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Chair: Mr. Manongi. (United Republic of Tanzania)

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The meeting was called to order at 10 a.m.

Statement by the President of the International Court of Justice

1. **The Chair** welcomed the President of the International Court of Justice, noting that Judges Bennouna, Keith, Donoghue and Greenwood and the Registrar of the Court, Mr. Philippe Couvreur, were also present. The Court's activities were crucial to the fulfilment of one of the primary purposes of the United Nations: bringing about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations that might lead to a breach of the peace. In addition, its jurisprudence was of the utmost importance for the progressive development of international law and its codification. The President's annual visits provided a welcome opportunity for the Committee to stay abreast of various facets of the Court's work. On the present occasion, the President would focus on select aspects of the Court's evidentiary practice.

2. **Mr. Tomka** (President of the International Court of Justice) said that, as the principal judicial organ of the United Nations, the International Court of Justice played a paramount role in applying and developing international legal principles, and its contributions on evidentiary matters warranted further consideration. Over the previous decade, there had been renewed interest in the Court's approach to evidentiary issues, as it had been increasingly called on to deal with large bodies of factual evidence, sometimes involving scientifically complex matters. The production and the management of evidence in international legal proceedings were of fundamental importance for international justice and the rule of law and constituted crucial building blocks for ensuring a just and well-reasoned judicial outcome in disputes between States. The Court's pronouncements were not only a way to resolve disputes, however; they also established a historical record of events and facts that were relevant to a dispute. The role of evidence was central, particularly as the Court was a court of both first and last instance and its judgments were final and without appeal. In each case the Court was called upon to sift through vast evidentiary records, establish the factual complex related to the proceedings and, ultimately, reach well supported and just conclusions on both the facts and the law.

3. The rule of thumb for evidentiary matters before the Court was flexibility. In principle, there were no highly formalized rules of procedure governing the submission and administration of evidence, nor any restrictions about the types of evidentiary materials that might be produced by parties. In deciding the cases submitted to it, the Court's overarching objective was to obtain all relevant evidence pertaining to both facts and law that might assist it in ruling on issues of substance, rather than providing a judicial outcome based primarily on technical or procedural considerations. The Permanent Court of International Justice had adopted that approach as its dominant judicial philosophy as early as 1932 in the case of *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, when it had proclaimed that the decision on such an international dispute should not depend mainly on a point of procedure.

4. The Court had wide latitude not only in requesting evidence, but also in assessing it in the light of both relevant rules of international law and the specific facts and circumstances of each case. The Rules of Court, particularly articles 57 and 58, laid down a fairly robust evidentiary framework with respect to the submission and admission of oral evidence; however, the practical effect of those articles was somewhat tempered by article 60, which prescribed succinctness and limited the scope of oral statements, and by article 61, which enabled the Court to manage the administration of evidence and to question parties. Under Article 49 of the Court's Statute, it could, even before a hearing began, call upon the agents to produce any document or supply any explanations. Article 50 gave the Court vast fact-finding powers, which allowed it to entrust other bodies or individuals with the task of carrying out an enquiry or giving an expert opinion. In addition, under the statutory and procedural framework governing proceedings before the Court, parties could call witnesses, including expert witnesses, who might then be cross-examined.

5. Testimonial evidence had played a prominent role in two recent oral proceedings before the Court: the cases concerning *Whaling in the Antarctic (Australia vs. Japan, New Zealand Intervening)*, which had been heard in 2013, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, on which hearings had been held in early 2014. Both proceedings had involved intricate

factual complexes and in one case the consideration of highly scientific evidence, providing an illustration of applicants' willingness to entrust the Court with the assessment of sophisticated evidentiary records. The scientifically complex case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* was another example.

6. The Court's judgment in the *Whaling in the Antarctic* case provided incontrovertible proof that the Court could deal cogently and methodically with vast amounts of highly technical scientific evidence, delivering judgments of rigour and analytical clarity. It was currently in the process of formulating its judgment in the Genocide Convention case involving Croatia and Serbia, in which voluminous testimonial evidence, including some given in camera by witnesses, was expected to play an important role in establishing the factual record.

7. While States were afforded a wide margin of freedom in submitting evidence, all evidentiary elements must be presented in the course of the written proceedings and in accordance with the modalities prescribed by the Rules of Court, which essentially meant that documents must be annexed to the written pleadings. Increasingly, the Court was confronted with litigation strategies in which parties might attempt to produce new evidence during the oral proceedings or refer in their oral statements to the contents of a document that had not been produced during the written proceedings. The Rules of Court provided that, after the closure of the written proceedings, no further documents could be submitted by either party except with the consent of the other party. However, the Court could agree to admit such documents after hearing the parties, provided the previously unproduced document was part of a readily available publication.

8. Such a situation had arisen in one of the Court's most recent judgments relating to both sovereignty and maritime boundary delimitation: the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. In its judgment of November 2012, the Court had noted that Nicaragua had included two documents in one of its judges' folders that had not been annexed to the written pleadings and thus were not part of a readily available publication. The Court had therefore decided not to allow those documents to be produced or referred to during the hearings. The Court had subsequently adopted a new practice in relation to such evidence aimed at governing the

introduction of new or previously unproduced audiovisual or photographic material at the oral proceedings stage.

9. The Statute and Rules did not lay down any major restrictions with regard to admissibility of evidence. In principle, parties could submit almost any form or type of evidence, with the caveat that the Court would enjoy unfettered freedom in weighing it against the circumstances of each case and relevant international legal rules. Obviously, unlawfully obtained proof was not acceptable, as had been emphasized by the Court in its judgment in the case concerning the *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*. The Court did not have any preliminary evidentiary filter to weed out inadmissible evidence at the outset, but once evidence had been entered into the written record it had broad discretion in ascribing different weight to evidentiary elements originating from different sources. Although evidence typically excluded in domestic judicial proceedings, such as hearsay evidence, might be admitted, the Court ascribed little or no weight to it. Indeed, in its oft-cited judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court had indicated that testimony on matters not within the direct knowledge of the witness but known to him only from hearsay was not of much weight, and in the *Corfu Channel* case it had set aside hearsay evidence on the grounds that it amounted to allegations falling short of conclusive evidence.

10. The Court was often called upon to weigh the evidentiary value of reports prepared by official or independent bodies that provided accounts of relevant events, especially in disputes occurring against the backdrop of armed conflict, such as in the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In the Bosnian genocide case, the Court had indicated that the probative value of such evidence would hinge, among other things, on the source of the evidence (partisan or neutral, for example), how it had been generated (for instance, as an anonymous press report or the product of a careful court or court-like process) and the quality

or character of the evidence (such as statements against interest and agreed or uncontested facts).

11. It was not unusual for the Court to attribute prima facie credibility to factual statements made by the principal organs of the United Nations, since they might have originated in statements by someone who was not a party to the proceedings and did not stand to gain or lose anything from its outcome — what the Court had termed a “disinterested witness” in the *Military and Paramilitary Activities* case. Such reports or factual statements were often produced by United Nations commissions of inquiry, peacekeeping missions or other subsidiary organs and stemmed from direct knowledge of and involvement in a situation or from an international consensus of States regarding the occurrence of certain events. Such evidentiary items were sometimes instrumental in bolstering the Court’s findings of fact. Factual statements made by the principal United Nations organs, particularly evidentiary items submitted by the Secretary-General, had been afforded considerable weight in the advisory proceedings concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as had comparable pieces of evidence in the Bosnian genocide case, in which the Court had drawn extensively from a report by the Secretary-General entitled “The fall of Srebrenica” (A/54/549). In the latter case, the Court had found that the care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation had lent it considerable authority.

