accountable for harm occurring in armed conflict, they reflected existing conceptual tools rather than creating new ones. They also provided an opportunity to promote discussions regarding protection of the environment in armed conflict during the negotiation of binding instruments, such as the United Nations Guiding Principles on Business and Human Rights. In so doing, they would help to shift the global debate towards a voluntary approach to corporate engagement.

4. Notwithstanding the complexities concerning non-State actors, particularly with regard to liability, it was important to forge ahead with the establishment of systematic rules in that regard. Developments in technology and connectivity would in future allow better opportunities for the elaboration, establishment and application of such rules. That area of law was still in its infancy and, depending on its evolution, the Commission could return to it at a later time. The current legal regime for the protection of the environment in relation to armed conflicts had been developed at a time when little had been known about the environmental impact of such conflicts. Despite their shortcomings, the draft principles would help significantly to improve the international legal regime.

5. Referring to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that it was essential to clarify the procedural implications of immunity, in order to alleviate the concerns regarding the politicization or abuse of the exercise of jurisdiction, thereby building trust between the forum State and the State of the official. Like the members of the Commission, her delegation broadly supported draft articles 8 to 16 proposed by the Special Rapporteur in her seventh report (A/CN.4/729), which reflected an adequate balance between the interests of the forum State and those of the State of the official, with due regard for the various norms and principles at play.

6. Draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which had been provisionally adopted by the Commission, continued to give rise to debate. Her delegation remained of the view that rules concerning the immunity of State officials, which merely embodied a procedural mechanism meant to ensure stability in international relations, should not be seen to be in conflict with norms of *jus cogens*. Nor should they absolve anyone of responsibility for serious violations or affect the objective of combating impunity for the most serious crimes. Given the range of views that had been expressed on limitations and exceptions to immunity *ratione materiae* of a State official, her delegation had understood that the Commission had adopted draft article 7 on the understanding that procedural provisions and safeguards would be elaborated.

7. Her delegation supported the view of the Special Rapporteur that the procedural provisions and safeguards set out in Part Four of the draft articles should apply to the draft articles as a whole, including draft article 7. That interpretation was supported by draft article 8 ante provisionally adopted by the Drafting Committee (Application of Part Four), which had been adopted without prejudice to the adoption of any additional guarantees and safeguards, including whether specific safeguards applied to draft article 7. Her delegation agreed with the Special Rapporteur that any supplementary safeguards should apply to all cases in which it was necessary to determine whether immunity *ratione materiae* of a State official applied (including if the applicability of draft article 7 was at issue), without there being any grounds at all to restrict it to cases involving the possible commission of a crime under international law.

8. Careful consideration should be given to proposals, such as those indicated in draft article 14 (Transfer of proceedings to the State of the official), aimed at preventing the potential abuse of the transfer of proceedings to the State of the official. For instance, a condition could be stipulated that the State of the official should genuinely be able and willing to exercise jurisdiction. The transfer of proceedings must not become an instrument for exempting the official from prosecution and hence for facilitating impunity. Standards should be in place to ensure that the decision of the forum State on whether or not to transfer proceedings had a solid foundation and were in full compliance with the principle of the sovereign equality of States. Her delegation would also be interested in exploring the option of a mechanism of communication between the forum State and the State of the official that would foster investigation and prosecution by the foreign State.

9. With regard to draft article 8 (Consideration of immunity by the forum State) and draft article 9 (Determination of immunity), her delegation supported broad wording that would cover all possible situations that might arise under international law. However, while it was indeed for the courts of the forum State to determine the admissibility of the case in view of all elements and information pertaining to the immunity of the official, that provision should be balanced with the principle of the sovereign equality of States, to avoid implying that a court could find that it had jurisdiction even when the State of the official had not expressly waived immunity.

10. With regard to draft article 10 (Invocation of immunity), her delegation agreed that there was no obligation to invoke immunity immediately. It would, however, be useful to clarify the consequences of failing to invoke immunity within a reasonable time. Her delegation was not convinced of the distinction drawn in the draft article between immunity *ratione personae* and immunity *ratione materiae*. For example, it appeared from paragraph 6 that the forum State should decide *proprio motu* in a case concerning immunity *ratione personae*, whereas the State of the official was expected to invoke immunity *ratione materiae* before consideration by the forum State. If the distinction were to be retained, care should be taken to ensure that the paragraph was consistent with draft article 8, paragraph 1, which provided that the competent authorities of the forum State should consider immunity as soon as they were aware that a foreign official might be affected by a criminal proceeding. It would be preferable to ensure that the provision for the invocation of immunity set out in paragraph 4 did not imply a preference for mutual legal assistance procedures to the detriment of the diplomatic channel, which was most often used in practice. Wording should therefore be found to indicate that the two means of invocation were on a par with one another.

11. In draft article 11 (Waiver of immunity), it would be useful to clarify the effect of a treaty provision that could be interpreted as an implied or express waiver. With regard to the communication of waivers, the diplomatic channel should have a central rather than a secondary role. States should also be free to decide on other modalities, as appropriate. In paragraph 4, it was indicated that a waiver that could be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official were parties should be deemed an express waiver. Her delegation wondered, however, whether there were no other situations in which a waiver of immunity could be deduced. For example, extradition to the forum State by the State of the official might qualify as a deduced waiver. Moreover, the formulation of the paragraph was ambiguous: it appeared to conflate a “deduced waiver” with an “express waiver”, whereas the two were distinct.

12. In draft article 15 (Consultations), a welcome emphasis was placed on consultations between States concerned regarding matters pertaining to the determination of immunity. Her delegation also supported draft article 16 (Fair and impartial treatment of the official), which was intended to ensure that the official was protected from politically motivated proceedings.

13. With regard to the future programme of work, her delegation acknowledged the Special Rapporteur’s intention to provide a brief analysis, in general terms, of the relationship of the topic with international criminal jurisdiction, bearing in mind the possible transfer of proceedings to an international tribunal. Such analysis was necessary in view of the ongoing discussions regarding the effects of the obligation to cooperate with an international criminal court in respect of the immunity of State officials. Her delegation remained of the view that the issue should be seen in a broader context, in conjunction with international judicial cooperation and assistance mechanisms and international arrest warrants registered with the International Criminal Police Organization (INTERPOL). However, such an analysis should remain within the agreed scope of immunity of State officials from criminal jurisdiction.

14. Turning to the topic “Sea-level rise in relation to international law”, she said that it was scientifically proven that sea levels would rise significantly in the near future. The implications for international law were manifold. For instance, it was crucial to determine what effect a receding coastline would have on a State’s

maritime zones, especially given that numerous maritime boundaries around the world had not yet been settled. Sea-level rise also posed a risk to the territorial integrity of States and could make it necessary to rethink some fundamental assumptions regarding statehood and international legal personality. Another concern was how to protect persons at risk from hazards caused by sea-level rise. In the light of those issues, it was important to understand whether the existing legal framework was adequate and what new rules might be needed. Patterns of State practice were emerging, and there was already a sizeable body of scholarly studies on the subject, some of them including *de lege ferenda* proposals. Of particular note was the report entitled "International Law and Sea Level Rise", which had been issued by the International Law Association in 2018. The topic was thus ripe for discussion.

15. Her delegation took note of the establishment, composition, programme of work and working methods of the open-ended Study Group. It believed that the three subtopics identified in the syllabus were apt, and that the structuring of the Study Group's activities would enable it to work in a thorough and efficient manner. Her delegation understood that the Study Group would approach the subject matter without questioning the applicable legal regimes codified under the United Nations Convention on the Law of the Sea and would duly take into consideration the need to maintain legal stability in international law.

