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Chair: Mr. Charles ..... (Trinidad and Tobago)
later: Mr. Kravik (Vice-Chair) ..... (Norway)
later: Mr. Charles (Chair) ..... (Trinidad and Tobago)

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The meeting was called to order at 10.05 a.m.

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (*continued*) (A/70/10)

1. **The Chair** invited the Committee to continue its consideration of chapters IX to XI of the report of the International Law Commission on the work of its sixty-seventh session (A/70/10).

2. **Mr. Reza Dehghani** (Islamic Republic of Iran), referring to the topic "Protection of the environment in relation to armed conflicts", said that the development of military technology had increased the risk of environmental destruction as a result of armed conflict, making the protection of the environment a common concern of the international community. Among the most fundamental principles of the law of armed conflict were those of distinction between civilians and combatants, proportionality in attack, precautions in attack and military necessity. In its consideration of the topic, the Commission should endeavour to strike a balance between safeguarding the legitimate rights of States and protecting the environment in relation to armed conflicts. Rather than to highlight differences between weapons, the Commission's work on the topic should address all weapons that did not distinguish between military and civilian objects and had long-term effects on the environment, including weapons of mass destruction.

3. Serious consideration should be given to nuclear weapons, in particular, as well as all depleted uranium weapons, which inflicted unnecessary suffering on civilians. Likewise, his delegation took the view that the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Additional Protocol I) applied to all types of weapons, whether conventional or non-conventional, and in particular to nuclear weapons. In its 1996 advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". Moreover, when ratifying the Rome Statute of the International Criminal Court, a large number of States had declared that it would be inconsistent with the principle of international humanitarian law to limit the scope of application of article 8, paragraph 2 (iv), of the Statute, to acts involving the use of conventional weapons.

4. His delegation welcomed the Special Rapporteur's decision to include in her consideration of the topic the issue of protected zones and areas and, in particular, the establishment of nuclear-weapon-free zones. It did not, however, share her view that it was not uncommon for physical areas to be assigned special legal status as a means to protect and preserve those areas. The United Nations General Assembly had adopted a definition of the designation "Nuclear-Weapon-Free Zone" in 1975, pursuant to a proposal submitted by Iran the previous year for the establishment of such a zone in the Middle East; regrettably, however, the matter had not been taken up, owing to political considerations. Moreover, in 1995, as part of a package of decisions that had resulted in the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the 1995 NPT Review Conference had called for the establishment of a Nuclear-Weapon-Free Zone in the Middle East.

5. As a result of the Special Rapporteur's decision to address the topic from the temporal perspective, there were a number of important issues that needed to be examined in future reports in relation to post-conflict situations. Those included environmental rehabilitation; pollution caused by unexploded, lost, stockpiled or immersed conventional or chemical weapons; mine clearance; and the inclusion of an environmental rehabilitation clause in peace agreements.

6. Although the various manuals on international law that were applicable to armed conflict, such as the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, were non-binding and could not replace treaty-based provisions or State practice, in some cases, their provisions could reflect well-established rules of customary international law. One such example was the provision in the San Remo Manual on the protection of the marine environment during armed conflict.

7. Iran had suffered severe environmental damage following attacks on offshore petroleum installations and pipelines that were located on its continental shelf in the Persian Gulf. His delegation proposed that the list contained in Additional Protocol I, article 56, and the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Additional Protocol II), article 15, should include oil and gas

platforms, as the latter could cause the release of dangerous forces and consequent severe losses to the environment in the event of an attack. Such installations must be protected during armed conflict, in conformity with Security Council resolutions condemning the targeting of petroleum installations.

8. The same applied to the protection of cultural and natural heritage in the context of armed conflicts, to which the Security Council had referred on numerous occasions; indeed, the wanton destruction of cultural heritage in the Middle East had shocked the conscience of humanity. In recent years, Iran had been subjected to the spread of highly polluted haze, which was a long-term environmental effect of regional armed conflicts that continued to pose serious, multifaceted problems long after the end of hostilities.

9. A number of decisions of international courts had taken into account the application of international humanitarian law in relation to the exploitation of the natural resources of occupied territories. In paragraph 133 of its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice stated that the construction of the wall had had "serious repercussions for agricultural production". He hoped that the Special Rapporteur would tackle that issue in her third report.

10. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the enjoyment of such immunity by State officials as it applied to their performance of official acts was well recognized in international law as serving to protect State sovereignty and to ensure the peaceful conduct of international relations. Since the concept "act performed in an official capacity" had not been defined in international law, certain aspects of its definition deserved consideration in the Special Rapporteur's future reports. Because the concepts "representing a State" and "acting on behalf of a State" were closely related, the definition of "act performed in an official capacity" should encompass all functions carried out by State officials in their official capacity without reference to any other capacity in which an official might act.

11. In its definition of the expression "act performed in an official capacity", the Commission should not give the same weight to the case law and practice of the national courts as to the more voluminous case law of international courts and tribunals. A review of the latter revealed that the criminal nature of an act could not, in itself, be considered a sufficient basis for excluding that act from the category of an official act, and consequently, from the scope of immunity. In other words, in assessing whether a given act was an "act performed in an official capacity" or an "act performed in a private capacity" for the purposes of determining eligibility for immunity, the core criterion was the governmental and official nature of the act.

12. Accordingly, all acts resulting from the exercise of elements of governmental authority should be covered by immunity. By the same token, international crimes could not be committed by individuals alone, without governmental complicity. Some acts, such as money-laundering, corruption and murder, exceeded the limits of official functions and governmental authority and were therefore not covered by immunity. They should be examined by the Special Rapporteur in future reports that dealt with limitations and exceptions to acts performed in an official capacity.

13. Extending immunity *ratione personae* to officials other than Heads of State, Heads of Government and Ministers for Foreign Affairs could be considered as progressively developing international law and was essential in order to account for the realities of international relations and to preserve the stability of inter-State relations. All acts performed by officials who enjoyed immunity *ratione personae* were covered by immunity, irrespective of whether they were carried out in an official or private capacity; his delegation therefore endorsed the basic characteristics of immunity *ratione materiae* described by the Special Rapporteur in her report. Immunity *ratione materiae* must be guaranteed to all State officials in respect of acts fitting the definition of those performed in an official capacity, whether those acts were performed while the officials were in office or after their term of office had ended.

14. The Special Rapporteur's in-depth analysis of the case law of international courts and tribunals showed that there was currently insufficient legal basis for codifying principles concerning the immunity of State officials from foreign criminal jurisdiction. The Commission therefore had no other choice but to proceed to progressively developing international law in that area.

15. With regard to the topic "Provisional application of treaties", his delegation supported the idea that the provisional application of treaties helped to accelerate the acceptance of international law and was beneficial because it allowed for both early application of and enjoyment of the rights embodied in the treaty by negotiating States, in advance of the treaty's entry into force. It took the view that a State could decide to provisionally apply a treaty that had already entered into force. The Commission's work was complicated by the fact that only a limited number of States had made arrangements for the provisional application of treaties in their domestic law or constitution. The Islamic Republic of Iran was no exception, as its constitution did not provide for the provisional application of treaties.

16. His delegation maintained that provisional application was limited to multilateral instruments and could not be applied to bilateral treaties. The Commission's work on the topic must adhere to the general international law principle whereby the decision to provisionally apply a treaty must be taken by the States concerned. The will of the States parties to a treaty played a pivotal role in provisional application, as indicated in article 25 of the 1969 Vienna Convention on the Law of Treaties. In other words, the obligation of a State to provisionally apply a treaty arose from an explicit provision in a treaty, a separate instrument or as otherwise agreed by the negotiating States.

17. Given that the modalities used by States to express consent to be bound by a treaty were linked solely to the treaty's entry into force, whereas provisional application was intended to take effect during the period preceding the treaty's entry into force, the means for expressing consent to be bound by provisional application should be materially distinct from those for expressing consent to be bound by the treaty. Moreover, further clarification was needed of the legal regime and modalities pertaining to the termination and suspension of provisional application. His delegation maintained that provisional application could not serve as a basis for restricting States' rights with regard to their future conduct in relation to the treaty. Thus, for example, a State's provisional application of a treaty did not prejudice its right to enter reservations to that treaty at the time that it ratified, accepted, approved or acceded to the treaty. His delegation took note of the proposed draft guidelines and welcomed the Special Rapporteur's proposed future work plan.