12. Audiovisual items, such as maps, photographs, small-scale models, recordings and films, were also admissible as evidence. For example, a relatively large-scale bas relief of Norway and a model of a fully equipped trawler had been presented in the *Fisheries case (United Kingdom of Great Britain and Northern Ireland v. Norway)*; and in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* in 1961, the judges had attended a private screening of a film about the dispute. The use of aerial photographs and satellite-generated imagery was also common in proceedings before the Court, as illustrated by the recent cases concerning the *Maritime Dispute (Peru v. Chile)* and the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. Maps played an important role in parties’ evidentiary strategies, especially in boundary disputes and maritime delimitation cases. However, such evidentiary items were typically

insufficient to establish a party’s claim to sovereignty over a land territory or maritime feature. In the *Territorial and Maritime Dispute* case, the Court had recalled that, according to its constant jurisprudence, maps generally had a limited scope as evidence of sovereign title and were not documents endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.

13. The general rule with respect to the burden of proof before the Court was similar to that found in most domestic judicial proceedings on civil matters: a party alleging a fact typically bore the burden of proving it. The usual standard of proof was a preponderance of the evidence. While that evidentiary principle had been reaffirmed in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the Court had qualified its application by declaring that it would be wrong to regard the rule, based on the maxim *onus probandi incumbit actori*, as an absolute one to be applied in all circumstances, and it had clarified that the subject matter and nature of each dispute would inform and ultimately dictate the determination of the burden of proof.

14. In the *Diallo* case, strict adherence to the above rule would have engendered significant evidentiary hurdles for Guinea, which had argued that Mr. Diallo, its national, had suffered several fundamental human rights violations while in the Democratic Republic of the Congo. Those violations were regarded as negative facts because they had occurred in the respondent State, the Democratic Republic of the Congo, which was therefore in a better position to provide evidence about its compliance with the relevant obligations. The Court had been confronted previously with similar situations in which one party had exclusive access to important evidentiary elements but refused to produce them for security or other reasons. In the *Corfu Channel* case, the Court had resolved that dilemma by having recourse to flexible inferences of fact against the State refusing to produce the evidence.

15. When parties invoked domestic law before the Court, such law was typically treated as a fact to be proven by the party alleging its existence, notwithstanding the Court’s ability to satisfy itself, of its own initiative, of the law’s existence. That evidentiary practice was firmly rooted in the jurisprudence of the Permanent Court of International Justice, which had articulated several key aspects of

procedural law that still governed the work of the present-day Court. Of particular importance was the Permanent Court's pronouncement in the case concerning *Certain German Interests in Polish Upper Silesia (Germany v. Polish Republic)*, in which the Court had underscored that from the standpoint of international law, municipal laws were, like legal decisions or administrative measures, merely facts that expressed the will and constituted the activities of States. Three years later, in the case concerning the *Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)*, the Permanent Court had pointed out that while it was bound to apply domestic law when the circumstances so warranted, it was not obliged to possess knowledge of the municipal laws of States; rather, it would have to secure such knowledge when it was obliged to apply such law. More importantly, it had stressed that it must do so either by means of evidence furnished to it by the parties or by means of any researches it might undertake or cause to be undertaken.

16. By contrast, there was a presumption that the Court knew international law and how to apply it (*jura novit curia*), although disputing parties might attempt to demonstrate that relevant international legal principles supported their claims or should be construed in a certain way. In the case of the *S.S. "Lotus" (France v. Turkey)*, the Permanent Court had affirmed that presumption, observing that in the fulfilment of its task of ascertaining what the international law was, it had not confined itself to consideration of the arguments put forward, but had taken into account all relevant precedents, teachings and facts to which it had access.

17. Similarly, the Court might take judicial notice of well-established facts or matters of public knowledge, thereby obviating the need for parties to prove such facts. In the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, for example, and subsequently in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court had declared that the essential facts of the case were matters of public knowledge which had received extensive media coverage and that the information available was wholly consistent and concordant as to the main facts and circumstances. However, in the latter case, the Court had acknowledged that such evidence should be approached with caution, as widespread reports of a

fact might prove on closer examination to derive from a single source. The Court had considered such evidentiary items not as evidence capable of proving facts, but as material that could contribute, in some circumstances, to corroborating the existence of a fact. It was worth noting that the Court's conclusion in that regard was unaffected by the fact that such evidence might seem to meet high standards of objectivity.

18. In the case concerning *Armed Activities on the Territory of the Congo*, the Court had provided further substantive guidance on the evidentiary parameters within which it carried out its judicial mandate. In particular, it had underscored that it would treat with caution evidentiary materials specially prepared for the case and also materials emanating from a single source. Moreover, it had indicated that it preferred contemporaneous evidence from persons with direct knowledge of the facts or realities and that it would give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them, thereby echoing the remarks it had made almost 20 years earlier in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In the *Armed Activities* case the Court had gone on to say that it would give weight to evidence that had not, even before the litigation, been challenged by impartial persons and that special attention should be afforded to evidence obtained by examination of persons who were directly involved and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature.

19. While the Court's evidentiary practice was relatively flexible when compared to that of most domestic courts, it nonetheless applied a great degree of caution when handling certain evidentiary items, rigorously scrutinizing all evidence put before it and balancing relevant evidentiary standards against the facts, circumstances and subject matter of each case. Its practice was forward-looking and embraced new modes of producing evidence, new technology and innovative ways of establishing factual records. A rich judicial fact-finding tradition had emerged from the Court's practice: while an applicant State would typically be called upon to substantiate its claims with available evidence, the other party was by no means exempt from assisting the Court in fulfilling its judicial function. Rather, evidentiary collaboration between the

parties and the Court — supplemented by a productive dialogue between the bench and the agents and counsel of the parties — ensured that the principal judicial organ of the United Nations could carry out its noble duties in the most effective and impartial way.

20. **Mr. Atlassi** (Morocco) said that all reports, no matter how well done and worthy of confidence they were deemed to be, had an element of subjectivity. Some, for example, might be based largely on press accounts. He wondered how the Court could render judgments on the basis of documents that might present a subjective view of events.

21. **Mr. Virachai Plasai** (Thailand) enquired how the Court determined the meaning and scope of domestic laws and regulations, particularly where the parties in a case disagreed in that regard. Was it the Court's practice to refer to interpretations given by domestic judges, and if so, what happened in the absence of such interpretations?

22. **Mr. Horna** (Peru) asked for clarification of the Court's practice with regard to site visits, especially in cases involving territorial or maritime disputes in which documentary evidence might not prove sufficient. He also wondered whether the Court was considering any paper-saving measures that might reduce the volume of documentation that parties had to prepare for inclusion in the judges' folders during oral proceedings, which his country's delegation had found quite burdensome in the recent *Maritime Dispute* case.

23. **Mr. Kanneh** (Liberia), noting that the burden of proof in a criminal case generally lay with the accuser, asked when that burden might shift to the defendant in criminal proceedings within the International Criminal Court.

24. **Mr. Tomka** (President of the International Court of Justice) said that while the Court did not consider reports produced by United Nations bodies to be conclusive evidence, it did accord them significant weight and regarded them as important elements in establishing the factual record in a case. Such reports were often produced by peacekeeping missions or special representatives of the Secretary-General who had considerable first-hand knowledge of the regions and situations in question; they were considered much more reliable than newspaper reports, for example, or hearsay evidence. Nevertheless, parties had full opportunity to bring to the Court's attention any

information that might cast doubt on the veracity of a United Nations report.