16. **Mr. Varankov** (Belarus), referring to the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on first reading, said that his delegation continued to hold the view that different environmental protection rules applied to international and non-international armed conflicts. A State's environmental laws continued to be in effect even when it was not in control of part of its territory during a conflict. Although the State's genuine inability to ensure compliance with said laws in that territory could justify relieving it of responsibility for such non-compliance, that could not be grounds for it recognizing other non-State participants in the conflict as subjects of international law. His delegation was not convinced by the reasoning underlying the inclusion of draft principle 10 (Corporate due diligence) and draft principle 11 (Corporate liability). The norms and principles applicable to the activities of private corporations were as relevant in times of armed conflict as in peacetime. Referring to draft principle 12 (Martens Clause with respect to the protection of the environment in relation to armed conflict), he said his delegation was not convinced that the phrase "principles of humanity" should be included in the wording of the draft principle. In light of the traditional interpretation given to it and its objectives, the Clause needed to be tailored to the context of environmental protection.

17. The meaning of draft principle 14 [II-2, 10] (Application of the law of armed conflict to the natural environment) was not entirely clear. The law of armed conflict applied by default in situations of armed conflict and was the primary law governing the activities of the parties to the conflict. Although his delegation agreed that principles of international humanitarian law applied to the environment in the context of armed conflict, there was no justification for highlighting the protection of the environment as one of the objectives of the application of international humanitarian law. As to rules governing occupation, an in-depth study of their applicability to the activities of international organizations, in particular in the context of peacekeeping and post-conflict peacebuilding, while valuable, would go beyond the scope of the topic and would constitute progressive development of international humanitarian law.

18. On the topic "Immunity of State officials from foreign criminal jurisdiction", he said his delegation was still of the view that, although the Commission had the prerogative to engage in the progressive development of international law, acceptance of its outputs depended on the consideration it gave to State positions, including those expressed in the Sixth Committee. His delegation agreed with the Special Rapporteur that a thorough study of the procedural aspects of the topic would help to strike a balance between the different rights and interests of the members of the international community. It could also be appropriate to include a special set of procedural guarantees applicable to draft article 7 provisionally adopted by the Commission, although it was the opinion of his delegation that the draft article should be excluded from the set of draft articles on the topic.

19. Referring to the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729), he said that the balance of the rights and responsibilities of States had shifted at the current stage in favour of the State intending to exercise jurisdiction. For the procedural mechanism to work, it was absolutely critical for the requirement contained in draft article 10 (Invocation of immunity) that the State of the official invoke immunity to be balanced against a requirement that the State intending to exercise jurisdiction inform the State of the official without delay of its intention to do so. The State of the official should also not be required to indicate the kind of immunity that was applicable, since the existence of immunity, regardless of its source, was what mattered for purposes of foreign

criminal jurisdiction. The presumption that matters relating to immunity, including the waiver of immunity, must be addressed through a mutual legal assistance mechanism, rather than through the diplomatic channel, did not reflect current practice. Using such a mechanism would be less efficient, as the web of diplomatic relations was much more extensive and effective than that formed by mutual legal assistance agreements. It would also go against the principle of separation of powers, since questions of immunity derived from the principle of sovereign equality of States and could not be resolved by the courts without taking into account the position of the executive branch.

20. With regard to draft article 13 (Exchange of information), which made it optional for the forum State to request from the State of the official information that it considered relevant in order to decide on the application of immunity, his delegation believed that the forum State should be obligated to make such a request. Decisions taken based solely on the reasoning and information of the forum State would raise questions as to their legitimacy and impartiality. Furthermore, the State of the official had the undeniable right to provide such information to the forum State, which in turn was under an obligation to consider that information in good faith.

21. The forum State should also consider the transfer of criminal proceedings to the State of the official, provided for under draft article 14, as its primary option; doing so would avoid many legal and political complications. In view of the significance and sensitivity of the matter, the consultations provided for in draft article 15 must be compulsory and have the status of a procedural obligation.

22. Turning to the topic "Sea-level rise in relation to international law", he said his delegation had doubts concerning the Commission's plan to study the implications of sea-level rise for statehood and for the protection of persons affected by the phenomenon. Although sea-level rise posed a pressing problem, it was not a matter of interest to the entire international community. It was also unlikely that situations where sea-level rise had implications for statehood owing to the loss of all or some of a State's land territory would become pervasive. A situation where a State's land became completely submerged would be an example of the types of disasters addressed in the Commission's work on the topic "Protection of persons in the event of disasters". It would also be interesting to consider the status of persons displaced in such situations and the potential obligation of the international community to assist them, first and foremost by providing them with a place to live, but those issues fell well outside the scope of the topic at hand.

23. **Mr. Tiriticco** (Italy) said that, as his delegation might be submitting written comments subsequently, his comments at the current juncture would be preliminary in nature. His delegation supported the Commission's holistic and temporal approach to the topic "Protection of the environment in relation to armed conflicts", as evidenced in the draft principles adopted by the Commission on first reading. Part Four, concerning principles applicable in situations of occupation, was particularly valuable, as the long-term effects of military presence and activities on the environment were often felt keenly in such situations. His delegation found it commendable that, in addressing the topic, the Commission had made a welcome distinction between codification and progressive development, specifically indicating when it engaged in the latter.

24. The question of the impact of armed conflict on the applicability of international environmental agreements required further study and to be reflected in the draft principles on the topic. The trend in the current work seemed to be to treat the law of armed conflict as *lex specialis* in relation to international environmental law. Clarifications would be welcome regarding the applicability of environmental treaty obligations not affected by the application of international humanitarian law during armed conflict. Such clarifications would also be warranted in the case of long-term occupation, where international humanitarian law was considered *lex specialis*, prevailing automatically over international environmental law, something which did not fully reflect current needs for the protection of the local population and the environment.

25. Referring to the draft principles adopted by the Commission on first reading, he said that his delegation supported draft principle 9 (State responsibility), under which States bore responsibility and had an obligation to make full reparation for environmental harm during armed conflict, including damage to the environment in and of itself, that could not be assessed financially. That provision was consistent with the practice of the United Nations Compensation Commission and the case law of the International Court of Justice. In paragraph 2, it was indicated that the draft principles were without prejudice to the rules on responsibility of States for internationally wrongful acts. His delegation wondered whether such a provision was necessary; it was clear from paragraph 1 that the rules of State responsibility applied to the specific context of environmental harm in armed conflict. Moreover, the Commission indicated in its commentary to draft principle 1 that the draft principles as a whole covered all three temporal phases: before, during, and after armed conflict.

26. In view of the broad definition of “occupation” in Part Four of the draft principles, further consideration should be given, where applicable, to the connection between the law of occupation and other branches of international law, especially the law of self-determination. That connection was relevant, in particular, to the exploitation and use of natural resources, which, according to draft principle 21 (Sustainable use of natural resources), could be undertaken for the benefit of the population of the occupied territory. In paragraph (3) of the commentary, it was indicated that the reference to the “population of the occupied territory” was to be understood in that context in the sense of article 4 of Geneva Convention (IV) relative to the Protection of Civilians in Time of War. His delegation would like to see, not only in the commentaries but also in the draft principles themselves, further reference to and exploration of the obligations of States stemming from the principle of self-determination and permanent sovereignty over natural resources, including the requirement that any exploitation of such resources should take place in accordance with the wishes, and for the benefit, of the local population.