18. **Mr. Czapliński** (Poland) said that the topic "Protection of the environment in relation to armed conflicts" raised important international law questions, inasmuch as it required finding a compromise between international environmental law and international humanitarian law, which represented two separate branches of international law. The aim of the topic was to strike a balance between safeguarding States' legitimate rights under the law of armed conflict and protecting the environment. Although the Special Rapporteur's second report did not cover practice relating to non-State armed groups, such practice could have some value for the topic.

19. As to the proposed outcome of the Commission's work on the topic, his delegation was not convinced that the Commission should produce draft principles rather than draft conclusions or draft articles. The Commission had had sufficient practice in producing the latter two types of outcome, but had rarely produced the former. It was therefore difficult to treat draft principle I-(x) — which related to States' duty to designate areas of environmental importance as protected zones — as a principle, and the same could be said of draft principle II-5 (Protected zones), in respect of which the automatic deprivation of the protection of such zones should be reconsidered.

20. His delegation recognized the importance of the topic "Immunity of State officials from foreign criminal jurisdiction", but had reservations about the terminology used by the Commission in relation to immunity *ratione personae* and immunity *ratione materiae*. The Commission discussed both the personal and material scope of immunity in relation to *ratione personae* (which denoted solely the personal scope), and equally ineptly referred to both the personal and material scope of immunity in relation to *ratione materiae* (which denoted solely the material scope). Draft article 6 (Scope of immunity *ratione materiae*), as provisionally adopted by the Drafting Committee, reflected that terminological confusion: although the title of the draft article referred to the scope of immunity *ratione materiae*, paragraph 3 of the same draft article dealt with individuals who enjoyed immunity *ratione personae*. While it was admittedly not easy to correct terminological errors, which had sometimes become entrenched, the problem was worth examining. Although both immunity *ratione personae*

and immunity *ratione materiae* were closely linked to the function performed by individuals, the terms "personal immunity" for denoting immunity *ratione personae* and "functional immunity" for immunity *ratione materiae* were better suited to the Commission's purposes in its work on the topic.

21. The draft articles should elaborate on the various aspects of personal and functional immunity in terms of their personal, substantive, temporal, and spatial scope. Provisions on the temporal scope of immunity should establish the rule of the permanency of immunity from criminal jurisdiction in respect of acts performed in an official capacity, irrespective of whether the individual enjoyed personal or functional immunity. Additionally, the draft articles should include a provision on the temporal scope of immunity that covered the private acts of individuals who enjoyed personal immunity.

22. His delegation supported the Commission's work on the topic "Provisional application of treaties". Provisional application was an important means by which States could exercise their rights and duties under international law; it accelerated the acceptance of international obligations by States and international organizations and had immense practical value. His delegation supported the preparation of guidelines as an appropriate tool for achieving those aims.

23. His delegation was satisfied that the three draft guidelines provisionally adopted by the Drafting Committee were solidly grounded in article 25 of the 1969 Vienna Convention. As to the draft guidelines presented by the Special Rapporteur in his third report, his delegation was concerned at the restriction introduced in draft guideline 1. It fully agreed that States and international organizations could provisionally apply a treaty, or a part thereof, when the treaty itself so provided, or when they had in some other manner so agreed, but from the international legal perspective, internal law restrictions were irrelevant. To make the provisional application of a treaty conditional on internal law provisions, as had been done in draft guideline 1 (Scope), might contradict article 27 of the 1969 Vienna Convention, which provided that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

24. His delegation was satisfied that the restriction represented by the words "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" had not been included in the new wording set out in draft guideline 3 (General rule) as provisionally adopted by the Drafting Committee. Those issues should be elucidated in the commentary and not in the guideline itself. Furthermore, draft guideline 4 as proposed by the Special Rapporteur in his third report, which stated solely that the provisional application of a treaty had legal effects, should be substantiated.

25. The Commission's work on the provisional application of treaties would have much higher practical value if the Commission provided certain model clauses for provisional application and enumerated their advantages and disadvantages in the commentary. His delegation was especially interested in the Commission's evaluation of a reservation, which was quite common in practice, and which made the scope of a treaty's provisional application dependent upon the availability of domestic law mechanisms at a given time. It would furthermore be very useful if the commentary provided examples of typical domestic regulations on the provisional application of treaties that dealt with aspects of procedure and implementation. In many cases, a treaty could be provisionally applied only if provision was made for such application in the domestic legal order. Understanding the practice of other States raised awareness of the advantages and disadvantages of provisional application, and the latter could be overcome through the introduction of a proper internal law mechanism.

26. **Mr. Otto** (Palau), referring to the topic "Protection of the environment in relation to armed conflicts", stressed the importance of addressing the impact of the effects of remnants of the Second World War in the water, as well as the effects of that war on the atmosphere, which were of particular concern to Palau as they related to health, food security and sustainable development.

27. He drew the Committee's attention to the outcome document of the SIDS Accelerate Modalities of Action (SAMOA) Pathway, which had been approved by the leaders of Palau. Article 71 (a) of that document referred to the management of hazardous waste and the need for "enhancing technical cooperation programmes, including those under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal … including chemical and

hazardous waste, ship- and aircraft-generated waste and marine plastic litter, and further strengthening and expanding geographic coverage of oil spill contingency plans".

28. His delegation encouraged the Special Rapporteur to address those issues in her next report on the topic and proposed that the Commission should formulate draft principles that reflected the need for protection of the maritime environment. On behalf of Palau, he wished to express his appreciation to Australia for the work it had undertaken in Palau to remove unexploded ordnance from the Second World War, some of which was under water.

29. *Mr. Kravik (Norway), Vice-Chair, took the Chair.*

30. **Mr. Hanami** (Japan), referring to the topic "Protection of the environment in relation to armed conflicts", recalled the view expressed by his delegation in the Sixth Committee debate the previous year that the Commission should formulate rules concerning protection of the natural environment in relation to armed conflicts based on the existing provisions of the law of armed conflict. That was all the more true as the attempt to strike a balance between military necessity and humanitarian considerations through the establishment of new rules might result in a higher rate of non-compliance with the law of armed conflict.

31. In attempting to produce specific and detailed guidelines concerning the protection of the natural environment in relation to armed conflicts, the Commission had referred to article 35, paragraph 3, and article 55, paragraph 1, of Additional Protocol I. The draft principles adopted provisionally by the Drafting Committee took into account the basic principles of the law of armed conflict, such as those of distinction and proportionality. On the other hand, draft principle II-5 (Protected zones) was procedural in nature and referred to the implementation of an existing rule under the law of armed conflict. The Commission should further examine the rationale for establishing a new procedure on the basis of a fundamental rule that had remained unchanged. Although the analysis contained in the Special Rapporteur's second report was, for the most part, consistent with the law of armed conflict, her future reports must focus on the protection of the natural environment in relation to armed conflicts. The Commission should pursue its efforts to produce detailed principles on the basis of an in-depth analysis of State practice.

32. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that Japan supported the Commission's efforts to provide a clear definition of the scope of immunity *ratione materiae*, since what had emerged from the Commission's previous two sessions remained vague. In the text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session (A/CN.4/L.850), the Commission had defined a State official as any individual who represented the State or who exercised State functions, and had concluded that State officials acting as such enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Paragraph (14) of the commentary to those draft articles indicated that the hierarchical position occupied by the individual was irrelevant for the purposes of the definition.

33. The draft articles as provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session (A/CN.4/L.865) stipulated that State officials enjoyed immunity *ratione materiae* "only with respect to acts performed in an official capacity" and defined the expression "act performed in an official capacity" as "any act performed by a State official in the exercise of State authority". If read together, those draft articles suggested that immunity *ratione materiae* encompassed virtually all official acts performed by State officials, regardless of whether the latter were senior officials, lower-ranking officials or private contractors acting as de facto officials.