25. With regard to domestic laws and regulations, it was incumbent upon a State invoking domestic legislation to provide the Court not only with the text of the law but also with information on how it had been interpreted, particularly by the country's highest courts, in order to enable the judges to understand the domestic legal system and how it might be important from the standpoint of dispute settlement. The Rules of Court provided for site visits if the judges considered that it would be useful to collect evidence in situ. For instance, in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, in which one party had claimed that the project in question had caused significant negative environmental impacts, the judges had decided to travel, at the invitation of the parties, to the project site in order to see its impact for themselves. However, the judges conducted such visits only if they were deemed strictly necessary.

26. The provision of documentation for the judges' folders was not a requirement of the Court. It was for the parties to decide what documents to supply in order to facilitate the Court's consideration of the case, the only limitation being that they must ordinarily be documents that were already part of the case records, such as annexes to written pleadings, although occasionally publicly available documents could be included. The Court encouraged States to be succinct in their presentations and not to include in the written record any documents that were not necessary or relevant. At the same time, it had also taken steps to modernize its facilities and practices. For example, all judges now had video screens that enabled them to see documents, maps and other types of evidence to which parties might refer in the course of an oral proceeding.

27. On the question concerning burden of proof, the International Court of Justice did not have jurisdiction in criminal matters. In the cases submitted to it, generally the party alleging a fact had to prove it, but in some situations, such as in the *Diallo* case, that would mean proving a negative fact. In such situations, the respondent was in a better position to produce evidence demonstrating that the applicant's allegations were not true. It was for that reason that the Court insisted that parties should cooperate with it in producing evidence so that it could correctly establish the facts and then apply the relevant rules of international law.

28. He wished to assure delegations that the Court followed the work of the Sixth Committee closely and sometimes found it useful to consult the summary records of the Committee's deliberations, particularly when it was called upon to interpret and apply international instruments adopted as a result of the Committee's work. It had done so, for example, 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)*. Similarly, the Court followed the work of the International Law Commission as it related to instruments and other documents subsequently adopted by the General Assembly.

Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session (A/69/10) (continued)

29. **The Chair** invited the Committee to continue its consideration of chapters VI to IX of the report of the International Law Commission on the work of its sixty-sixth session (A/69/10).

30. **Mr. Scullion** (United Kingdom) said that the Commission's adoption of the final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) was an appropriate conclusion to its work on the topic. The obligation to extradite or prosecute arose from treaty obligations, with the relevant treaty governing the precise nature of the obligation and the crimes to which it applied. His delegation welcomed the Commission's extensive survey of relevant provisions in multilateral instruments (A/CN.4/630), which reflected in part the recent judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, and it agreed with the Commission's assessment that it would be futile to attempt to harmonize the diverse arrangements put in place by States to fulfil their obligation to extradite or prosecute. It also welcomed the Commission's work to identify lacunae in the current treaty regime on prosecution or extradition in respect of crimes of international concern, notably crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflicts, and agreed that the existence of international criminal tribunals should be taken into account in considering the obligation to prosecute or extradite.

31. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation supported the approach taken by the Commission in producing draft conclusions with supporting commentaries and welcomed the depth of analysis and practical examples provided in the commentaries. It especially welcomed the explanation of the difference between interpretation and application of a treaty in draft conclusion 6 (Identification of subsequent agreements and subsequent practice). Draft conclusions 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), 9 (Agreement of the parties regarding the interpretation of a treaty) and 10 (Decisions adopted within the framework of a Conference of States Parties) were also welcome. However, draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation) in its current form was too prescriptive. In relation to subsequent agreements, his delegation was pleased to see reflected its view that memorandums of understanding did not constitute legally binding agreements. More detailed comments reflecting his delegation's position on the draft conclusions could be found in his written statement, available on the Committee's PaperSmart portal.

32. On the topic "Protection of the atmosphere", the Commission had noted the challenges associated with identifying what contribution it could make to global endeavours to protect the environment. Given those challenges and the ongoing political negotiations on climate change and related issues, his delegation continued to question the usefulness of further consideration of the topic. If the Commission did decide to proceed, its consideration of the topic should not include the concept of "common concern of humankind", which appeared in the preambles of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, but not in the Vienna Convention for the Protection of the Ozone Layer or its Montreal Protocol on Substances that Deplete the Ozone Layer. His delegation was concerned about the consequences of importing the concept from the preambles of conventions that dealt with specific, narrowly defined issues into the consideration of a subject such as protection of the atmosphere, which was much wider in scope.

33. The topic of immunity of State officials from foreign criminal jurisdiction was of genuine practical significance, and a clear, accurate and well-documented statement of the law by the Commission was likely to be very valuable. As the Commission's work to date had encompassed elements that both reflected existing law and represented progressive development of the law, the appropriate form for the outcome of the Commission's work was likely to be a treaty, although such an approach could be successful only to the extent that the text was generally acceptable to States. The Commission should therefore work towards an outcome that reflected a high degree of consensus.

34. His delegation welcomed the Commission's provisional adoption of draft article 5 (Persons enjoying immunity *ratione materiae*). In respect of draft article 2 (Definitions), subparagraph (e), it shared the view of those Commission members who considered it unnecessary to define the term "State official" for the purposes of the draft articles. The effect of the text should be that all acts performed by State officials in an official capacity were subject to immunity *ratione materiae* from foreign criminal jurisdiction. The distinction between acts performed in an official capacity and acts performed in a private capacity was not the same as the distinction between *acta jure imperii* and *acta jure gestionis* in the context of State immunity from civil jurisdiction. His delegation welcomed the confirmation in the commentary that the terms "who represents" and "State functions" were to be given a broad meaning. However, greater clarity could be achieved on that point, and he therefore encouraged the Commission to give the matter further consideration.

35. Important aspects of the draft articles remained to be developed, including those relating to possible exceptions from immunity and the procedures for asserting and waiving immunity. His delegation's comments on the articles so far adopted should therefore be regarded as provisional until the full text of all articles was available. With regard to exceptions to immunity *ratione materiae*, he recalled the well-known decision of his country's House of Lords in the Pinochet case, which found that, for those States that had ratified it, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment constituted *lex specialis* or an exception to the usual rule on

immunity *ratione materiae* of a former Head of State because under the Convention's definition of torture it could be committed only by persons acting in an official capacity. He was not aware of similar reasoning in judgments in respect of other treaties which required the criminalization of certain conduct and the assertion of extraterritorial jurisdiction, but he recalled another criminal case in which immunity of State officials had been considered, the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, which suggested that a plea of immunity *ratione materiae* would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State.

36. As to possible exceptions to immunity *ratione personae* for those identified in draft article 3 (Persons enjoying immunity *ratione personae*), the current state of international law required a highly restrictive approach. It was important to note in that regard that the topic concerned immunity from national jurisdiction and therefore did not extend to prosecutions before the International Criminal Court or ad hoc tribunals. His delegation stressed the importance of analysing relevant State practice and case law with great care. The memorandum by the Secretariat of 31 March 2008 (A/CN.4/596), which contained a study of State practice, had provided a useful aid for the Commission's work on the subject. Since that memorandum was more than six years old, however, the Commission might wish to consider whether an updated version would be helpful.

37. **Mr. Ney** (Germany) said that the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties provided excellent guidance for interpreting subsequent agreements and practice without unduly restraining State practice. Two provisions exemplified their well-balanced approach. In draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), paragraph 3 established the presumption that, by a subsequent agreement or subsequent practice, parties intended to interpret the treaty rather than to amend or modify it; that provision was realistic, reflecting an accurate assessment of State practice and providing an excellent guideline for interpretation. Without excluding the possibility that subsequent practice might, in very specific cases, amend or modify a treaty, the draft

conclusion also accurately pointed out that that possibility had not been generally recognized.