27. Turning to the topic “Immunity of State officials from foreign criminal jurisdiction”, he said that his delegation strongly supported the formulation of draft article 7 as provisionally adopted by the Commission, and appreciated the manner in which the procedural aspects of immunity and the duty of international judicial cooperation between the forum State and the State of the official had been addressed in the seventh report of the Special Rapporteur (A/CN.4/729). In the draft articles proposed in that report, the Special Rapporteur made a welcome distinction between immunity *ratione materiae*, which was conditional on invocation by the State of the official, and immunity *ratione personae*, which should be applied *proprio motu* by the forum State, as reflected in draft article 10.

28. His delegation was, however, concerned at the proposed wording of paragraph 1 of draft article 14 (Transfer of proceedings to the State of the official): the provision that “the authorities of the forum State may consider declining to exercise their jurisdiction in favour of the State of the official” introduced a discretionary element, whereas the rules on immunity of State officials, when applicable, created an obligation to refrain from exercising jurisdiction. While understanding that the Special Rapporteur had envisaged a model of judicial cooperation in cases in which the forum State would be entitled to assert jurisdiction, his delegation believed that the primary purpose of the draft articles should be to regulate situations in which immunity *ratione materiae* applied, and that the Drafting Committee should amend draft article 14 accordingly.

29. Italy was at the forefront of initiatives to address sea-level rise and supported the inclusion of the topic “Sea-level rise in relation to international law” in the programme of work of the Commission. Sea-level rise was indeed a major issue with dramatic impact, particularly on developing countries and small island nations of the Pacific and the Caribbean; it was therefore appropriate for the Commission to explore its possible repercussions in relation to international law. Sea-level rise could affect issues such as the legal baselines for measuring the breadth of the territorial sea; the recognition of the status of islands; the legal status of artificial islands; and the displacement and resettlement of island inhabitants.

30. In view of the theoretical complexities and novelty of the topic, his delegation believed that the establishment of a Study Group with rotating Co-Chairs was the most appropriate way to proceed, and that the proposed subtopics would provide a good starting point. Although his Government was not currently in a position to share any specific practice of its own, it looked forward to commenting on the work of the Commission once the first substantive report on the topic was produced.

31. **Mr. Špaček** (Slovakia) said that the topic “Protection of the environment in relation to armed conflicts” was an important one because armed conflict could cause long-term and irreparable damage to the environment, especially as the means of warfare became more advanced. As his delegation might submit written comments on the topic subsequently, its observations at the current juncture were preliminary in nature. His delegation had concerns of a conceptual nature regarding the draft principles adopted by the Commission on first reading. A more streamlined and concise set of principles with a clear normative content would be more useful in order to guide State practice. For instance, it was difficult to see the benefit of paragraph 1 of draft principle 9 (State responsibility), which stated that “an internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself”. That provision could potentially create confusion with regard to the scope of reparations for any environmental damage. The issue of reparations could be easily resolved within the framework of the general rules on State responsibility.

32. While welcoming the substance of draft principle 10 (Corporate due diligence), his delegation wondered whether more prescriptive wording should be used. Moreover, it was not convinced that the obligation enshrined in the draft principle could be extended to post-conflict situations. Although it was firmly convinced that reparations should be provided for any harm caused, his delegation did not believe that the inclusion of a draft principle on corporate liability was appropriate or fell within the scope of the Commission's work on the topic.

33. His delegation appreciated the specific focus on situations of occupation in Part Four of the draft principles, but believed that the Commission should take a moderate approach when addressing post-conflict situations beyond the protection of the environment in and of itself; for instance, the Commission should avoid focusing excessively on remedial actions. His delegation also had concerns about draft principle 24 [18] (Sharing and granting access to information) and would, at the very least, appreciate some examples of categories of information to which it should apply.

34. Although it had no wish for the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction" to be completed prematurely, his delegation regretted the apparent lack of progress and supported the plan to complete the first reading of the draft articles in 2020. A greater focus on existing State practice would be helpful in order to produce a useful and meaningful set of draft articles on procedural aspects of immunity. In view of the variety of such practice, the draft articles should not be overly prescriptive.

35. Referring to the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729), he said that, overall, his delegation agreed that, as indicated in paragraph 1 of draft article 8 (Consideration of immunity by the forum State), the competent authorities of the forum State should consider immunity as soon as they were aware that a foreign official might be affected by a criminal proceeding. It was not, however, convinced that further elaboration, as found in paragraph 2, was necessary. Paragraph 3 raised the practical concern of whether it was possible for the competent authorities to consider, but not determine, immunity before taking any coercive measure. It should also be made clear how the concept of coercive measures was understood; it would be helpful to include an illustrative list in the commentary.

36. It was indicated in draft article 9 (Determination of immunity) that it was for the courts of the forum State to determine the immunity of State officials. However, it should not necessarily be for the courts to determine immunity, and in fact, that was not the case in Slovakia. It would therefore be appropriate to take a broader view regarding which organs of the forum State could determine immunity.

37. As to draft article 10 (Invocation of immunity), his delegation believed that invocation of immunity was not a procedural requirement for the authorities of the forum State to consider and determine the immunity of a State or one of its officials from foreign criminal jurisdiction. Rather, those authorities should make that consideration and determination *proprio motu*, and they should do so regardless of the type of immunity involved. Accordingly, his delegation interpreted paragraph 6 of draft article 10 as not requiring immunity *ratione materiae* to be invoked for the forum State to act. However, such invocation would apply in the context of paragraph 3 of draft article 9, draft article 12 (Notification of the State of the official) and draft article 13 (Exchange of information). As paragraph 6 of draft article 10 addressed the determination of immunity rather than its invocation, it should be relocated to become paragraph 4 of draft article 9. A "without prejudice" clause should be inserted in paragraph 2 of draft article 10, in order to make it clear that any delay in invoking immunity should not be detrimental to the State of the official.

38. His delegation welcomed the provision, in paragraph 2 of draft article 11 (Waiver of immunity), that waivers of immunity should be express. As to paragraph 3, it should be indicated that a waiver of immunity should preferably be communicated through the diplomatic channel, because it was not a matter of mutual judicial or legal assistance. For the same reason, the words "where a waiver of immunity is not effectuated directly before the courts of the forum State" should be deleted from paragraph 5. Further consideration should be given to the irrevocability of waiver, as provided for in paragraph 6, and to the provision, in paragraph 4, that a waiver that could be deduced clearly and unequivocally from an international treaty should be deemed an express waiver.

39. His delegation welcomed paragraph 6 of draft article 13 (Exchange of information), in which it was indicated that refusal by the State of the official to provide the requested information could not be considered sufficient grounds for declaring that immunity from jurisdiction did not apply. It believed, however, that greater attention should be given to the reasons for refusing a request for information.

40. With regard to future work, his delegation believed that the Special Rapporteur should not analyse the relationship of the topic with international criminal

jurisdiction, as that would go beyond the scope of the topic.

41. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation welcomed the convening of an open-ended Study Group and its composition, methods and programme of work. It recognized that the topic was a pressing concern for the international community as a whole, and that many States believed that the Commission should address it as a matter of priority. Although it remained convinced that urgent legal and other questions connected with sea-level rise would more properly be addressed in other multilateral forums, such as the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, it looked forward with interest to the work of the Study Group. It now seemed clear that the final outcome of the Commission's work on the topic should take the form of an analytical study, and the Commission should reaffirm the unified character of the United Nations Convention on the Law of the Sea and the vital importance of preserving its integrity.

42. More detailed comments reflecting his delegation's position on the aforementioned topics could be found in his written statement, available on the PaperSmart portal.

43. **Mr. Alabrune** (France) said that his delegation would closely examine the draft principles and commentaries on the topic "Protection of the environment in relation to armed conflicts" adopted by the Commission on first reading, and would endeavour to submit written comments and observations by 1 December 2020.