34. It was unclear what limits, if any, there were to the definition of "act performed in an official capacity"; the failure to establish limits gave rise to the risk that the institution of immunity *ratione materiae* would be abused. He hoped that the commentary to be considered and adopted at the Commission's sixty-eighth session would shed light on some of the questions to which the latest draft articles had given rise and perhaps include a non-exhaustive list of examples of an "act performed in an official capacity".

35. His delegation would like to know what kind of acts qualified as an "exercise of State authority" and whether the use of the expression "State authority" in the definition of "act performed in an official capacity" was intended to be more limiting than the expression "State functions", which appeared in the definition of

the expression "State official" contained in draft article 2 (e) that had been provisionally adopted by the Drafting Committee at the Commission's sixty-sixth session (A/CN.4/L.850). Japan would also be interested to know whether the variety of functions assumed by States in the contemporary world, such as national security, diplomatic relations, economic regulation and social welfare, fell *ipso facto* under the definition of the term "State authority", and it would welcome further explanation on those questions in the commentary.

36. He also asked whether the current definition of an "act performed in an official capacity" distinguished between acts performed by State officials in the exercise of State authority and acts performed by State officials in the course of their exercise of State authority that were incidental to the exercise of State functions but could not be classified as purely "private acts".

37. The special regime of immunity from foreign criminal jurisdiction that applied to individuals in the context of diplomatic missions, consular posts, special missions or military forces abroad was based on the receiving State's consent to the entry of such individuals into its territory and to the performance of their stated functions. Given the current state of international law, it would be going too far for a receiving State to grant a foreign State official immunity for an act performed in an official capacity when the receiving State had not consented to the exercise of foreign State authority by that official on its territory. In such a case, it would be unreasonable to maintain that the receiving State's only recourse was to invoke the responsibility of the sending State, especially since the international wrongfulness of the act in question could be disputed, even though it was clearly a violation of the domestic law of the receiving State. In order to avoid the undue limitation of the territorial sovereignty of States, the contours of immunity *ratione materiae* should be clearly and explicitly delimited.

38. The law of immunity was one of the fundamental principles of international law that underpinned the equality of sovereign States and stable inter-State relationships, and his delegation considered the Commission's ongoing work on that topic to be of great practical value. A clear and well-defined scope of immunity *ratione materiae* was all the more necessary in order to preserve that value. When discussing the topic in the Sixth Committee, Member States tended to see it from the perspective of the official who enjoyed immunity, but there was equal value in seeing it from that of the State that received a foreign State official.

39. At its sixty-eighth session, the Commission should discuss the limitations to the scope of immunity *ratione materiae* that had not yet been clearly defined. Such limitations should not be equated with exceptions to immunity, as limitations should be considered in conjunction with the definition of the outer scope of immunity *ratione materiae*, while exceptions should be considered only after confirming the material scope of that type of immunity. Japan's judicial practice with regard to exceptions to immunity was limited to those under special arrangements pertaining to diplomatic, consular and military officials.

40. **Ms. Nguyen** (Viet Nam) said that, with regard to the topic "Protection of the environment in relation to armed conflicts", her delegation concurred with the assertion made in draft principle II-l (General protection of the [natural] environment during armed conflict) that "care shall be taken to protect the [natural] environment against widespread, long-term and severe damage". Several Commission members had referred to the need to analyse that assertion and the standards against which the criteria it mentioned were to be tested. It was important to require an environmental impact assessment prior to deploying weaponry in the battlefield, especially if chemical weapons were used, since such weapons, if deployed massively over a vast surface area of the battlefield, could have significant and lasting adverse effects on the environment.

41. Her delegation considered it appropriate, at the current stage, for the scope of the topic to be restricted to international armed conflicts, and therefore to exclude non-international armed conflicts, recalling the Special Rapporteur's observation to the effect that only a few legal instruments addressed non-international armed conflicts. Although most developments regarding non-international armed conflicts were decided by national courts, the information provided to the Special Rapporteur had not demonstrated there to be sufficient general State practice concerning the obligation to protect the environment in relation to non-international armed conflicts.

42. As to the Special Rapporteur's future programme of work and proposal to address the law applicable in post-conflict situations, particular attention should be paid to rehabilitation efforts, which could have a major

impact on the complete recovery of war-torn countries and consequently on future generations. Obligations in the post-conflict period should include the provision of humanitarian assistance for the purpose of, in particular, clearing landmines, toxic chemicals and other remnants of war.

43. In relation to the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation agreed with Commission members who considered it excessive and unnecessary to establish a link in the definition of "act performed in an official capacity" between such an act and its criminal nature, as reference to the criminal nature of such an act was merely descriptive, while the question of immunity was a procedural one. She welcomed the Drafting Committee's decision to delete the phrase "that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction" and its intention to make it clear in the commentaries that the criminal nature of an act did not, in principle, disqualify it as an official act.

44. The separate opinion of President Guillaume appended to the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* case addressed the exception to the immunity rule for international crimes with regard only to immunity *ratione personae*, leaving open the question of exceptions to immunity *ratione materiae*. Along those lines, her delegation took the view that immunity *ratione materiae* should be granted in respect of all acts performed in the exercise of State authority, State functions and sovereignty and invited the Special Rapporteur to focus in her fifth report on the thorny issues of exceptions and limitations to immunity and the procedural aspects of immunity. In doing so, the report should survey State practice from a broad variety of legal traditions and regions and the case law of various regional and international courts and tribunals.

45. On the topic "Provisional application of treaties", her delegation agreed that the provisional application of treaties gave rise to rights and obligations and that the treaty was subject to the *pacta sunt servanda* rule set out in article 26 of the 1969 Vienna Convention. Breaches of provisionally applied obligations could entail some international responsibility; however, provisional application remained provisional, and only those States that agreed to provisional application were bound by the clauses of the relevant treaty that were subject to provisional application. She drew attention to the fact that provisional application could be used to bypass constitutional constraints, in particular where internal law required parliamentary ratification. It was therefore important to further elaborate on the nuances of the "legal effects" to which reference was made in draft guideline 4, as proposed by the Special Rapporteur in his second report.

46. Regarding the form that the final outcome of the project would take, her delegation welcomed the Commission's choice of draft guidelines. The 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations already provided sufficient legal basis for the provisional application of treaties. The draft guidelines would provide States and international organizations with a practical tool that had a variety of uses, such as the formulation of arrangements for the provisional application of treaties and the termination or suspension of provisional application.

47. **Ms. Ahmad** (Malaysia), referring to the topic, "Protection of the environment in relation to armed conflicts", expressed concern at the definitions proposed by the Special Rapporteur in her second report (A/CN.4/685) for the terms "armed conflict" and "environment". The first had been taken almost verbatim from article 2 of the articles on the effects of armed conflicts on treaties and the second from principle 2 (b) of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

48. In that connection, her delegation agreed with Commission members who maintained that one could not transpose a definition from an instrument dealing with peacetime situations to an instrument dealing with situations of armed conflict. The Special Rapporteur should therefore propose alternative definitions for the Commission's consideration. Although working definitions of those terms were useful, it was not urgent to settle on their definitive wording at such an early stage. The Commission should determine which actors the draft principles covered and the specific scope of the draft principles before discussing the definition of "armed conflict".

49. The text of the draft principles provisionally adopted by the Drafting Committee reflected changes

to principles 1 to 5 that had been proposed by the Special Rapporteur in her second report. It would be useful if the commentaries to the provisionally adopted draft principles, which would be considered by the Commission at its sixty-eighth session, provided a detailed analysis of those changes, as a way of improving understanding of the matters they addressed. Consequently, her delegation deemed it premature to comment on the draft principles at the current stage.

50. Her delegation was particularly interested in the topic "Immunity of State officials from foreign criminal jurisdiction", given that the Special Rapporteur had proposed two new draft articles that captured the key normative aspects of immunity *ratione materiae*. She welcomed the draft articles and echoed Commission members' proposals for the Special Rapporteur to explore the extent to which a State could determine the range of activities it considered to be constitutive of acts performed in an official capacity. Moreover, the Special Rapporteur should further elucidate the content of draft article 2 (f) as provisionally adopted by the Drafting Committee.