38. Draft conclusion 10, paragraph 3, dealt with the circumstances under which decisions adopted within the framework of a conference of States parties would embody a relevant subsequent agreement or subsequent practice. In order to determine those circumstances, it must be established whether a decision actually amounted to an agreement in substance by the Parties. The adoption of a decision by consensus should not automatically be equated with an agreement in substance. Indeed, the practice of multilateral forums provided abundant examples of decisions adopted by consensus despite disagreement in substance.

39. Protection of the atmosphere was a topic of utmost importance for humanity as a whole. It was also an area in which much further work was needed, including from a legal point of view. It was to be hoped that the Commission's long-term work on the topic would not only raise its visibility, but also counteract the increasing fragmentation of international environmental law through horizontal analysis and cross-cutting approaches that extended beyond individual environmental regimes. The understanding reached within the Commission before the start of the work on the topic was highly pertinent. Any interference with political negotiations must be avoided if a successful outcome to the work was to be achieved. Identifying norms of international law was the legitimate function of the Commission and therefore could not constitute unwarranted interference in political negotiations. However, in order to avoid any appearance of such interference, it was essential at the current stage for the Commission to focus on the identification of general principles of international environmental law and to clarify whether or not they were applicable.

40. His delegation welcomed the two draft articles provisionally adopted by the Commission on the topic of immunity of State officials from foreign criminal jurisdiction, but wondered whether the definition of "State official" in draft article 2 might be overly broad. In Germany, for example, teachers and professors in State-run schools and universities might exercise State functions, but he questioned whether it was appropriate to include them in a definition of State officials qualifying for immunity. It was to be hoped that the following year's report by the Special Rapporteur, which would focus, inter alia, on the concept of acts

performed in an official capacity, would provide further clarification on that question.

41. The issue of immunity enjoyed special significance in international relations. Questions of immunity necessarily related to the delimitation of and mutual respect for the sovereign powers of States and were therefore politically highly sensitive. It should always be borne in mind that the functional necessities of inter-State relations lay at the heart of the established rules on immunity. It was therefore necessary to proceed carefully, especially where changes to the scope of immunity were contemplated. Specifically identified *opinio juris* and relevant State practice were of paramount importance in that regard.

42. **Mr. Válek** (Czech Republic) said that the various reports on the obligation to extradite or prosecute (*aut dedere aut judicare*) and the study by the Secretariat (A/CN.4/630) provided a thorough overview and clarification of relevant issues in relation to the topic and would serve as useful guidance for States in dealing with issues concerning the obligation, both multilaterally and bilaterally, and as an important source of information in discussions on the exercise of universal jurisdiction. His delegation agreed with the Commission's views and recommendations with regard to the need to close gaps in the existing treaty regime governing the obligation to extradite or prosecute, particularly in relation to most crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflict, and genocide. It acknowledged the links between that obligation and the topics of crimes against humanity and the exercise of universal jurisdiction, and it was prepared to consider any initiatives in that regard.

43. The Commission's consideration of the topic of protection of the atmosphere might represent an opportunity to address related issues from the perspective of general international law. At the same time, it was not yet entirely clear what the general orientation and direction of the topic should be and whether the Commission could make a contribution to it in the context of other relevant global endeavours.

44. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation was of the opinion that the two draft articles provisionally adopted by the Commission during its sixty-sixth session were not controversial, and that they adequately complemented the previously adopted

draft articles. As indicated in the commentary to draft article 2, subparagraph (e), the decisive factor for defining “State official” was the link between the individual and the State. Issues relating to de facto officials and de facto links between the individual and the State might be more appropriately addressed in connection with a definition of “acts performed in an official capacity”. Immunity *ratione materiae* was based on the principle that State officials were immune from the jurisdiction of a foreign State with regard to such acts, since they were attributable to the official’s State. It would be useful to consider the issue in the context of the relevant provisions of chapter II of the draft articles on responsibility of States for internationally wrongful acts, which described the attribution of conduct to a State and also dealt with de facto links between individuals and States. Account should be taken of relevant criminal law treaties, such as the Convention against Torture or the International Convention for the Protection of All Persons from Enforced Disappearance, which provided for extraterritorial criminal jurisdiction and expressly contemplated the prosecution of crimes committed in an official capacity, including a de facto official capacity.

45. **Ms. Carnal** (Switzerland) said that her delegation fully supported the Commission’s work on the topic of the immunity of State officials from foreign criminal jurisdiction, which was of crucial importance. It welcomed the Commission’s provisional adoption of draft article 2, subparagraph (e), and draft article 5. The former rightly provided that only natural persons could benefit from immunity. While the definition referred to individuals who enjoyed such immunity without prejudging the question of which acts were covered by immunity, it was nonetheless very broad. It extended immunity to a wide circle of potential beneficiaries, since it did not require the individual in question to occupy an official position within the State. In proceeding with its work, the Commission would have to determine the acts for which individuals would enjoy immunity in order to define the scope of functional immunity for the purposes of the draft articles. More detailed technical comments on the matter could be found in her written statement, available on the PaperSmart portal.

46. Draft article 5 was the first of the draft articles to deal with immunity *ratione materiae*. According to the commentary, the purpose of the draft article was not to

define the acts that would be covered by immunity but rather to stress the functional nature of immunity *ratione materiae* and distinguish it from immunity *ratione personae*. Her delegation wondered whether such an article might not lead to misinterpretation. The challenge would be to define the kinds of acts with regard to which State officials acting as such would enjoy functional immunity. It would also be necessary to define to what extent former State officials might continue to claim functional immunity.

47. **Ms. Lijnzaad** (Netherlands) said that her delegation appreciated the general and descriptive character of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which should be seen more as practical guidance on interpretation than as a prescriptive set of rules. The commentaries provided a rich and valuable analysis of practice, including the case law of international courts, identifying relevant questions to be asked when identifying and weighing subsequent agreements and subsequent practice in relation to treaty interpretation. With respect to the question of whether subsequent practice might have the effect of amending or modifying a treaty, her delegation appreciated the Special Rapporteur’s cautious approach. A clear distinction should be made between the process of amending or modifying treaties through the operation of articles 39 to 41 of the Vienna Convention on the Law of Treaties and the process of interpreting treaties.

48. With regard to the draft articles on immunity of State officials from foreign criminal jurisdiction, her delegation continued to prefer the term “representative of the State acting in that capacity” to the term “State official”. The definition in draft article 2, subparagraph (e), addressed its concerns to some extent, but still seemed too broad in that it separated individuals representing the State from individuals exercising State functions and thus seemed to include representatives of the State who were not acting in that capacity at the critical moment. Use of the term “representatives of the State acting in that capacity” would address the need for a definition that encompassed State representatives with representational functions as well as those with State functions in a narrow sense. Although members of official missions would presumably fall within the scope of the definition, they were not mentioned in the commentary. Her delegation suggested that such a

reference should be included, along with a reference to the customary status of the rule granting immunity to all members of official missions. The vagueness of the term “State functions” was also of concern. Although the commentary provided an in-depth explanation of its meaning, her delegation was not convinced that it would adequately prevent its abuse. A term that resembled, *mutatis mutandis*, the definition of “State organ” in the draft articles on responsibility of States for internationally wrongful acts would perhaps be preferable.

49. With regard to draft article 5, while the expression “act performed in an official capacity” should be avoided, perhaps the phrase “acting as such” could be replaced by “acting in that capacity” to reflect the official, as opposed to private, capacity of the individual concerned. In view of the non-absolute character of immunity *ratione materiae*, it must be ensured that draft article 5 was not interpreted as providing all State officials acting in that capacity with immunity in all circumstances. International law had gradually come to recognize that immunity *ratione materiae* did not cover private acts committed by a person while in office, nor did it extend to international crimes committed in the course of an official’s duties. Indeed, domestic courts might decline to grant immunity to persons enjoying immunity *ratione materiae*, including former Heads of State, Heads of Government or Ministers for Foreign Affairs, when they were suspected of international crimes or of crimes committed in a private capacity. Her Government supported that approach, as it considered international crimes to fall inherently outside the scope of acts performed in an official capacity. The draft articles should allow the non-application of immunity in such situations.