44. Referring to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that, throughout the discussions on the various draft articles she had proposed, the Special Rapporteur had pointed out that they were meant to address the concerns raised by a number of Member States and the Commission itself regarding the exceptions to immunity *ratione materiae* set out in draft article 7 provisionally adopted by the Commission. In that connection, his delegation wished to point out that those exceptions did not constitute rules of customary international law, owing to the lack of sufficient State practice and *opinio juris*.

45. His delegation agreed with the Special Rapporteur that it would not be useful to examine how the topic related to international criminal jurisdiction. As several members of the Commission had noted, the decision of the International Criminal Court Appeals Chamber in the case of the *Prosecutor v. Omar Hassan Ahmed Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir)* had not settled the matter. The question of immunity from international jurisdiction would thus go beyond the scope of the topic as defined in draft article 1. Moreover, the Commission had indicated in paragraph 19 of annex A of the report on the work of its fifty-eighth session (A/61/10), that its discussion of the topic should cover only immunity from domestic jurisdiction, as the legal regime of that institution was distinct from the legal regime of immunity from international jurisdiction.

46. His delegation believed that the work of the Commission should result in the elaboration of a draft convention, as had been the case with all of the Commission's work on topics related to immunity. It would therefore not be useful for the Special Rapporteur to propose recommended good practices. Instead, the Commission should focus on finalizing a set of draft articles that could gain broad consensus.

47. While recognizing the importance of the topic "Sea-level rise in relation to international law", his delegation was concerned that the proposed method of work seemed to mark a departure from the normal procedure. It was important that the Commission discuss the topic publicly in plenary session, and that the draft articles and the commentaries thereto adopted year after year be transmitted to the Sixth Committee. The establishment of an open-ended Study Group with a rotating Chair could affect the transparency of the deliberations; the discussions would be held in private and only an annual summary of work and the final report would be made public.

48. Given the importance of the topic for Member States, particularly island States, and its myriad ramifications for international law, it was important for the Sixth Committee to be fully involved in the work, including when the topic was at an early stage of consideration and even more so as it involved a new area of law in which State practice and *opinio juris* were not yet clearly established. His delegation therefore hoped that the Commission would revert to its normal procedure, perhaps by establishing a new system of joint Special Rapporteurs. Failing that, the work of the Study Group should be as transparent as possible, and its deliberations should be published regularly so that States could comment on them each year.

49. **Ms. Telalian** (Greece), referring to the topic "Protection of the environment in relation to armed conflicts", said that her delegation noted that the Special Rapporteur had dealt with pressing issues in her second report, such as the environmental impact of displacement and questions of responsibility, and had made technical and structural changes, bringing the codification process closer to completion. Referring to the draft principles

adopted by the Commission on first reading, she said that preventive measures for the protection of the environment should not be limited to the mere minimization of damage and should also be applicable in peacetime. It would therefore be preferable to refer to "preventive measures for minimizing or avoiding damage" in draft principle 2 (Purpose). Her delegation welcomed the acknowledgement of the protected status of areas of particular environmental interest in draft principles 4 [I-(x), 5] (Designation of protected zones) and 17 [II-5, 13] (Protected zones). However, the protected areas envisaged in the latter draft principle should be expanded to include not only sites designated by agreement, but also sites protected by decisions of relevant treaty bodies, such as the natural sites of outstanding universal value included in the World Heritage List in accordance with the 1972 Convention for the Protection of the World Cultural and Natural Heritage. Her delegation supported the inclusion of draft principle 8 (Human displacement), which helped to safeguard against environmental degradation in areas where displaced persons were sheltered.

50. Referring to draft principle 13 [II-1, 9] (General protection of the natural environment during armed conflict), she noted that, although it was stated in paragraph (5) of the commentary that "the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, remained relevant" as applicable international law, more information was needed on how and to what extent the general principles of environmental law operated in wartime, and how they interacted with *jus in bello* rules. The duty of care stated in paragraph 2 of the draft principle should be considered together with the "no harm" principle in customary international environmental law, given that both contained a due diligence standard.

51. In its commentary to draft principle 14 [II-2, 10] (Application of the law of armed conflict to the natural environment), the Commission should establish a link between the rule that precautions be taken during an attack to avoid or minimize collateral damage to the environment and the due regard clause contained in rule 44 of the study entitled "Customary International Humanitarian Environmental Law" of the International Committee of the Red Cross, which provided for a coordinated application of that rule and the precautionary principle of general environmental law. Her delegation welcomed draft principle 18 (Prohibition of pillage) and the clarification, provided in paragraph (8) of the commentary to the draft article, that the prohibition of pillage applied also in situations of occupation.

52. Her delegation welcomed the clarification, provided in paragraph (1) of the commentary to draft principle 21 [20] (Sustainable use of natural resources), that the use of natural resources by an Occupying Power was permissible to the extent allowed not only by the law of armed conflict but also by other applicable rules of international law, including the principle of permanent sovereignty over natural resources and the principle of self-determination. It should also be stated in the commentary that States should abstain from recognizing situations of illegal occupation and from engaging in economic or other forms of cooperation with an Occupying Power.

53. Her delegation welcomed draft principle 26 (Relief and assistance) in situations where the source of environmental damage was unidentified or reparation was unavailable. It should, however, be made clear that the liable State, if known but unwilling to provide compensation, was not relieved from its secondary obligations under the law of State responsibility once the draft principle was put into motion through the action and contributions of benevolent States or international organizations. It might therefore be appropriate to state, in a separate paragraph, that the draft principle was without prejudice to draft principle 9 (State responsibility).

54. The text of draft principle 28 [17] (Remnants of war at sea) should be amended to reflect the fact that remnants of war at sea could include leaking wrecks or warships, which were regulated by general international law, including the United Nations Convention on the Law of the Sea. The draft principle would therefore read: "States and relevant international organizations should cooperate in accordance with applicable rules of international law, including the United Nations Convention on the Law of the Sea, to ensure that remnants of war at sea do not constitute a danger to the environment."

55. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the Commission's debate had demonstrated, once again, the scarcity of relevant international and national case law and practice on the topic. Also, the divergence of views within the Commission regarding the content of draft article 7 provisionally adopted by the Commission could significantly delay work on the topic. Accordingly, her delegation reiterated the importance it attached to the clarification of the procedural aspects of immunity and the elaboration of relevant rules and safeguards, since those were areas where the Commission could provide valuable, practical and workable guidance to States. Although it acknowledged the difficulties involved, her delegation still found it regrettable that the Commission

had not provisionally adopted any draft articles on those issues at its seventy-first session.

56. With regard to the topic "Sea-level rise in relation to international law", which had been added to the Commission's programme of work despite the concerns expressed by some delegations, including her own, she reiterated her delegation's view that additional scientific and academic research was needed before the international community could fully grasp the legal and other implications of rising sea levels. The topic was not ripe for codification, as State practice and generally accepted rules were lacking.

57. The Commission's intention to examine law of the sea issues, as set out in paragraph 15, Annex B, of the Commission's previous report (A/73/10), in such an uncertain context might call into question cardinal and well-established law of the sea rules reflected in the United Nations Convention on the Law of the Sea. Her delegation also could not ascertain the exact scope of each of the law of the sea issues that the Commission might consider, given their degree of overlap. Her delegation would nonetheless closely follow the discussions within the Commission and its open-ended Study Group, bearing in mind the importance of maintaining the integrity of the Convention. Noting the assurance provided by the Commission in paragraph 14 of Annex B of the report that it would not propose modifications to existing international law, her delegation hoped that the Commission would, in addressing the topic, avoid fragmentation or derogation from the Convention, which was one of the most fundamental pillars of the current international legal order.