51. With regard to draft article 6 (Scope of immunity *ratione materiae*) as provisionally adopted by the Drafting Committee, her delegation had previously emphasized the need to define the term "immunity *ratione materiae*" in order to determine the circumstances in which State officials could be granted immunity from foreign criminal jurisdiction. However, the definition of that term, which had been set out in draft article 3 (b) of the draft articles proposed by the Special Rapporteur in her second report (A/CN.4/661), had been deleted, and no reason had been given. Her delegation shared the Special Rapporteur's view of the basic characteristic of immunity *ratione materiae*, which was that it was granted to all State officials solely in respect of an "act performed in an official capacity" and that it was not time bound, since it continued even after the person who enjoyed it ceased to be a State official. Her delegation looked forward to receiving the commentary to the draft articles in order to gain a better understanding of the latter's purpose and intention.

52. Regarding the topic "Provisional application of treaties", the Special Rapporteur's third report had elucidated several scenarios in which the provisional application of treaties might operate. Great caution must be exercised when using those scenarios in order to shed light on the legal effects produced by the provisional application of treaties, the relationship of provisional application to other provisions of the 1969 Vienna Convention and provisional application as it applied to international organizations.

53. With regard to the six draft guidelines proposed by the Special Rapporteur in his third report (A/CN.4/687), consideration must be given to clarifying doubts concerning certain aspects of the draft guidelines, as the latter must allow for clear understanding and interpretation, as well as take into account the internal laws and practice of States. In that connection, her delegation had a number of concerns in relation to the draft guidelines to do with the internal law of Malaysia and its practices with regard to the signature and ratification of treaties. Under the Malaysian Constitution, executive authority extended to all matters with respect to which the legislature could make laws, which included treaties, agreements and conventions concluded with other States. In relation to draft guideline 1, the domestic law of Malaysia did not provide for any express provision that prohibited or allowed for the provisional application of treaties. Her Government had been conscientious in complying with its treaty obligations following ratification — a practice that it followed by ensuring that its domestic legal framework was brought into line with treaties to which it was a party before the treaty became legally binding for Malaysia.

54. In relation to draft guideline 2, her delegation was of the view that, at the current juncture, agreement on the provisional application of a treaty must be expressly stipulated in the treaty itself or established by means of a separate agreement, as both means produced legal effects. There was a risk in agreeing to the provisional application of a treaty through resolutions adopted by international conferences or through other arrangements between States or international organizations, as some States might not be directly involved in the negotiation of such agreements. Furthermore, resolutions were not normally recognized as being binding, and it was therefore unacceptable for them to be afforded the same legal weight as a legally binding treaty. In order to avoid ambiguity, provisional application must therefore be provided for explicitly in the treaty. Provisional application by means of a separate agreement must also be explicitly stipulated in the treaty.

55. Draft guideline 3 was similar to article 11 of the 1969 Vienna Convention, which enumerated the means of expressing consent to be bound by a treaty as being

signature, ratification, acceptance, approval or accession, or any other means if so agreed. Under the domestic legal framework of Malaysia, consent to be bound by a treaty was subject to a subsequent act of ratification. For that reason, her delegation was particularly concerned about the legal effects of the provisional application of a treaty and proposed that the Commission should further examine draft guideline 3 in terms of the rights and obligations of States to which a provisionally applied treaty gave rise.

56. Draft guideline 4 should be read in conjunction with draft guideline 3, as the two were interrelated. Her delegation took the view that a provisionally applied treaty was binding only morally and politically; at the same time, her delegation was guided by article 18 of the 1969 Vienna Convention, which indicated that States were obliged to refrain from acts that would defeat the object and purpose of the treaty. In that context, the term "legal effects" should be clarified and further developed, and the Commission should ensure that its definition was consistent with article 18. She proposed that the rights and obligations of States arising from a provisionally applied treaty should be addressed in the draft guidelines, in order to safeguard States' rights. In the light of her country's internal law, including the requirements for signing and ratifying treaties, extreme caution should be exercised in determining whether draft guideline 4 was acceptable, as it entailed significant legal obligations.

57. It was crucial to distinguish between the provisional application of a treaty and the application of the treaty itself as the source of obligations. If provisional application was provided for by means of alternative sources, its legal effects should be determined on the basis of the State's unequivocal acceptance, expressed through a clear mode of consent, of such provisional application. She proposed that the topic should be developed further by taking due account of States' sensitivities, the peculiarities and contextual differences of each treaty and the way in which States had responded to those differences thus far, as reflected in their practice.

58. **Mr. Dea** (Canada), referring to the topic "Provisional application of treaties", said that his delegation had identified two issues that deserved further discussion as part of the Special Rapporteur's future plan of work. The first concerned the validity of a State's consent to the provisional application of a treaty, most notably when the expression of such consent might be affected by that State's internal law. The Commission had debated whether greater attention should be paid to the internal law of States when drafting the guidelines and had noted, for example, that certain States had difficulty accommodating provisional application within their legal system.

59. A key factor in determining whether the internal law of States was relevant was the question whether article 46 of the 1969 Vienna Convention applied to provisional application. Article 46 provided that a State could not invoke its internal law as a way to invalidate its consent to be bound by a treaty obligation. Given that when States agreed to provisional application they were presumably seeking to enjoy the benefits of a treaty commitment, it seemed natural to conclude that article 46 remained relevant, regardless of whether a treaty was in force or was provisionally applied. It should therefore be up to each State to ensure that its expression of consent to provisional application was consistent with its internal law. In view of the impact that that issue could have on the understanding of provisional application, his delegation was keen to know the Commission's final conclusions with regard to the applicability of article 46.

60. Another point relating to the expression of consent was the idea that agreement to provisional application could be tacit or implied in certain situations. If the provisional application of a treaty had legal effects, as was suggested by draft guideline 3 proposed by the Special Rapporteur in his third report, then the presumption should be that States must formally express their consent to be bound by it. His delegation looked forward to the Commission's clarification of its position on that issue. If there were any circumstances in which implied consent could be envisaged, they would need to be very clearly and specifically defined.

61. Another related issue to be resolved was whether the provisional application of a treaty had the same legal effects as the treaty's entry into force, or whether there were some differences. It would be useful for that point to be clarified, as it was important for States to understand the exact nature of the legal obligations they were undertaking when they agreed to provisional application.

62. With regard to the termination and suspension of the provisional application of a treaty, his delegation noted that draft guideline 5 referred to article 25,

paragraph 2, of the 1969 Vienna Convention, which provided that a State could terminate the provisional application of a treaty by notifying other States of its intention not to become a party to the treaty. It might be necessary, however, to provide some additional clarification of what constituted an acceptable method of signalling an intention not to become a party to a treaty. The process would presumably need to be different if a State had merely signed a treaty without ratifying it or had completed the necessary ratification procedures, but the treaty itself had not yet entered into force and was still being applied provisionally by the parties. It would be helpful if the Commission could take that distinction into consideration as it pursued its examination of the topic. His delegation hoped that the draft guidelines would become a useful tool for the interpretation of article 25 of the 1969 Vienna Convention and would provide a predictable framework for State practice in that area.

63. **Mr. Simonoff** (United States of America), referring to the topic "Protection of the environment in relation to armed conflicts", said that his delegation had substantial concerns about the content and phrasing of a number of the draft principles provisionally adopted by the Drafting Committee and the direction in which they appeared to be orienting the project. Most of the draft principles were phrased in mandatory terms, purporting to provide what "shall" be done, despite the fact that the principles went beyond the existing legal requirements of general applicability. Along the same lines, his delegation was troubled by the presence among the principles of rules that had been extracted from certain treaties that did not, in its estimation, reflect customary law. For example, draft principle II-4 (Prohibition of reprisals) reproduced a prohibition, as contained in Additional Protocol I to the 1949 Geneva Conventions, on attacks against the natural environment by way of reprisals that his delegation did not consider to exist as a rule of customary international law. To the extent that that rule was offered to encourage normative development, his delegation remained in disagreement with it, consistent with the objections it had stated on other occasions.