50. **Mr. Xu Hong** (China) said that the final report on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) clearly detailed various types of obligation to extradite or prosecute and their specific nature. The results of the Commission’s study of the topic showed that the obligation applied to a variety of crimes. The obligation to extradite or prosecute was a treaty-based obligation, and its scope of application should therefore be based on the provisions of the specific treaties concerned. There was no general practice or *opinio juris* to support the conclusion that it had become a rule of customary international law. Moreover, there was not necessarily

a link between the obligation to extradite or prosecute and universal jurisdiction. The two were different and should not be confused.

51. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, in recent years there had been numerous cases of abuse of criminal prosecution against foreign State officials without regard for their immunity from criminal jurisdiction. Such occurrences hampered normal inter-State exchanges and impaired the stability of international relations. In order to maintain the rule of law at the international level and promote stable inter-State relations, the international community should give careful attention to the topic; in so doing, however, it should seek to codify relevant rules of international law, rather than rushing to develop new rules.

52. On the whole, his delegation believed that the definition of “State official” in draft article 2, subparagraph (e), was viable, since it covered both the representational and functional characteristics of such officials. It must be emphasized that the question of an official’s representation of the State or his or her exercise of State functions should be interpreted in a broad sense and on a case-by-case basis in accordance with the constitutional system, laws and regulations and the practical situation of the official’s State, rather than being determined subjectively and arbitrarily by the State in which the court was located.

53. Regarding the scope of immunity *ratione personae*, as deputy prime ministers and government ministers were increasingly taking part in international exchanges and exercising functions directly on behalf of States, they should be accorded the same immunity as Heads of State and Government, Ministers for Foreign Affairs and other high government officials. As for exceptions to immunity, since immunity of State officials was procedural in nature, it did not exempt the officials concerned from substantive liabilities. As stated by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* such officials could still be held criminally responsible without prejudice to their immunity from foreign criminal jurisdiction through measures such as prosecution by their own domestic courts, waiver of their immunity, prosecution at the termination of their tenure of office and prosecution by an international criminal justice body. Therefore, immunity was not

necessarily linked with impunity. Moreover, although the international community had identified genocide, ethnic cleansing, and crimes against humanity as serious international crimes, it had not developed rules of customary international law relating to disregard for the immunity of State officials in such crimes. When the Commission considered exceptions to such immunity in the future, it should research national practices comprehensively and handle the issue of exceptions to immunity prudently.

54. His delegation appreciated the Commission's approach to the topic of protection of the atmosphere, which recognized the complexity and sensitivity of the issues involved. Protection of the atmosphere was a multifaceted issue, with political, legal and scientific dimensions. The Commission's work should be carried out in a prudent and rigorous manner and be oriented towards providing a constructive complement to the various relevant mechanisms and political and legal negotiation processes under way. It should not reinvent the wheel, downplay existing treaty mechanisms or distort such major principles as equity, common but differentiated responsibilities and national capacities. The Commission might consider looking at difficulties related to capital, technology and capacity-building in the context of international cooperation for environmental protection and provide guidance from the perspective of international law for countries to draw on. Various specialized treaties and mechanisms relating to protection of the atmosphere already existed and were generally effective, particularly those in the areas of control of chemicals and protection of the ozone layer. Their advantage lay in their specificity and sharp focus. It was far from clear what practical effect might be achieved by seeking a general comprehensive law on protection of the atmosphere.

55. The development of the draft guidelines should be based on common international practice and current laws. The report of the Special Rapporteur (A/CN.4/667) had focused mostly on treaties of certain regions, practices of certain countries and guidelines of certain international organizations, which were of a soft law nature. Such a narrow approach could hardly meet the Commission's requirements for the codification and progressive development of international law. The Commission should consider general international practices of more regions and mechanisms and codify relevant legal rules on the basis of current laws. In the proposed draft guidelines,

on which the Commission had failed to reach agreement, the Special Rapporteur had defined the protection of the atmosphere as a common concern of humankind, which seemed unrelated to the legal status of the atmosphere itself. Moreover, the term "common concern of humankind" was vague and its legal content difficult to define. It would therefore not be appropriate to include it in any definition or glossary of terms. The Commission should continue to strengthen its research on relevant theories and practices in a rigorous manner, avoid using ambiguous concepts and gradually clarify relevant guidelines.

56. **Ms. Wyrozumska** (Poland), welcoming the Commission's adoption of the final report on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), said that her delegation fully concurred with the Commission's principal conclusion that the obligation was a crucial element in combating impunity for crimes of international concern. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the five draft conclusions adopted by the Commission all rightly warned of the need to be careful in determining the significance of agreements, acts or omissions in the light of paragraph 3 of article 31 (General rule of interpretation) and article 32 (Supplementary means of interpretation) of the Vienna Convention on the Law of Treaties.

57. Her delegation found particularly useful the clarifications concerning article 32. The distinction proposed in the draft conclusions between article 31, paragraph 3, and article 32, was well founded and should be maintained. Especially useful was the clarification in draft conclusion 6 (Identification of subsequent agreements and subsequent practice), which differentiated the identification of subsequent agreements and subsequent practice under article 31, paragraph 3, from subsequent practice under article 32. The identification of subsequent practice under article 32 required a determination of whether conduct by one or more parties was in application of the treaty. It was not easy to find definitions of "interpretation" and "application" that would satisfy everyone, but the approach set out in the commentary, together with the subsequent explanations and various examples of conduct and the emphasis on requirement of careful consideration, was well balanced.

58. Draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in

interpretation) rightly emphasized the interaction of subsequent agreements and subsequent practice in the process of interpretation and the contribution that subsequent practice under article 32 could make to clarifying the meaning of a treaty. Her delegation supported the presumption described in paragraph 3 and welcomed the cautious approach towards the possibility of amending or modifying a treaty by subsequent practice. Since some of the examples given in the commentary were controversial — the case of *Al-Saadoon and Mufdhi v. the United Kingdom*, for example — it was appropriate to conclude that that possibility had not been generally recognized.

59. Her delegation look forward to the report on the question of subsequent agreements and subsequent practice in relation to international organizations and hoped that examples of the practice of the European Union member States, such as the Luxembourg compromise, would be carefully studied in that regard. If the commentary referred to World Trade Organization practice, it would be useful to reinforce the notion that a treaty might preclude the subsequent practice of the parties from having a modifying effect by referring to the landmark case of *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, in which the European Court of Justice had held that a resolution of the member States of 30 December 1961 concerning the issue of equal pay for men and women was ineffective to make any valid modification of the time limit fixed by the treaty.

60. With regard to draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation), her delegation was convinced by the commentary that it was preferable to assess the weight of a subsequent agreement or practice as a means of interpretation in terms of clarity, specificity and repetitiveness, rather than in terms of whether it was uniform, common and consistent. However, the draft conclusion would be clearer if its first paragraph dealt only with the weight of a subsequent agreement and its second paragraph with that of subsequent practice. Her delegation welcomed the moderate approach of draft conclusions 9 (Agreement of the parties regarding the interpretation of a treaty) and 10 (Decisions adopted within the framework of a Conference of States Parties) and noted with satisfaction that they took account, respectively, of the difficult but important issue of silence as a possible element of an agreement under article 31 of the Vienna

Convention and of the effect of decisions adopted within the framework of a conference of States parties.