58. Turning to the topic "Succession of States in respect of State responsibility", she said that draft articles 12 to 15 of the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731) were well-balanced and sufficiently flexible to be applicable to the particularities of each case. Her delegation would submit specific comments on that topic, and on the topic "General principles of law" via the PaperSmart portal.

59. **Ms. Chung** (Singapore), referring to the topic "Protection of the environment in relation to armed conflicts", said that her delegation was pleased that the Commission had included a reference to the Singaporean case of *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission* in the commentaries to the draft principles it had adopted on first reading. The Commission should continue to ensure that its output reflected the different legal cultures and geographical regions represented in the United Nations.

60. The Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction" touched on practical aspects of the international relations of Member States and thus was of significant interest to her delegation. Singapore underscored the need to focus on safeguards, in order to ensure that exceptions to immunity *ratione materiae* were not applied in a wholly subjective manner. It agreed with members of the Commission who considered that a full discussion of procedural issues was important, to ensure that immunities, where applicable, were respected, in order to safeguard the stability of international relations and ensure respect for the sovereign equality of States. States also needed flexibility when addressing matters pertaining to immunity of State officials. Mechanisms allowing for consultations between the State of the official and the forum State would undoubtedly be useful, in particular in the event of unforeseen circumstances.

61. The topic "Sea-level rise in relation to international law" was an existential issue for small, low-lying island States. Although Singapore would do its part to combat and mitigate the effects of climate change, including rising sea levels, ultimately climate change was a challenge for the global commons and required a multilateral approach. The Commission's decision to study the topic was therefore both timely and crucial. The composition of the open-ended Study Group should be representative of the interests of States in the different geographical regions, especially States that were particularly vulnerable to the threat of rising sea levels.

62. **Ms. Pelkiö** (Czechia), referring to the topic "Protection of the environment in relation to armed conflicts", said that as her delegation would be submitting written comments subsequently, her comments at the current juncture were only preliminary in nature. Her Government was aware of the fundamental principle of environmental protection in any context. The study of the topic was quite relevant because armed conflicts always had a negative impact on the environment, not only where they occurred but also in places not involved in the conflict. The key problem in the context of contemporary armed conflicts was compliance with the basic principles of international humanitarian law, especially by non-State actors. A useful outcome of the topic would have been a summary of the rules of international humanitarian law in relation to the use and protection of the environment and natural resources during an armed conflict. Instead, the Commission had proposed an ambitious and innovative list of recommendations which were often based on general concepts, such as corporate due diligence, responsible business practices and sustainable use, imported from other areas of

international law. All the same, legal obligations concerning the protection of the environment in relation to armed conflict could not be properly interpreted and understood in the abstract, in isolation from other rules applicable to armed conflict.

63. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that her delegation was of the opinion that the Commission's debates on the procedural aspects of immunity should focus on the application of those aspects in judicial decisions and the practice of national authorities in cases involving immunity *ratione materiae* and immunity *ratione personae*. Since procedural aspects were discussed mainly with respect to the application of immunity *ratione materiae*, State practice taken into account should cover all situations in which that immunity applied, namely cases where States applied general procedural rules contained in international conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; cases where States prosecuted perpetrators of crimes under international law without any treaty basis; procedural steps with respect to crimes covered by immunity *ratione materiae* provided for in treaties, such as in article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations; and cases of "official crimes" committed in the territory of the forum State, such as the *Rainbow Warrior* case between New Zealand and France. In all those instances, States applied the rules of criminal procedure contained in their national laws and the treaties by which there were bound. The Commission should analyse and identify common elements in the practice of States in that regard. However, it would not be appropriate for the Commission to formulate new, additional procedural obligations, much less to engage in an exercise of progressive development of international law.

64. Her delegation did not support the inclusion of a mechanism for the settlement of disputes between the forum State and the State of the official in the draft articles on the topic. The procedural requirement that the immunity of an official be invoked by the State of the official should be reconsidered. Both types of immunity, *ratione personae* and *ratione materiae*, existed as a matter of international law. The national authorities should be able to initiate criminal proceedings *proprio motu*, taking into consideration any applicable immunity, including immunity *ratione materiae*, on the basis of available evidence. In addition, the International Court of Justice had found in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* that the State notifying a foreign court that a judicial process should not proceed, for reasons of immunity, against its State organs, was assuming responsibility for any international wrongful act at issue committed by such organs. Therefore, the invocation or application of immunity *ratione materiae* might have consequences not only for the criminal proceedings, but also for the international responsibility of the State invoking such immunity, and for that State's civil liability, if the crime had been committed on the territory of the forum State.

65. With regard to waiver of immunity *ratione materiae*, more attention should be given to the application of such immunity in relation to treaties that provided for the exercise of extraterritorial criminal jurisdiction over crimes committed in an official capacity, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance. Under such treaties, immunity *ratione materiae* was not applicable in relation to such crimes in criminal proceedings before foreign courts. It was not applicable, not as a result of an implied waiver, but as a consequence of the normative incompatibility of immunity *ratione materiae* with the express definitions and obligations provided for in those treaties.

66. With respect to the topic "Sea-level rise in relation to international law", when the General Assembly had noted its inclusion in the Commission's long-term programme of work in its resolution 73/265, it had recommended that the Commission take into consideration the comments and observations of Governments in its work on the topic. However, the Commission had not indicated in its report (A/74/10) whether it had done so before deciding to include the topic in its current programme of work. Although climate change posed global dangers, including sea-level rise and its consequences for low-lying coastal States and small islands States and their populations, the topic was predominantly scientific and technical in character. It should therefore be taken up by the relevant technical and scientific bodies and intergovernmental forums with a mandate to address law of the sea issues.

67. **Mr. Azimov** (Uzbekistan), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that according to the principle of sovereign equality of States, enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, all States had the same rights and responsibilities and were equally members of the international community, independent of their economic, social, political or other differences. The issues

considered within the scope of the topic were therefore extremely sensitive and called for a thorough examination of the general practice and positions of States.

68. Immunity of State officials from foreign criminal jurisdiction was a rule of customary international law derived from the principles of the sovereign equality of States and the prohibition against the use or threat of use of force. Any exception from such a rule must be justified by the existence of another rule of customary international law.

69. Draft article 7 of the draft articles provisionally adopted by the Commission contained a list of crimes under international law for which immunity *ratione materiae* would not apply. Allowing for exceptions to immunity from foreign criminal jurisdiction contradicted well-established principles of international law, which formed the foundation of the entire system of international relations. The draft article in its current form did not reflect any trend in State practice or existing customary international law. The unfounded denial of immunity of State officials would gravely undermine international rule of law by disrupting relations among States and could be used as a tool in politically motivated proceedings. Such immunity existed not for the benefit of State officials as individuals, but to ensure the effective performance of their functions. Therefore, when the immunity of State officials was at issue, it concerned first and foremost the immunity of the State itself. However, that did not call into question the principle that no crime should go unpunished, including those listed in draft article 7, nor the ability of a foreign State or an international court to exercise jurisdiction over crimes designated in treaties.

70. The Commission's work on the topic "General principles of law" would be helpful for determining the legal character of general principles of law as one of the sources of international law and for clarifying the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. His delegation called on the Commission to avoid delving too deeply into, or giving priority to, general principles of law derived from national legal systems, and to produce practical and specific conclusions and commentaries on the topic grounded, above all, in an analysis of the international legal system.