64. His delegation was also concerned that the draft principles appeared to suggest that the Commission would address questions about the concurrent application, in situations of armed conflict, of bodies of international law other than international humanitarian law. For example, draft principle II-1 (General protection of the [natural] environment during armed conflict) referred to "applicable international law and, in particular, the law of armed conflict". His delegation's consistent view had been that the Commission should avoid such questions; such a course would appear appropriate, given that all the draft principles had been drawn from the law of armed conflict.

65. Other draft principles could also benefit from further refinement or adjustment. For instance, his delegation had concerns about the inclusion in draft principle I-(x) (Designation of protected zones) of the words "or otherwise", insofar as they could be taken to suggest that a designation to which one side had not consented might nevertheless have legal effects. By way of illustration, even though a State might remove its military objectives from an area in order to reduce the likelihood that an opposing State would, during armed conflict, conduct attacks in the area or view such an area as a military objective, a unilateral designation of an area as a protected zone would not create obligations for an opposing State to refrain from capturing that area or placing military objectives inside it during an armed conflict.

66. He also recommended deleting the words "cultural importance" from draft principle I-(x), as a basis for designating an area as a protected zone, since that reference went beyond the scope of the principles, as specified in the preamble. In draft principle II-5 (Protected zones), he proposed clarifying that States not parties to an agreement were not bound by its provisions, especially if a non-party was the State in whose territory such an area was located. He also proposed clarifying that, if a designated area contained a military objective, the entire area would not necessarily forfeit protection from being made the object of an attack.

67. With regard to draft principle II-2 (Application of the law of armed conflict to the environment), he did not consider it useful or correct to state that the entire law of armed conflict "shall be applied" to the natural environment. Whether a particular rule of the law of armed conflict was applicable in respect of the natural environment might depend on the context, including the contemplated military action. To the extent that draft principle II-2 was intended merely to confirm the applicability of existing law, its current wording seemed too vague and ambiguous to accomplish that

purpose, and he hoped that the principle was not intended to modify the applicability of existing law.

68. He recommended that draft principle II-3 (Environmental considerations) should be deleted or revised, perhaps with the addition of a caveat such as "where appropriate", given that environmental considerations would not in all cases be relevant in applying "the principle of proportionality and the rules on military necessity" in the context of *jus in bello*. More fundamentally, it was unclear exactly what was meant by the phrase "environmental considerations", and the requirement that such considerations be "taken into account". For the sake of clarity, he recommended employing the term "natural environment" rather than "environment".

69. Referring to the topic of "Immunity of State officials from foreign criminal jurisdiction", he noted that draft article 6, paragraph l, as provisionally adopted by the Drafting Committee, limited immunity *ratione materiae* to acts performed in an official capacity. That provision was sensible, in light of the draft articles that had been provisionally adopted by the Drafting Committee in 2014, in particular draft article 5 (Persons enjoying immunity *ratione materiae*), which provided that State officials acting as such enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, and draft article 2 €, which defined "State official" as any individual who represented the State or exercised State functions.

70. During the Sixth Committee debate at the sixty-ninth session of the General Assembly, his delegation had commented that draft articles 2 (e) and 5 appeared to express a broad view of immunity *ratione materiae*, subject to exceptions and procedural requirements. By contrast, draft article 6 (Scope of immunity *ratione materiae*) provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session, as narrowed by the new definition in draft article 2 (f), limited the reach of immunity *ratione materiae*. In particular, draft article 2 (f) defined the phrase "act performed in an official capacity" as meaning "any act performed by a State official in the exercise of State authority". That definition resulted in a narrower scope of immunity than would exist if the definition turned solely on whether the official's conduct could be attributed to a State — a factor analysed in the Special Rapporteur's fourth report. The definition set out in draft article 2 (f) and the matter of exceptions to immunity were important and difficult issues that merited ongoing and careful consideration.

71. Draft article 6, paragraphs 2 and 3, provided that immunity *ratione materiae* subsisted even after the individuals concerned had ceased to be State officials, and that individuals who formerly enjoyed immunity *ratione personae* continued to enjoy immunity with respect to acts performed in an official capacity during such term of office. Both articles were consistent with the treaty-based immunities of diplomats, consular officers, and United Nations officials, who continued to enjoy residual immunity for their official acts even after they had left their respective offices.

72. The other major areas yet to be addressed were exceptions to immunity and the procedural aspects of immunity. The Special Rapporteur had proposed to consider, in her next report, the issue of limits and exceptions to immunity, which she had accurately characterized as the most politically sensitive issue, to be addressed in the project. His delegation looked forward to her continuing work on the topic.

73. Regarding the topic "Provisional application of treaties", his delegation took the view that the meaning of the term "provisional application" in the context of treaty law was well settled, as being a State's agreement to apply a treaty, or certain provisions thereof, prior to the treaty's entry into force for that State. Provisional application gave rise to a legally binding obligation to apply the treaty or specific treaty provisions, although that obligation could more easily be terminated than the treaty itself could be, once it had entered into force. His delegation hoped to see that fact clearly stated in the draft guidelines as the Commission's work on the topic progressed.

74. The draft guidelines should also make clear that a State's legal obligations under provisional application could arise only by means of an agreement between that State and the other States that undertook to apply the treaty provisionally. His delegation was concerned that draft guideline 2, as proposed by the Special Rapporteur in his third report, and the language of his report might suggest that such obligations could be incurred through some method other than agreement, contrary to article 25 of the 1969 Vienna Convention.

75. His delegation was impressed by the extensive research reflected in the Special Rapporteur's third report, which contained references to a wide variety of situations. He cautioned, however, that not every

situation in which States applied a treaty prior to its entry into force involved the provisional application of the treaty within the meaning of the 1969 Vienna Convention. His delegation did consider the application by an international organization of its constituent instrument, for example, to be provisional application in the sense of the 1969 Vienna Convention, as the international organization was not a prospective party to the treaty. Similarly, a non-legally binding commitment to begin applying a treaty prior to its entry into force did not, in his delegation's view, constitute provisional application.

76. As to the future work of the Special Rapporteur and the Commission on the topic, his delegation supported the proposal for the Commission to develop model clauses as a part of the exercise, since such clauses could assist practitioners in considering the many options available to negotiators and how best to capture those options in their drafts. Nevertheless, his delegation was not convinced of the merits of studying the legal effects of the termination of provisional application in respect of treaties granting individual rights, as it did not believe that the rules on provisional application differed for such instruments.

77. **Ms. Weiss Ma'udi** (Israel), addressing the topic of protection of the environment in relation to armed conflict, said that Israel saw no need to formulate new standards in that regard since the law of armed conflict contained an adequate body of rules and principles. Her delegation continued to believe that the discussion should exclude issues such as cultural heritage, natural resources, indigenous peoples and the effect of specific weapons, all of which were suitably addressed in other bodies of law. Some of the language suggested by the Special Rapporteur and the Drafting Committee went beyond the level of protection afforded to the environment under existing international law, which was currently equivalent to the protection to be provided to civilian populations and property. She urged the Special Rapporteur not to promote a standard inconsistent with current international norms.

78. Her delegation suggested the following amendments to the proposed draft principles: replacement of paragraph 1 of draft principle II-1 by "The natural environment enjoys general protection against attacks under the law of armed conflict" in order to reflect the existing and appropriate level of protection offered to the environment, while referring to the relevant body of law; rewording of paragraph 3 of that same draft principle as "no part of the natural environment may be the object of attack, unless it has become a military objective", which was consistent with the language commonly used in the law of armed conflict and clearly distinguished between intended and incidental harm to the environment; in draft principle II-2, removal of the words "with a view to its protection", as that went beyond the standard required under the law of armed conflict; rewording of draft principle II-3 as "Damage to the environment which is expected to prejudice the health or survival of the population shall be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives", since the existing phrase "environmental considerations" was vague and perhaps too broad; and removal of draft principle II-4, since it did not reflect customary law.

79. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, she said that the definition of an "act performed in an official capacity" in draft article 2 (f) revealed the need for further study as it could lead to ambiguity. For instance, the term "State authority" used in that definition, as provisionally adopted by the Drafting Committee in its report (A/CN.4/L.865), could be taken to mean the State official's powers as prescribed by national statute and other forms of legislation, or to relate to categories of forms of conduct performed by State officials in their official capacity. It should therefore be defined or broadly construed on a case-by-case basis, in accordance with relevant legislation in each country, rather than allowing courts in forum States to deduce such authority or lack thereof on subjective and potentially arbitrary grounds. Moreover, an "act performed in an official capacity" should be defined in accordance with the functions carried out by the State organ to which the State official belonged, with reference to the specific State official concerned. The question whether any act fell within that category should thus again be resolved on a case-by-case basis.

80. Looking ahead to the Special Rapporteur's next report, which was expected to address the issue of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction, she stressed that the functional necessities of inter-State relations lay at the heart of the established rules of immunity. While, however, questions of immunity were political and sensitive, State officials were not precluded from relevant liabilities, particularly before a proper legal

forum. As the International Court of Justice had found in the *Arrest Warrant* case, such officials could be held criminally accountable without prejudice to their immunity from foreign criminal jurisdiction through such measures as prosecution by their own national courts or submission of a waiver of their immunity by their State before a foreign court. Moreover, while the international community had identified certain serious international crimes, it had not yet developed rules of customary international law on the waiving of State officials' immunity in regard to such crimes. The Commission's work should therefore proceed in a careful and measured manner, with all due regard for specifically identified *opinio juris* and relevant State practice.

81. On the topic "Provisional application of treaties", she recalled that in Israel the provisional application of treaties was permitted only in exceptional circumstances. Such circumstances included cases where such application had a clear financial or political significance; cases where there was a need for exceptional flexibility; and situations where it was important not to wait until the treaty had been approved. Notwithstanding that practice, which was not part of the written legal framework and remained uncodified, the Government must approve the treaty and its provisional application prior to the date on which the agreement was provisionally applied; it must also approve provisional application prior to the entry into force of the treaty, with the reasons for exceptional approval being stated in each specific case.

82. **Ms. Park** (Republic of Korea) said that her delegation supported the Special Rapporteur's comprehensive approach to the topic of protection of the environment in relation to armed conflicts, and particularly the inclusion of preventive and remedial measures. However, caution was in order regarding the use of the term "armed conflict" to include both international and non-international armed conflicts, since it would not be easy to identify legal principles equally applicable to both. As for the term "environment", which could be interpreted too broadly, it might be more advisable to limit the discussion to the "natural environment". Her delegation would welcome a detailed explanation from the Commission on the applicability to the environment of the principles and rules regarding distinction, proportionality, military necessity and precautions in attack and hoped that commentaries to the draft principles would be considered at its next session.

83. Her delegation welcomed the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction, which was of legal and political importance for States. It was indeed essential for the Commission to contribute to the codification and progressive development of international rules in that regard, while making every effort to balance *lex lata* and *lex ferata*. Her delegation agreed that an "act performed in an official capacity" should be distinguished from an "act performed in a private capacity" and supported the definition provisionally adopted by the Drafting Committee, with its reference to "the exercise of State authority" in place of "elements of governmental authority". With regard to the scope of immunity *ratione materiae*, the reformulated version of draft article 6 clearly stated the extent to which a specific State could enjoy such immunity. For the future work plan, it would be useful to focus the work on limits and exceptions to immunity rather than broaden the discussion, as it would be better to proceed on the basis of *lex lata* rather than *lex ferata*.

84. Turning to the topic of the provisional application of treaties, she said that the legal effects of such provisional application should be distinguished from those of the entry into force of the treaty. While agreeing that articles 11, 18, 24, 26 and 27 of the 1969 Vienna Convention on the Law of Treaties were applicable to the provisional application of the treaty, her delegation was of the view that careful consideration needed to be given to the question of whether it was appropriate to compare the article on provisional application in the 1986 Vienna Convention with the similar provision in article 25 of the 1969 Convention, given that the 1986 Convention had not yet entered into force. Her delegation looked forward to more in-depth discussion of the topic and to the establishment of clearer guidelines on the mechanism of provisional application of treaties.

85. **Mr. Redmond** (Ireland) said that the concept of an "act performed in an official capacity" was central to the topic of immunity of State officials from foreign criminal jurisdiction and that the inclusion in the draft articles of a definition of the term was therefore to be commended. It was also important for there to be well-crafted commentaries in order to capture the subtleties involved and thereby contribute to greater legal certainty, particularly since it was indeed questionable whether the term ought best to be regarded as an indeterminate legal concept that could be identified by

judicial means. A definition, together with detailed commentaries, would highlight the core rationale of immunity, which was to protect State sovereignty and ensure the efficient performance of State functions and not to benefit individuals; that might help to guard against any unduly broad interpretations of the term. The proposed definition could be said, however, to have an element of circularity and to be general in nature. While, therefore, acts performed in an official capacity should be identified case by case, there would be value in setting out in the commentaries criteria or characteristics for applying the definition in practice. Whether such criteria might usefully be included within the definition itself remained an open question.

86. His delegation agreed that it was appropriate to follow the terminology used by the International Court of Justice in the *Arrest Warrant* case: an act performed in an official capacity did not automatically correspond to the concept of *acta jure imperii*; it might refer to some action *jure gestionis* performed by State officials exercising State functions. Since, moreover, the concept of such an act bore no relation to its lawfulness or otherwise, his delegation supported the omission of the criminal nature of the act from the criteria for categorizing an act as one performed in an official capacity. His delegation looked forward to the Special Rapporteur's next report, particularly on how best to deal with the relationship between the definition of acts performed in an official capacity and limitations and exceptions to immunity *ratione materiae*.

87. Addressing the topic of provisional application of treaties, he said that his delegation welcomed the twin focus in the Special Rapporteur's third report (A/CN.4/687) on the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and on provisional application with regard to international organizations. Ireland agreed on the need to stress the conceptual distinction between the expression of consent to be bound by a treaty with a view to its entry into force and the provisional application of the treaty for a period preceding its entry into force, albeit with the qualifying provision contained in article 11 of the Vienna Convention, and agreed also that provisional application was very different from any supposed exceptional modality for entry into force. His delegation shared the view that provisional application did produce legal effects and supported the conclusion of the tribunal in the *Yukos* case, cited in paragraph 66 of the Special Rapporteur's report, while also supporting the suggestion that further analysis should be undertaken as to the precise nature of the legal effects created by provisional application and the extent to which they differed, if at all, from the effects created by the entry into force of the treaty. That might include consideration of whether there were any differences in the termination and suspension processes for both regimes.

88. In the case of treaties with or between international organizations, the example of the provisional application of amendments to the Convention on the International Maritime Satellite Organization, referred to in paragraph 115 of the Special Rapporteur's report, raised a number of interesting issues that would benefit from further examination, particularly the question whether and how States parties thereto could decide to provisionally apply amendments to that Convention. His delegation welcomed the draft guidelines proposed by the Special Rapporteur. It supported draft guidelines 1 and 2 and concurred with the proposal to remove from draft guideline 3 any reference to the internal law of the State or the rules of international organizations and to track the language of article 25 of the Vienna Convention as closely as possible. Ireland welcomed the Special Rapporteur's intention to consider in his next report the question of the termination and suspension of provisional application and the interplay between provisional application and reservations to treaties.

89. **Mr.** Omer Dahab Fadl **Mohamed** (Sudan), commenting on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Special Rapporteur's fourth report could not be removed from the context of the previous reports and the commentaries. The principle of the immunity of State officials was firmly and unquestionably established in international law, customary international law and the judgments of the International Court of Justice. It reflected the principle of the equal sovereignty of States, which was clearly stated in international law. Its purpose was to preserve national sovereignty and ensure peaceful international relations. Any subsequent conventions that departed from or avoided the principle of immunity would be without effect, and would polarize international relations in a manner inconsistent with the spirit of international law and the principle of amicable relations among States.