61. The topic of immunity of State officials from foreign criminal jurisdiction was an important but difficult one. The aim of the Commission's work should be to strike the best balance between ensuring respect for the immunities of officials of sovereign States and ensuring accountability for heinous crimes as a crucial element of the rule of law in international relations. Her delegation agreed with the list of persons enjoying immunity *ratione personae* included in draft article 3. It also agreed that the functional nature of immunity *ratione materiae* should be emphasized; however, the crucial issue was the material scope of such immunity. That issue should be evaluated taking into account ultra vires acts and the concept of universal jurisdiction. It was unquestionable that State officials enjoyed immunity *ratione materiae* for acts performed in an official capacity. However, it was difficult to accept that such immunity could apply in the case of international crimes committed in the course of duty. In her delegation's view, a draft article regarding the temporal scope of immunity *ratione materiae* was also needed. Although it might be inferred from draft article 4 (Scope of immunity *ratione personae*) that such immunity would apply during and after representation of the State or the exercise of State functions, it would be valuable to expressly indicate the norm.

62. On the topic of protection of the atmosphere, her delegation agreed with those who had expressed reservations about the Special Rapporteur's description of the atmosphere as the common concern of humankind. It was unclear what legal implications such a concept would entail and, in particular, whether they would be similar to those in the Convention on Biological Diversity, strict application of which to the regime for protection of the atmosphere would be neither feasible nor advisable.

63. **Mr. Tang** (Singapore) said that the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) would be a useful tool for understanding the treaty landscape, which involved a complex web of treaties featuring different formulas in relation to the obligation. The report's examination of the implementation of the obligation and comprehensive consideration of the comments by delegations in the Sixth Committee

enhanced its practical value to the international community.

64. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, while subsequent practice could influence the interpretation of a treaty, the cornerstone of interpretation remained the wording of the treaty itself, not only because it was the most authoritative expression of the parties' intentions, but also because it reflected the often delicate balance that had been struck as a result of negotiations between the parties. That wording should not be easily unravelled, and subsequent practice as a means of interpretation should therefore be applied prudently. That said, his delegation acknowledged the need for flexibility and willingness to adapt to changing circumstances in order to make a treaty work over time. In such situations, it should be borne in mind that the tools of treaty interpretation were simply the means of establishing the intention of the parties.

65. The key question in relation to subsequent practice was the extent to which it might be accorded evidential value or weight. Draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation) identified criteria that might be helpful in answering that question, including the clarity and specificity of the practice and whether and how it was repeated. While his delegation could see why a conscious and mindful repetition might generally be perceived as having more weight, it was reluctant to summarily dismiss or discount the value of technical or unmindful repetitions. In some circumstances, practice might be repeated mechanically precisely because of an unquestioningly clear intention and understanding between the parties, which was the ultimate goal of treaty interpretation. His delegation appreciated the many practical examples included in the commentary on the various draft conclusions and hoped that the Commission would continue to provide such examples, which would serve as a useful guide in the application of article 31, paragraph 3, of the Vienna Convention.

66. As to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation recognized that it was not possible to list all the individuals to whom immunity might apply and that often the assessment had to be made on a case-by-case basis. The functional approach taken in draft article 2, subparagraph (e), reflected the realities of State practice. With regard to draft article 5, his delegation

could see the merit in the doubts expressed by some members of the Commission about the need to define the persons who enjoyed immunity *ratione materiae*, since the essence of such immunity was the nature of the acts performed, not the individual who performed them. Nevertheless, the definition in draft article 5 could provide coherence in the context of the overall framework of the draft articles. His delegation preferred to keep an open mind on the matter until it had the benefit of the Special Rapporteur's fourth report, which would deal with the material and temporal scope of immunity *ratione materiae*.

67. **Mr. Campbell** (Australia) said that the obligation to extradite or prosecute was a key feature of the international community's commitment to ending impunity for certain core crimes. The final report of the Working Group highlighted two important considerations concerning application of the obligation in the future. The first was the gap between the existence of the obligation and its implementation. The second was the need to ensure wider application of the principle in order to provide more comprehensive coverage and thus help to achieve the goal of ending impunity for core crimes.

68. His delegation encouraged all States to ensure that they were in a position to fulfil their relevant obligations to investigate and prosecute or extradite those responsible for relevant offences. The final report of the Working Group (A/CN.4/L.844) contained a useful analysis of the 2012 decision of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, which helped to elucidate aspects relevant to the implementation of the obligation, particularly in relation to formulation of the principle used in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and many other treaties. The Court in that case had examined the fundamental elements of the obligation and the consequences of failing to give it proper effect and had noted that a State's obligation extended beyond merely enacting legislation; it must also actually exercise jurisdiction in accordance with the relevant convention. The Commission's report drew attention to Judge Donoghue's statement (A/69/10, note 449) that while the dispositive paragraphs of the Court's judgment bound only the parties to that case, the Court's interpretation could have implications for other States subject to the same obligation.

69. The Commission had highlighted the lack of international conventions creating an obligation to extradite or prosecute in respect of most crimes against humanity and war crimes other than grave breaches. In that connection, he assumed that in its future examination of the topic of crimes against humanity the Commission would give consideration to a broader application of the obligation to extradite or prosecute. In the meantime, States should continue to cooperate to ensure the full investigation and prosecution of such crimes under the framework of applicable bilateral mutual legal assistance and extradition agreements and arrangements.

70. **Mr. Hanami** (Japan) said that the Commission's final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" would serve as a useful reference for States. His delegation agreed with the Commission's view that the obligation was primarily treaty-based and also that the relevant points of deliberation in relation to the topic had all been addressed. Nevertheless, the topic was closely related and could contribute to the examination of other topics, such as immunity of State officials from foreign criminal jurisdiction, crimes against humanity and the development of international criminal law in general.

71. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission should give a clear explanation of the relationship between article 31, paragraph 3, and article 32 of the Vienna Convention on the Law of Treaties. Draft conclusions 6, 7, 8 and 10 referred to the two articles as if they both stipulated subsequent practice as a means of interpretation. His delegation was sceptical of that approach, particularly as article 32 did not mention subsequent practice. His delegation recognized that the Commission had decided during its sixty-fifth session to treat other subsequent practice under article 32; that should not be taken to mean, however, that any type of act categorized as "other subsequent practice" could be treated the same as subsequent practice as stipulated under article 31, paragraph 3. Article 32 should be seen as complementing the rules under article 31.

72. The legal significance of silence should be studied more carefully. Although it could, as provided in draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), constitute acceptance of subsequent practice, there was a risk of misinterpretation: inaction of a State might be

considered as acceptance of the subsequent practice, even if that was not its intention. Similarly, joining in a consensus decision of a conference of States parties, as provided in draft conclusion 10, paragraph 3, did not always constitute agreement. The Commission should continue to discuss the matter. Any modification to the provisions of treaties must be made by a clear expression of intention by States, and not solely by an unclear subsequent agreement or subsequent practice. The primary rule in that regard was article 39 (General rule regarding the amendment of treaties) of the Vienna Convention. Accordingly, his delegation welcomed draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), paragraph 3.

73. The first report of the Special Rapporteur on the topic of protection of the atmosphere was, on the whole, well balanced and moderate in approach. It provided useful information on the historical development of international efforts in the field of atmospheric protection. His delegation was pleased that the Commission had agreed that protection of the atmosphere was extremely important for humankind. That shared recognition must be the basis for discussion of the topic. The first report had been written in a prudent manner in order to comply fully with objectives of the understanding on the topic reached during the Commission's sixty-fifth session, in particular that work on the topic would proceed in a manner so as not to interfere with relevant political negotiations. While the first report mentioned several binding and non-binding documents on specific substances, it did so in order to elucidate the international regime on the protection of the atmosphere, not to deal with those substances per se. In his delegation's view, the report had not deviated from the Commission's understanding.