71. **Mr. Lefeber** (Netherlands) said that, in its work on the responsibility of international organizations, the Commission had not addressed the issue of the settlement of disputes of a private-law character to which an international organization was a party. Determining how and on the basis of which standards international organizations settled such disputes raised difficult questions, not only as a matter of principle but also in practice. The immunity of international organizations, which was vital for their effective functioning, needed to be balanced against the legitimate expectation of third parties that a remedy would be available to them. The way international organizations dealt with claims of a private-law nature set a benchmark for the promotion of the rule of law at the national and international level by such organizations. His delegation thus reiterated its appeal that the Commission place the topic of settlement of disputes of a private-law character to which international organizations were parties on its agenda.

72. Referring to the topic of protection of the environment in relation to armed conflicts, he said that his delegation was generally supportive of the draft principles adopted by the Commission on first reading. It was pleased that its earlier comments regarding the risk of broadening the topic beyond the sphere of armed conflict had been taken on board by the Special Rapporteur and the Commission. The Netherlands had ratified a large number of the relevant conventions referred to in the Commission's report (A/74/10), including Additional Protocols I and II to the 1949 Geneva Conventions, and hoped that those instruments would become universal in the future. He welcomed the Special Rapporteur's decision to use the term "armed conflict" without making a distinction between the international or non-international character of such conflict.

73. His delegation agreed with the Commission, as noted in its commentary to the introduction, that the draft principles contained provisions of different normative value; some reflected customary international law, and would therefore be binding upon States, while others were of a more recommendatory nature and were aimed at progressive development of international law. His delegation was pleased that the Commission had made an effort to indicate which provisions fell under the first category, with the use of the word "shall" in the commentaries. However, further clarification would be beneficial regarding the use of the general reference to "armed conflict" and the fact that the draft principles were not only supposed to reflect customary international law.

74. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he observed that the vast majority of States already had views relating to immunity of State officials and State practice was widely available. His delegation therefore shared the concern expressed by members of the Commission and many Member States that the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729) had not been sufficiently based on

extensive and virtually uniform State practice and *opinio juris*. Instead, they represented an exercise in progressive development, which was unnecessary for a topic with extensive State practice. The Netherlands therefore urged the Commission to reconsider its work and to ensure that it was based more on State practice and *opinio juris*.

75. Perhaps because State practice and *opinio juris* had not been referenced sufficiently, there was a lack of consensus within the Commission on the way forward: proponents of protecting the interests of the State of the official had continued to request further safeguards and high thresholds for the exercise of jurisdiction by the forum State, while the proponents of protecting the interests of the forum State had continued to point out that such safeguards and thresholds would render it impossible for the forum State to exercise its jurisdiction. Because the Commission had decided to make progress on the topic by focusing on procedural safeguards without addressing those differences, the procedural safeguards introduced in draft articles 8 to 16 had been interpreted by the Commission's members either as favouring the forum State or as favouring the State of the official, or even as striking the correct balance. The development of procedural safeguards had thus not helped to resolve the differences of opinion.

76. Many of the proposed draft articles and their level of detail did not seem relevant to the law of immunities, as the procedural safeguards did not contribute to the rules defining whether immunity existed and what the consequences were of the presence or absence of immunity. The Netherlands agreed with the Commission members that the procedural safeguards should be limited to those directly relevant to immunity, and that the draft articles should be streamlined. The current level of detail therein distracted from the more important issues. For example, the draft articles addressed the questions of the highest authority to decide on prosecution, or of the standard of proof in criminal law cases, or the exact content and form of a notification to the State of the official. In order to implement such detailed rules, States might have to change their municipal criminal law system, which could in turn affect the ratification rates of a future convention. Such a level of detail was not of decisive importance to the question of whether immunities applied, which should be at the core of the Commission's work on the topic.

77. The Netherlands was also concerned by the distinction drawn in the procedural safeguards between immunity *ratione personae* and immunity *ratione materiae*. That distinction was important with respect to the question of whether immunity applied, but not so much with respect to the procedural safeguards set out in draft articles 8 to 16. Indeed, the obligation to respect immunity existed independently of whether immunity was invoked. His delegation therefore disagreed with the notion that immunity needed to be invoked as a condition for the application of immunity *ratione materiae*. The forum State was under an obligation to respect the rights of the State of the official under international law without the latter having to intervene. Procedures, therefore, should apply to both immunity *ratione personae* and immunity *ratione materiae*. Without prejudice to the question as to whether all the issues covered in the draft articles were relevant, the draft articles contained vague wording and were unclear as to the extent of the obligations or the rights provided thereunder.

78. Lastly, it was regrettable that a list of crimes had been included for the purpose of defining exceptions to immunity. The Netherlands reiterated its position that it was preferable to refrain from defining crimes or including a list of crimes constituting exceptions or limitations to immunity. A reference to "crimes under international law" would avoid unnecessary debate and allow the topic to proceed. Furthermore, it could not be maintained that immunity *ratione materiae* applied to all acts performed by a State official; such immunity would clearly not cover international crimes. His delegation urged the Commission to reconsider the topic and to find consensus on the fundamental notions inherent in it, before developing or adopting any draft articles.

79. Turning to the topic "Sea-level rise in relation to international law", he said his delegation welcomed the Commission's decision to include the complex topic in its programme of work and to establish an open-ended Study Group. With regard to the scope of the study, the Netherlands appreciated that it would include the study of issues relating to statehood, law of the sea and the protection of persons affected by sea-level rise. The Caribbean islands of the Kingdom of the Netherlands were not far above the current sea level and might lose a significant amount of land territory as a result of continued sea-level rise. A quarter of the land territory of the European part of the Kingdom currently lay below sea level; that share was likely to increase as the sea level rose. His Government would draw on his country's age-old struggle with water to furnish information in support of the Commission's work on the topic.

Statement by the President of the International Court of Justice

80. **Mr. Yusuf** (President of the International Court of Justice) said that between 26 October 2018 – when he had last addressed the Committee – and 1 November 2019, the Court had delivered two judgments, one order

on a request for indication of provisional measures and one advisory opinion. There were 16 cases pending before the Court involving 26 countries from all regions of the world. In considering the many and diverse cases before it, the Court was required to determine the applicable rules of international law. In Article 38 of the Statute of the Court, which had been drafted in 1920 as part of the Statute of the Permanent Court of International Justice, it was provided that the primary sources of international law applicable in cases before the Court consisted of "international conventions", "international custom, as evidence of a general practice accepted as law" and "the general principles of law recognized by civilized nations". Judicial decisions and the teachings of the most highly qualified publicists were recognized as subsidiary means for the determination of rules of law. The Court could decide a case *ex aequo et bono* only with the consent of the parties to the dispute.

81. Treaties were in written form, at least according to the definitions set forth in the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). However, customary international law and general principles of law were often unwritten, unless they were clearly identified or codified in a specific instrument. In the absence of a written text, the Court must first of all determine the actual existence of those two sources of law and the scope of the norm that they contained. The difficulty of the task was amplified by various theoretical and conceptual debates regarding their definition and determination, and, in many cases, how they were distinct from other sources of international law.

82. The Court's approach to the determination of what constituted customary international law had changed over time as a result of the evolution of international law and the expanded composition of international society. Factors in that change included the universalization of international law following the adoption of the Charter of the United Nations, the emergence of formerly colonized territories as States Members of the United Nations and subjects of international law, and the process of codification and progressive development of international law through multilateral conventions.

83. The judgment of the Court in the *North Sea Continental Shelf* cases, which had been rendered in 1969, had marked a watershed moment in the Court's approach to customary international law. Before that time, the Court's approach had been characterized by two main elements. The first had been to focus on repeated usage by States over a long period of time. For instance, in *Right of Passage over Indian Territory (Portugal v. India)*, the Court had had to determine whether Portugal enjoyed a right of passage over Indian territory. The Court had explained that, with regard to private persons, civil officials and goods in general, there had existed during the British and post-British periods a "constant and uniform practice" allowing free passage on Indian territory. The practice had continued "over a period extending beyond a century and a quarter" and had been unaffected when India had become independent. The Court had therefore concluded that Portugal had a right of passage with regard to private persons, officials and goods in general.

84. The second approach had been to emphasize the will and acceptance of States as a factor in the creation of rules of customary international law and as a condition for such rules to be binding on them. In the *Case of the S.S. "Lotus" (France v. Turkey)*, the Permanent Court of International Justice had found that the rules of law binding upon States emanated from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. That approach, which equated the emergence of customary norms to a tacit agreement, had enabled States that had opposed the existence of a customary rule to declare that they were not bound by it. Two *obiter dicta* of the Court, in the *Asylum (Colombia v. Peru)* and *Fisheries (United Kingdom v. Norway)* cases, respectively, were often invoked in legal writings to support what was known as the persistent objector doctrine. In the *Asylum* case, the Court had held that even if a local rule of customary international law concerning the qualification of offences in matters of diplomatic asylum did exist between Latin American States, that rule could not be invoked against Peru which, far from having by its attitude adhered to it, had, on the contrary, repudiated it.

85. In the *Right of Passage* and *Lotus* cases, the Court's approach to customary international law had been based primarily on the realities of international society through the nineteenth century, when multilateralism had been in its infancy, the legal personality of international organizations had yet to be recognized, and information on State practice had not readily been accessible. The *North Sea Continental Shelf* cases had been considered in a very different world, 20 years after the Court had recognized the international legal personality of international organizations in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, and about a decade after the emergence of newly

independent African and Asian States on the international scene, and at a time when a wide range of multilateral conventions had been concluded.

86. The *North Sea Continental Shelf* cases had arisen between Denmark and the Federal Republic of Germany, on the one hand, and between the Netherlands and the Federal Republic of Germany, on the other. In both cases, which had been joined, the Court had had to identify the principles of international law applicable to the delimitation of the continental shelf in the North Sea. In that context, the Court had stated that, in order for a rule of customary international law to exist, "two conditions must be fulfilled. Not only must the acts [of State practice] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation".

87. That approach marked a new development in three critical respects. Firstly, the Court had rejected the previous emphasis on repeated usage in determining the existence of a customary international law rule. On the contrary, the Court now emphasized the importance of *opinio juris*. It had argued that "the frequency, or even the habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty". It had further explained that there was a symbiotic relationship between State practice and *opinio juris*, as the same act could constitute evidence of both. The States performing the act in question must already feel that they were conforming to what amounted to a legal obligation, and that their conduct was motivated by a sense of legal duty. In other words, *opinio juris* might, in some cases, precede or accompany the development of State practice.

88. Secondly, the Court had clarified that State practice was not limited to the usages of States: it also included the rules established in multilateral conventions, as *consuetudo scripta* (written custom). In contrast with its approach in the *Asylum* case, the Court had drawn a clear distinction between consent to be bound by a conventional norm and *opinio juris*. While a State might opt out of a treaty or certain treaty provisions through reservations, it could not do the same with rules of customary international law. By their very nature, such rules must have equal force for all members of the international community, and therefore could not be the subject of any right of unilateral exclusion exercisable at will by a State in its own favour. That finding took account of a major development in international relations over the previous century, namely the multiplication of multilateral conventions in such areas as human rights, the law of the sea, the law of treaties, international humanitarian law and diplomatic and consular relations. Through such conventions, concepts such as *jus cogens*, the common heritage of humanity and the exclusive economic zone had entered the language and rules of international law, and had acquired a dual significance and value as both treaty and customary norms. In that connection, the Court had considered that the relevant provisions of the United Nations Convention on the Law of the Sea concerning a coastal State's baselines and entitlement to maritime zones, the definition of the continental shelf, and the delimitation of the exclusive economic zone and the continental shelf, all reflected customary international law. The Court had thus been able to apply those provisions even to States not parties to that Convention.

89. Thirdly, the Court's new approach had not been to regard time as a critical factor in determining rules of customary international law. In the *North Sea Continental Shelf* judgment, the Court had clarified that, even without the passage of any considerable period of time, very widespread and representative participation in a multilateral convention might suffice in itself to generate customary rules, provided it included that of States whose interests were especially affected. During the previous century, technological developments had made State practice more readily accessible and had increased opportunities for States to meet and exchange views on the desirability and content of rules of international law. International organizations had also created regular forums, such as meetings of the General Assembly, in which States had opportunities to engage directly with each other. The development of customary international law was thus no longer necessarily a slow process.

90. That significant change in approach had paved the way for the Court to take full account of relevant General Assembly resolutions in determining rules of customary international law. The admission of newly independent States to membership in the United Nations had made the General Assembly into a global forum in which all States could express their views on the content of rules of international law, often through the adoption of declaratory resolutions, the legal significance of which had become a hotly contested matter in the academic literature of the 1970s and 1980s.

91. The *North Sea Continental Shelf* judgment played an important role in the settlement of that debate, in at

least three ways. Firstly, since a single act could be relied upon to establish both State practice and *opinio juris*, resolutions adopted by the General Assembly could potentially do the same. Secondly, in the absence of any requirement of long-term maturation and repeated practice, a single resolution or succession of resolutions, even if adopted within a short period of time, could also be evidence of both State practice and *opinio juris*, and hence lead to the emergence of a rule of customary international law. Lastly, an *opinio juris* could be expressed in a resolution even before the emergence of a corresponding practice, depending of course on the content of the resolution and the conditions of its adoption.

92. The Court had first invoked resolutions of the General Assembly for the purposes of determining norms of customary international law in its 1971 advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276 (1970), in which it had described the adoption, by virtue of General Assembly resolution 1514 (XV), of the Declaration on the Granting of Independence to Colonial Countries and Peoples as "an important stage" in the development of international law with regard to Non-Self-Governing Territories, which had made the principle of self-determination applicable to all of them. Subsequently, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court had explained that *opinio juris* might, with all due caution, be deduced from, inter alia, the attitude of the parties and the attitude of States towards certain General Assembly resolutions. The effect of consent to the text of such resolutions could be understood as an acceptance of the validity of the rule or set of rules declared in the resolutions. Consequently, even if General Assembly resolutions were not formally binding, they could in certain circumstances provide important evidence of the existence of a rule or the emergence of an *opinio juris*. In order to establish whether that was true of a given resolution, it was necessary to examine its content and the conditions of its adoption, and to consider whether an *opinio juris* existed as to its normative character.

93. The Court's shift in approach in the *North Sea Continental Shelf* cases had significantly enhanced the identification and determination of norms of customary international law, but had not completely excluded the manner in which traditional custom continued to emerge: sometimes slowly, on the basis of long-established usages outside the framework of General Assembly resolutions or multilateral conventions. The Court had analysed the existence of such rules of customary international law in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* and *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. In the latter case, the Court had found that Costa Ricans living along the San Juan River had a customary right to fish in the river for subsistence purposes. While agreeing that that practice had long been established, the parties had disagreed as to whether it had become binding on Nicaragua as a matter of customary law. The Court had found that the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, was particularly significant.