74. With regard to the definition of the atmosphere, as had been frequently noted, one of the difficulties in relation to the topic was its highly technical nature. His delegation concurred with the view that input was needed from scientific experts regarding the atmosphere and other technical information and welcomed the Commission's intention to hold consultations with such experts during its sixty-seventh session. As to the legal status of the atmosphere and its protection, his delegation considered the Special Rapporteur's proposal that protection of the atmosphere was a common concern of humankind to be

reasonable and a good start for further deliberation. Affirming the legal status of protection of the atmosphere as a common concern of humankind — a concept that appeared in several legal and non-legal documents, including the United Nations Framework Convention on Climate Change — would not necessarily entail substantive legal norms that directly set out legal relationships among States. Rather, it should be taken to mean only that protection of the atmosphere was not an exclusively domestic matter; rather, it was inherently bilateral, regional and international in nature. As long as the connotation of the concept was limited in that way, it was acceptable to his delegation. As protection of the atmospheric environment required coordinated action by the international community, it was to be hoped that deliberation on the topic within the Commission would continue in a cooperative and constructive manner.

75. The topic of immunity of State officials from foreign criminal jurisdiction — one of the fundamental principles of international law derived from the sovereign equality of States — had been debated in previous sessions in the light of the potential conflict between the rule of immunity of State officials and global efforts to combat impunity. In recent decades, the development of international criminal law and the idea of universal jurisdiction had exerted an influence on the traditional principle of State immunity. Through the foundation of the International Criminal Court the international community had upheld the concept of the fight against impunity as a key element of international security and justice. Article 27 of the Rome Statute provided that official capacity would in no case exempt a person from criminal responsibility under the Statute when that person was alleged to have committed a serious international crime. That rule had had great impact on the modern rule of immunity. At the same time, there was a widely shared view that the notion of jurisdictional immunity greatly contributed to the stability of international relations. A balance must be struck between the effort to prevent impunity and State sovereignty. Without prejudice to Japan's understanding of the notion of universal jurisdiction, his delegation maintained that the core crimes under international law must be punished without exception. It would therefore continue to pay attention to the discussion on the scope and the legal status of immunity *ratione materiae*. It strongly supported the Commission's efforts to reconcile the apparent conflict between the rule of immunity of State officials and the

evolving concept of the fight against impunity, which was essential for sound international criminal justice.

76. **Ms. Dieguez La O** (Cuba) said that her delegation continued to support the Commission's study of the obligation to extradite or prosecute (*aut dedere aut judicare*), which was of paramount importance to the international community. The principles of self-determination and State sovereignty, sovereign equality of States, political independence and non-interference in the internal affairs of States must be strictly adhered to in the regulation and application of the principle of the obligation to extradite or prosecute, which arose from the commitment of each State to combat impunity. In the study of the topic it was essential to take account of the general principles governing extradition. It would also be advisable to adopt a specific guideline concerning the grounds for refusal as set out under article 3 (Mandatory grounds for refusal) of the Model Treaty on Extradition contained in the annex to General Assembly resolution 45/116. The Commission should seek to establish a general framework of extraditable offences, while bearing in mind that each State had the right to identify in its legislation those offences for which extradition would be granted.

77. The obligation to prosecute arose from the presence of the alleged perpetrator in the territory of a State, while the obligation to extradite only applied in the framework of a multilateral convention or when there was a treaty or a declaration of reciprocity between the States involved. The aim of both the obligation to extradite or prosecute and the principle of universal jurisdiction was to combat impunity in respect of certain types of crimes against the international community. The Working Group on the topic should consider whether it would be desirable to specify the crimes to which the two principles would apply, taking into account the negative effects that the abuse of those principles could have on State sovereignty. Application of the obligation to extradite or prosecute should be considered in the light not only of practice but of international law and its relationship with the domestic law of States. If a State refused to grant an extradition request, that State had a duty to bring criminal proceedings, but only in accordance with its domestic law. Extradition was an option available to a State under relevant treaties, whereas prosecution was an obligation under its domestic law or the international treaties to which it was a party. Her

delegation considered it appropriate to regulate the procedural principles governing extradition requests.

78. As to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties should be considered together in relation to the interpretation of treaties. It was important not to alter the Vienna regime, which reflected customary law. The interpretation of treaties must be done in an evolutive manner over time through a combination of means of interpretation, without giving more weight to any particular one over the others. An important consideration in the interpretation of treaties was the intention of the parties as to the treaty's application and interpretation. Indeed, it was impossible to study the interpretation of treaties without taking into account the spirit in which the parties had entered into them.

79. Her delegation continued to follow closely the Commission's work on the important topic of protection of the atmosphere, which was without doubt a global issue and a responsibility of all. The issue was of vital importance for humankind. Cuban leaders had repeatedly warned of the risks posed by continued degradation of the environment. In principle, her delegation had no objections to the notion of protection of the atmosphere as a common concern of humankind, but believed that the term should be given further consideration in the Commission's subsequent work on the topic. It should be recognized that the atmosphere could not be given the same legal treatment as the high seas, which differed in essence and nature.

80. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation continued to support any initiative aimed at clarifying the content and preserving the firmly established regime of immunity of State officials in accordance with international conventions and principles of international law. The work on the topic should serve to reinforce the principles enshrined in the Charter of the United Nations and other sources of international law, especially the principle of respect for the sovereignty of all States. The Commission should seek to codify existing rules of international law and avoid the dangerous inclusion in customary law of exceptions to immunity. In no way should the principle of universal jurisdiction or the obligation to extradite or prosecute be applied to officials who enjoyed immunity. As to which high-level officials should be

accorded immunity, the Commission should give due regard to the provisions of domestic law on the matter.

81. Her delegation could not accept any alteration of the immunity regime established under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions, which, together with the principles of international law, constituted the rules governing the matter. Cuban laws ensured that there was no impunity for those responsible for violations of international law and for crimes against humanity. Both the existing rules of international law on the immunity of State officials and national legislation on the subject should be respected. In general, her delegation wished to highlight the need for States to continue promoting full respect for international law in the context of the International Law Commission and contributing to the advancement of the Commission's work.

82. **Ms. Weiss Mau'di** (Israel) said that Israel ascribed great importance to the protection of the atmosphere. In 2008, its parliament had passed a law aimed at improving air quality and preventing and reducing air pollution in order to protect human life, safeguard health, enhance quality of life and protect the environment. The Government had also worked to regulate emissions from factories and other sources. With respect to the first report on the topic (A/CN.4/667), her delegation welcomed the Special Rapporteur's decision to focus on identifying already existing and emerging principles used in the sphere of atmospheric protection and agreed that non-binding draft guidelines would be the preferred approach for addressing the topic in the current initial stage. In light of the complexity of the topic, the work should proceed with caution in order not to interfere with ongoing and future negotiations of States on related international treaties. Only State practice should be looked at for the purpose of identifying international customary law. In that regard, she wished to echo the concerns raised by Commission members regarding the Special Rapporteur's reliance on non-governmental actors and scholarly works.

83. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, there was consensus that the essence of immunity *ratione materiae* was the nature of the acts performed and not the identity of the individual concerned. For that reason, some had questioned whether a definition of the beneficiaries of

such immunity was necessary. Her delegation supported the approach taken in draft article 2 (Definitions) and the commentary thereto, namely that the term “State officials” should emphasize the nature of the act without specifying which acts should be covered by such immunity. That approach recognized the need for flexibility and took into consideration potential ramifications for a State, acknowledging that certain acts were undertaken on its behalf. It should be clarified in that regard that the determination of whether the individual acted on the State’s behalf and consequently was entitled to immunity should be the prerogative of that State. The formulation “who exercises State functions” had been put forward in order to emphasize the “subjective” element of immunity, in other words the individual. However, her delegation remained of the view that the expression “who act on behalf of a State”, proposed in earlier sessions of the Commission, was preferable since it highlighted the nature of immunity *ratione materiae* as based solely on the sovereign nature of the acts performed; the individual performing the act was merely a beneficiary of such immunity. At the same time, her delegation acknowledged that a broad spectrum of actions could be considered acts of the State.

84. With respect to immunity *ratione personae*, her delegation supported the Commission’s view that the group of high-ranking State officials who enjoyed immunity *ratione personae* was not, and should not be, limited to the so-called “troika” — the Head of State, the Head of Government and the Minister for Foreign Affairs. That malleable approach also reflected the position of the International Court of Justice in the *Arrest Warrant* case, in which there had been no apparent intention to limit such immunity to the “troika”. In view of the complexity of the issue, her delegation encouraged further identification of State practice in order to assist in the formulation of guidelines regarding the scope and application of the immunity of State officials from foreign criminal jurisdiction.

85. With respect to the topic “The obligation to extradite or prosecute”, treaties were the sole legal basis of the obligation. There was not a sufficient basis under current international law or State practice to extend the obligation beyond binding international treaties that explicitly contained it. When drafting treaties, States should decide for themselves which formula regarding the obligation to extradite or

prosecute best suited their objectives. It would be futile to try to harmonize the various provisions and set out a single model for all situations and treaties, owing to the great diversity in the formulation, content and scope of the obligation in treaty practice.

86. Her delegation wished to reiterate its view that the concept of universal jurisdiction should be clearly distinguished from the principle of the obligation to extradite or prosecute. It also expressed appreciation to the Working Group on the topic for its study of the judgment of the International Court of Justice in the case *Questions relating to the Obligation to Prosecute or Extradite*; however, it had doubts as to whether broad and far-reaching implications could be derived from the specific circumstances presented in the judgment.

87. **Ms. Illková** (Slovakia), noting with satisfaction the Commission’s provisional adoption of five draft articles on the topic of immunity of State officials from foreign criminal jurisdiction, said that her delegation shared the Special Rapporteur’s view with regard to the need to define the terms used in relation to the determination of the individuals to whom immunity would apply. In particular, a clear and simple definition of the term “State official” was needed. With regard to the broad definition provisionally adopted by the Commission, her delegation wished to underline the need to define either the term “State functions” or the term “official acts” in order to establish immunity *ratione materiae* and its beneficiaries. As for immunity *ratione personae*, it supported a restrictive approach that would limit such immunity to members of the “troika”. Regarding the scope of the draft articles as proposed in draft article 1, the second paragraph should include explicit reference to members of permanent missions and delegations to international conferences. Lastly, she wished to point out that the draft articles clearly showed a balance between the fight against impunity and the maintenance of harmonious inter-State relations based on the sovereignty and equality of States.

88. Referring to the topic of identification of customary international law, she said that her delegation supported the Commission’s approach, which focused on the two constituent elements of rules of customary international law: “a general practice” and “accepted as law”. Regarding the debate over the terms “*opinio juris*” and “accepted as law”, her delegation shared the Special Rapporteur’s view that

the wording of the Statute of the International Court of Justice should be followed. That approach better reflected the legal position of States and, in particular, demonstrated the cumulative and indivisible relationship between the two constituent elements. Her delegation supported draft conclusion 7 (Forms of practice), which included both verbal and physical actions. However, questions arose on several points — for example, whether or not draft conclusion 9 (Practice must be general and consistent), which called for in-depth consideration of the practice of States whose interests were specially affected, was at odds with draft conclusion 8 (Weighing evidence of practice), which provided that there was no hierarchy among the various forms of practice, and whether or not the requirement in draft conclusion 9 that practice be sufficiently widespread would impede the creation of local or bilateral custom. Her delegation could agree to the inclusion of the practice of international organizations, but preference should be given to the practice of States.

89. **Ms. Escobar Pacas** (El Salvador), welcoming the Commission's final report on the topic of the obligation to extradite or prosecute, said that there was a close relationship between that obligation and the fight against impunity for serious crimes. Her delegation shared the view that the obligation to extradite or prosecute played a crucial role in the investigation and punishment of crimes of international concern, such as genocide, war crimes and crimes against humanity. In order to ensure continuity in the Commission's work, due account of the final report on the topic should be taken in the work to be done on the new topic of crimes against humanity, which had recently been included in the Commission's programme of work. Her delegation also supported further elaboration in respect of the responsibilities incumbent on States in order to ensure effective fulfilment of the obligation to extradite or prosecute, which would contribute to a broader understanding of the topic beyond the strictly international sphere. Indeed, in order to implement the obligation to extradite or prosecute, States must not only ratify the relevant international treaties but also take steps at the national level, such as criminalizing and establishing jurisdiction over the relevant offences and ensuring the investigation and detention of offenders.

90. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of

treaties, the Special Rapporteur's second report, which was firmly grounded in international practice and jurisprudence, enabled a better understanding of the draft conclusions. Her delegation agreed that subsequent agreements and subsequent practice could, in combination with other means of interpretation, help to determine or clarify the meaning of a treaty. Nevertheless, particular caution should be exercised with regard to the possibility of amending or modifying a treaty by subsequent practice, which might amount to non-compliance with the treaty. Although draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) indicated that that possibility had not been generally recognized, a more conclusive explanation should be provided.

91. Draft conclusion 10 concerning decisions adopted within the framework of a conference of States parties was very useful, as the decisions of such conferences often reflected a certain agreement with respect to the application of treaties. However, the concrete implications of such decisions would depend on what specific powers the conference had and how representative its decision-making processes were. Draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time), provisionally adopted in 2013, provided that subsequent agreements and subsequent practice under articles 31 and 32 of the Vienna Convention on the Law of Treaties might assist in determining whether or not the presumed intention of the parties was to give a term a meaning that was capable of evolving over time. For her delegation, that wording was rather misleading, as many of the terms used in treaties would evolve naturally. The ability to evolve did not depend only on the willingness of the parties to a treaty; it could derive from the nature of the term or from events occurring during the life of the treaty. Accordingly, her delegation suggested that that provision should be revisited.

92. With regard to the topic of protection of the atmosphere, her delegation shared the Special Rapporteur's view that while degradation of the atmosphere had long been of serious concern to the international community, there was currently no legal framework that covered the entire range of atmospheric environmental problems in a comprehensive and systematic manner. The Commission was therefore justified in undertaking a study of the topic. Given the technical complexity of the subject matter, the

Commission focus initially on defining the various concepts to be used, bearing in mind their practical application, in order to provide a solid foundation for any rules or guidelines to be developed subsequently.

93. As to the topic “Immunity of State officials from foreign criminal jurisdiction”, her delegation had long emphasized the functional nature of immunity, which could only be justified in order to ensure the performance of important State functions and not to protect the interests of the individuals who performed them. It therefore agreed with the Special Rapporteur’s general approach to the topic. It also applauded the academic rigour evident in the formulation of the draft articles and the clarity and richness of the technical analysis of the commentaries. In order to enhance understanding of draft article 5 (Persons enjoying immunity *ratione materiae*), which referred to State officials “acting as such”, she suggested that reference should be made to the official nature of their acts, which would better reflect the functional nature of immunity. In addition, in the light of past abuses of immunity, it would be best to avoid using the word *beneficiarse* (benefit) in the Spanish version of the draft article, since officials were not meant to derive any benefit from immunity. The word *gozar* (enjoy), the term agreed in the context of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, would be preferable.

The meeting rose at 1.05 p.m.