94. General principles of law were another area in which the Court had been able to show sound legal creativity. The International Court of Justice, like its predecessor, had never explicitly based a decision on a rule or principle derived from the "general principles of law recognized by civilized nations", as permitted under Article 38, paragraph 1 (c) of its Statute, owing perhaps to the negative historical connotations of the expression "civilized nations". Following the universalization of international law and the extension of its application to all States, Guatemala and Mexico had proposed in 1971 that the Statute be amended by removing the word "civilized", which Mexico had described as "a verbal relic of the old colonialism". However, the term now had little practical significance. As Judge Fouad Ammoun had stated in his separate opinion in the *North Sea Continental Shelf* cases, "in view of the contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph 1 (c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality". While the Court had wisely avoided using the phrase "general principles of law recognized by civilized nations", it had nevertheless invoked and applied general principles of a legal character in a manner that had enriched international law.

95. The term "general principles" as used by the Court, should be distinguished from the word "principles", which was used as a convenient shorthand for the rules of international law. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, the Court had been requested to decide the question before it "in accordance with the principles and rules of international law

applicable in a manner as between the parties". In that instance, the Court had made it clear that the terms "rules" and "principles" conveyed one and the same idea. In that context, "principles" had clearly meant principles of law.

96. Aside from that usage, the Court had identified three types of general principles. The first was inherent to any legal system, including the international system. An example was the general principle of good faith: in all legal systems, participants should be able to expect good faith from each other when negotiating, interpreting or applying their agreements. Thus, in the *Nuclear Tests (Australia v. France)* cases, the Court had characterized good faith as "one of the basic principles governing the creation and performance of legal obligations". On the basis of that general principle, it had held that unilateral declarations of States were also a formal source of international law, thereby updating and enriching Article 38 of its Statute.

97. The second type referred to general principles derived from existing rules of international law, which could be referred to as general principles of international law. Some of those principles, such as non-intervention, the prohibition of the use of force, the sovereign equality of States and territorial integrity, had been explicitly recognized by the Court as "principles of international law" and were enshrined in the Charter of the United Nations as the fundamental principles of the international legal order. The Court had also referred to other general principles of a moral and normative character that reflected values shared largely by the international community and might generate concrete rules of positive international law. For example, the Court had referred, in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, to the "elementary considerations of humanity, even more exacting in peace than in war" and, in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, to the "most elementary principles of morality", and the "moral and humanitarian principles" forming the basis of the Genocide Convention.

98. The third category of general principles referred to by the Court as "general principles of law" was often said to be derived from domestic legal systems. One of the main areas in which the Court had recognized such general principles of law was in international procedural law. Examples included evidentiary principles, such as the admissibility of indirect evidence, and other procedural principles, such as the principle of the equality of arms of parties and the principle of *res judicata*. Other general principles of international procedural law included the principle that "no one can be judge in his own cause", the fundamental principle of the sound administration of justice, and the prohibition on deciding cases *infra petita* or *ultra petita*.

99. The Court invoked those three categories of general principles primarily in order to create coherence in the international legal system. The question of coherence was an existential one: the lack of a central legislator at the international level had often triggered fears that international norms could contradict one another, that there could be lacunae in international law and, hence, that the Court could make a declaration of *non liquet*. In such circumstances, general principles had proved effective in helping the Court to promote coherence and address structural problems of law-making in international society.

100. The Court had also used general principles of international law to "fill in the gaps", in order to avoid findings of *non liquet* or recourse to the *Lotus* principle of liberty. For example, in the *Fisheries (United Kingdom v. Norway)* case, the Court had explained that, despite the absence in international law of technically precise rules governing the choice by a coastal State of its baselines for the delimitation of its territorial sea, "certain basic considerations inherent in the nature of the territorial sea bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question".

101. Another reason for relying on general principles was to ensure that the functioning of the international legal system was consonant with the expectations of the international community. One example was the principle of *res judicata*. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court had identified two purposes underlying that principle, internationally and nationally. Firstly, the stability of legal relations required that litigation come to an end; secondly, it was in the interest of each party that an issue which had already been adjudicated in favour of that party not be argued again. For the Court, depriving a litigant of the benefit of a judgment it had already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

102. In conclusion, the Court's engagement with the so-called unwritten sources of international law had been characterized by creativity and caution. The Court had shown extreme creativity by adapting and updating the sources of international law described in Article 38 of its Statute to reflect the evolution of international law and the realities of international life. Thanks to the

jurisprudence of the Court, unilateral acts of States were now well-established sources of international law. The Court had also established the important role that multilateral conventions and General Assembly resolutions could play in the emergence of rules of customary international law. Fears that unwritten sources might empower the Court to bring subjective considerations to bear in the identification of rules of international law had not materialized. As a result, the Court's determinations regarding the existence and content of customary international law and of general principles were widely accepted in the international legal community.

103. Some might argue that, despite such appreciation, the compulsory jurisdiction of the Court had yet to be universally accepted. Nevertheless, progress towards that goal had been significant, if slow. Latvia had recently made a declaration accepting the compulsory jurisdiction of the Court; the number of States having done so now stood at 74. He hoped that, in the light of the record of the Court and its predecessor over almost a century of adjudication, more States would consider accepting its compulsory jurisdiction and that there would be a marked return to the use in bilateral or multilateral treaties of compromissory clauses by which any dispute would be referred to the Court.

104. **Mr. Eick** (Germany) said that, although the International Court of Justice might give priority to written sources over unwritten sources of law when deciding a dispute, no order of priority existed among the different sources of law. Furthermore, treaties were subject to interpretation in light of subsequent agreements and practice, as reflected in the work of the International Law Commission on that subject. With regard to the Court's challenging task of applying customary international law, he agreed with the view that the Court's function was not to legislate, but to ascertain the existence, or otherwise, of applicable legal principles and rules. The Court should continue to be rigorous in its use of the Commission's excellent work on the identification of customary international law, as it had done in the *Jurisdictional Immunities* case.

105. The Court should also continue to explore the application of general principles of law in its jurisprudence. His delegation fully shared the President's view that the term "civilized nations" was outdated and should not be used, and suggested that the term "community of nations" could be used instead. The Commission had already begun a discussion on the subject.

106. **Mr. Sarvarian** (Armenia) said that the Court's working methods played an important role in the development of written law. Under the revised article 79 of the Rules of Court, preliminary objections needed to be made no later than three months after the filing of the memorial. In light of the Organization's financial difficulties, he wondered whether the Court would envisage considering preliminary questions following the first case management conference, rather than wait for respondents to raise preliminary objections before doing so.

107. **Mr. Hernes** (Norway) said that norms of customary international law were often regional or subregional in nature and applied to a limited number of States. He was interested to know whether the Court had made reference in its jurisprudence to customary international law between States linked by a common cause other than their geographical position.

108. **Mr. Fintakpa Lamega** (Togo) said that there was a tendency to accord greater importance to sources of written international law. In view of the growing reluctance of States to enter into new international treaties, as evident from the form given by the International Law Commission to many of its outputs that were not likely to take the form of international conventions, it seemed that non-written subsidiary sources of law, regardless of legal system, were poised to gain in importance.

109. **Mr. Ochieng** (Kenya) said that it would be interesting to learn to what extent the Court gave due consideration to prevailing circumstances and whether they affected its judicial engagement.

110. **Mr. Yusuf** (President of the International Court of Justice) said that article 79 of the Rules of Court had been restructured to address long-standing confusion concerning the matter of preliminary questions and preliminary objections. The Court did not wait until preliminary objections had been filed to determine whether preliminary questions existed, but rather addressed any questions of jurisdiction *proprio motu*. With regard to regional or subregional customary norms, he recalled that in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court had considered as customary the rights of riparians of the San Juan River. As to the future of non-written sources of international law, it depended entirely on the actions of States and would become evident from changes in the drafting of treaties and State practice in international law. Lastly, the Court took prevailing circumstances into account depending on the particular circumstances of individual cases and not in the abstract.

The meeting rose at 1.10 p.m.