90. The concept of an act performed in an official capacity was closely linked with that of a State official. At the previous session of the Sixth Committee (see A/C.6/69/SR.25), his delegation had argued for expanding the definition of the immunity of State officials to include all individuals who represented the State or exercised State functions or held a position in the State, regardless of their position in the hierarchy. His delegation therefore believed that draft article 2(f) should include all official acts performed by State officials in an official capacity. The core consideration was that the act in question should be an official act of the State, and should be of a governmental or official nature.

91. In identifying criteria for such acts, the practices and legal precedents of States should not be granted the same weight as those of international judicial tribunals, particularly the International Court of Justice. State practices could shift over time, and therefore could not be used to identify the scope of a given concept. While national courts dealt directly with issues regarding immunity, the practices and rulings of international courts were clearer and more consistent, and could make a more valuable contribution to deliberations on the topic. His delegation hoped that the Special Rapporteur's forthcoming report would not neglect procedural issues and would take a comprehensive approach, including the broader issues that remained under discussion. The comments of States should be reflected in the report, in the deliberations of the Commission and in the resulting recommendations and draft articles.

92. **Ms. Özkan** (Turkey), addressing the topic of provisional application of treaties, said that provisional application was an important instrument of international treaty practice and deserved analysis by the Commission. The purpose of the study should not be to persuade States to use that mechanism; rather, it should provide a practical guide to its various aspects. Her delegation therefore welcomed the guidelines option favoured by the Special Rapporteur and agreed that the drafting of model clauses could be of practical importance in that context. She highlighted the importance of domestic law, noting that it was up to individual States to determine whether or not their legal systems allowed for provisional application. A comparative study on domestic provisions relating to provisional application would accordingly be useful for proper consideration of the topic.

93. Turkey shared the view that the Special Rapporteur needed to substantiate his conclusion that the legal effects of provisional application were the same as those stemming from a treaty after its entry into force. He had indicated in his first report that "provisional application" and "provisional entry into force" were not synonymous and referred to different legal concepts, but further clarification would be appreciated. His intended further study of the relationship between provisional application and other provisions of the 1969 Vienna Convention should consider article 19, on reservations, as being particularly relevant.

94. As for the provisional application of treaties involving international organizations, it would be appropriate first to examine related questions with regard to treaties concluded by States. Lastly, the reference in draft guideline 2 to "a resolution adopted by an international conference or by any other arrangement between the States or international organizations" should be clarified; draft guideline 4 could be further elaborated; and, in draft guideline 5, further clarification would be welcome on whether the entry into force in question was that of the treaty itself or the entry into force in respect of one State.

95. *Mr. Charles (Trinidad and Tobago) resumed the Chair.*

96. **Ms. Bodenmann** (Switzerland) said that her delegation had taken note of the draft principles provisionally adopted by the Drafting Committee on the protection of the environment in relation to armed conflicts and would welcome their further clarification. The topic needed to be more clearly spelt out and further developed. International humanitarian law provided a valuable basis which should be adequately reflected in the elaboration of new and specific protection regimes.

97. Noting that the natural environment was protected under international humanitarian law from direct attacks so long as it was not a military objective, she said that in assessing attacks on legitimate military targets in accordance with the principle of proportionality, incidental harm to the natural environment needed to be taken into account and that the prohibition against destroying or seizing property except where required by imperative military necessity also applied to the natural environment. Her delegation

therefore welcomed the explicit prohibition on attacks against the natural environment by way of reprisals.

98. Given that, under Additional Protocol I to the 1949 Geneva Conventions, the use of methods or means of warfare "which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment" was prohibited, in non-international armed conflicts, where there was no specific conventional rule to protect the environment, customary international law provided some rules whose scope could be made more precise or expanded. Switzerland was also interested in the concept of "protected zones" proposed in the draft principles: they could help to operationalize and strengthen the concept of demilitarized zones described in article 60 of the aforementioned Protocol, in both international and non-international armed conflicts. It would be interesting to clarify the differences and possible synergies between the two concepts.

99. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, she recalled the view expressed by her delegation in 2014 that, given the broad definition of a State official, which included both persons representing the State and persons exercising State functions, it would be particularly important to clearly circumscribe the type of conduct for which immunity *ratione materiae* could be invoked. The Commission had now defined the material scope of such immunity, which under draft article 6, paragraph 1, of the draft articles provisionally adopted by the Drafting Committee in its report (A/CN.4/L.865), applied only with respect to acts performed in an official capacity; under draft article 2 (f), such an act was "any act performed by a State official in the exercise of State authority".

100. Since the most recent draft articles confirmed the broad nature of immunity *ratione materiae* rather than limiting its scope, three questions needed to be addressed. First, would the conduct of a State official carried out *ultra vires* fall within the scope of such immunity? Secondly, would the conduct of a private military or security contractor working for the State fall within the scope of such immunity, since, under article 5 of the articles on State responsibility, they could be considered to have been "empowered by the law of that State to exercise elements of the governmental authority"? Thirdly, would the conduct of a person holding no official position within the State but acting under its de facto direction or control fall within the scope of such immunity? Neither the definition of State official adopted in 2014 nor the definition of an "act performed in an official capacity" adopted in 2015 appeared to preclude that possibility. She noted that the broad scope of immunity *ratione materiae* could be narrowed down by limitations and exceptions, but that aspect of the topic still remained to be addressed by the Commission. A very broad definition of the scope of such immunity carried a risk, even if later qualified by specific exceptions. Exceptions to a general rule tended to be construed narrowly, and then again it was difficult to foresee the kind of scenarios that might arise in the future. Since the Commission's work on the topic was still ongoing, her delegation's comments remained provisional.

101. **Mr. Bickerton** (New Zealand) said that all States collectively shared an interest in the topic of the protection of the environment in relation to armed conflicts, as it was not one that could be confined to particular areas or conflicts. New Zealand therefore welcomed the broad scope of the Commission's work, which recognized harm to the environment, irrespective of the parties to or the location of the armed conflict, or whether the conflict was international or non-international. His delegation supported a broad working definition of the terms "armed conflict" and "environment" for the time being, until they could be defined in a manner consistent with the purpose of the Commission's work.

102. His delegation supported draft principle 4 and encouraged the Commission to adopt it provisionally at its next session. The latest draft of the Military Manual of New Zealand explicitly prohibited reprisals against the natural environment, in line with the 1992 manual currently in force. Indeed, the draft manual went further than the current manual in that it also prohibited members of the New Zealand Defence Force from attacking any part of the natural environment that was not a military objective or demanded by military necessity, as well as from the use of methods or means of warfare which were intended, or might be expected, to cause widespread, long-term and severe damage to the environment, in conformity with article 55 of Additional Protocol I to the Geneva Conventions. New Zealand encouraged all States that had not yet done so to adopt similar national practices. His delegation continued to support the inclusion in the Commission's future reports of the question of reparation and compensation by those responsible; it

might be useful in that regard to draw on the language of Principle 13 of the 1992 Rio Declaration on Environment and Development.

103. **Mr. Sandoval Mendiolea** (Mexico) said that the topic of protection of the environment in relation to armed conflicts was of special relevance and that there was a general obligation for States to protect the natural environment, as set out in draft principle II-1. His delegation supported the Special Rapporteur's approach in favour of draft principles that reaffirmed the scope and specific characteristics of that general obligation before, during and after armed conflict and included a reference to the principles of distinction, proportionality, military necessity and precaution. The term "natural environment" merited further study in view of the importance of ensuring a balance between the rules of international humanitarian law and those of international environmental law. Moreover, given the disastrous humanitarian and environmental consequences of the use of nuclear weapons, his delegation agreed that the Commission's work should include a reference to the environmental consequences of the use of certain weapons. He reiterated Mexico's readiness to continue collaborating with the Commission on the topic, which had been notably advanced by the work of the Special Rapporteur.

104. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, he said his delegation agreed that it could not be seriously analysed without taking into account existing treaties, custom and national and international case law, within the framework of applicable general principles such as the sovereignty of States. Through the Special Rapporteur's analysis of national and international judicial practice, treaty-based practice and the Commission's previous work, an approach was being developed that would encompass the multiplicity of views and doctrines expressed. While noting that countries with both common law and civil law traditions were being taken into account, his delegation considered, however, that a broad transnational approach should be explored that would also address the practice of States outside North America and Europe. Moreover, the analysis of international judicial decisions should focus on the particular characteristics of each case and should not confuse the effects of immunity *ratione materiae* with those of immunity *ratione personae*.

105. In the draft articles, his delegation considered it useful to have a definition of an "act performed in an official capacity", given that the object was to provide a practical guide. The definition should be interpreted teleologically and might include a descriptive and non-exhaustive list. The definition contained in draft article 2 (f), as proposed by the Special Rapporteur in her fourth report (A/CN.4/686), should say "might constitute a crime" rather than "constitutes a crime" since immunity, as a procedural barrier to determining the criminality of the act, would not allow its criminal nature to be ascertained without a trial. With regard to acts constituting serious international crimes, his delegation agreed that they should be addressed from the standpoint of limitations and exceptions.

106. Further work would indeed be welcome on that subject; its importance was brought out by the use of the model "single act, dual responsibility", which highlighted how far the introduction of the criminal dimension prevented the automatic application of State responsibility. His delegation agreed with the deletion in article 6 , paragraph 3, of the word "former" in the reference to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, since it considered that the term would apply only if *ratione materiae* and immunity *ratione personae* were mutually exclusive; however, the understanding was that they were complementary and could operate at the same level, notwithstanding that evidence of one was sufficient to recognize immunity.

107. On the topic of the provisional application of treaties, his delegation agreed with the Special Rapporteur that the provisional application of a treaty generated the same legal effects as those that would stem from it if it were in force. The rules on the responsibility of States for internationally wrongful acts were therefore applicable *mutatis mutandis* in cases of provisional application. It was nevertheless of interest to study the question of reciprocity and the possible nullification of a treaty in accordance with the Vienna Conventions. As for the relationship between provisional application and the domestic law of States, that issue had been settled and there was therefore no need for an exhaustive comparative study of the various legal systems. It would suffice to reaffirm the sovereign power of each State to regulate provisional application, where appropriate and in accordance with its constitutional law, without prejudice to the provisions of articles 18 and 27 of the 1969 Vienna

Convention. His delegation considered that the analysis of the relationship between article 25 and other provisions of that Convention offered a practical way of fully and truly understanding the scope of the legal effects of provisional application and therefore urged the Special Rapporteur to continue such an analysis, taking into account other provisions of that instrument, including those on reservations.

108. Of the utmost importance also was the analysis of the provisional application regime in respect of international organizations, especially since the 1986 Vienna Convention had still not entered into force. While agreeing that the rule on provisional application contained in article 25 of that Convention reflected a customary norm, his delegation did not consider that the same could be said of all its articles. He invited the Special Rapporteur to include in her next report a more detailed analysis of the practice of regional international organizations and of multilateral treaty depositary functions in relation to provisional application. Lastly, as the draft guidelines on the topic were still being discussed by the Drafting Committee, his delegation would refrain from commenting on them, except to say that the starting point for their elaboration should be article 25 of the 1969 Vienna Convention and that they should focus on the legal effects of provisional application.

109. **Ms. Palacios Palacios** (Spain), commenting on the topic of protection of the environment in relation to armed conflicts, said that the many debates to which it had given rise attested to its difficulty, but also perhaps to its lack of maturity. Her delegation continued to have doubts about the treatment initially proposed by the Special Rapporteur, distinguishing between preventive measures, those applicable during armed conflict and subsequent measures, since many of the draft principles were applicable to each of those three phases.

110. Turning to the legally complex and politically sensitive topic of immunity of State officials from foreign criminal jurisdiction, she noted the slow but steady progress achieved by the Special Rapporteur and the value of the debates thereon within the Commission. Her delegation recognized the need to include the definition of an "act performed in an official capacity", but welcomed the deletion of its qualification in the report of the Drafting Committee (A/CN.4/L.865) as a crime in respect of which "the forum State could exercise its criminal jurisdiction". Immunity from jurisdiction, to whomever it might be applicable and regardless of the jurisdiction (civil, criminal or administrative), presupposed the existence of jurisdiction of the forum State. Questions concerning the existence of immunity arose only when the courts of that State had jurisdiction. Moreover, such immunity was proclaimed in such benchmark texts as the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations without its being spelt out that the immunity was in respect of conduct against which the receiving State could exercise its jurisdiction.

111. Her delegation also welcomed the Drafting Committee's more systematic approach to the "scope of immunity *ratione materiae*", as well as the deletions and new wording proposed in draft article 6. She noted that, once the issue of limitations and exceptions to immunity had been addressed in 2016, the crucial question would arise of the relationship of immunity to international crimes and the jurisdiction of the International Criminal Court.

112. With regard to the topic of the provisional application of treaties, the reference in draft guideline 1 to the internal law of States or the rules of international organizations ran counter to the approach followed in international treaty law and, generally, in international law. The proviso that such internal law or rules must not prohibit such provisional application violated a principle enshrined in article 27 of the 1969 and 1986 Vienna Conventions according to which a State or an international organization party to the treaty could not invoke, respectively, the provisions of its internal law or the rules of the organization as justification for its failure to perform the treaty. Once the State or international organization had agreed to provisionally apply a treaty, it could not find thereby a justification for failing to do so.

113. Her delegation questioned the usefulness of draft guideline 2 and did not even consider it necessary to give examples of ways of establishing the agreement for provisional application in practice, other than under the terms of the treaty; in practice, there did not appear to be any problems in that regard. As for draft guideline 3, it was surprising that, in a text intended to be in line with the Vienna Conventions, the means of expressing consent to be bound by a treaty should not be exactly the same. The Vienna Conventions referred to ratification, acceptance, approval or accession; draft guideline 3 omitted any mention of approval.

114. The statement in draft guideline 4 that "provisional application of the treaty has legal effects" was puzzling and was not matched by any provision in either the Vienna Conventions or the internal law of Spain. It could be said, however, that such a stipulation served the educational purpose for which the draft guidelines appeared to have been designed, in that it pointed to how provisional application entailed the effective implementation of all or part of the provisions of a treaty prior to its entry into force. In draft guideline 5, it would be advisable to introduce the preambular provision usually found in treaty law, in order to safeguard any other mode of termination that might be agreed upon by the parties. That would cover the possibility of termination after a given period of time if the treaty did not enter into force, as was sometimes provided for in treaties.

115. In view of the huge differences between internal laws, the inclusion of model clauses in the draft text would be complicated. With regard to the provisional application of treaties concluded by international organizations, it might be appropriate to take into account the practice followed in the case of so-called mixed agreements between the European Union and its member States, on the one hand, and a third State on the other, whereby only those parts of the agreement that pertained to the competences of the Union were applied provisionally. Her delegation was confident that the questions she had raised would be addressed, along with others, such as whether all treaties were susceptible of provisional application; whether in some cases provisional application was not possible for reasons of treaty content or the implications of such provisional application; whether provisional application should be *inter partes* or only for one State; whether the period of provisional application should be taken into account in determining the termination date of treaties of pre-established duration; and lastly, whether the termination of provisional application when not followed by the entry into force of a treaty produced effects *ex tunc* or *ex nunc*.

116. **Mr. Issetov** (Kazakhstan) said that the Special Rapporteur's fourth report (A/CN.4/686) on the topic of immunity of State officials from foreign criminal jurisdiction clearly showed that State practice was not uniform and that it was not easy to identify unambiguous rules. His delegation agreed with the Special Rapporteur that an "act performed in an official capacity" needed to be defined for the purposes of the draft articles in the interests of legal certainty.

117. Turning to the topic of provisional application of treaties, he welcomed the work of the Commission and the Special Rapporteur and expressed his delegation's confidence that the scrutiny of the internal laws of different States could provide greater insight into how they viewed the nature of provisional application as a legal phenomenon. While article 25 of the 1969 Vienna Convention was the basis for the legal regime of provisional application, it did not answer all the related questions. He hoped that the Commission would provide guidance to States on such questions as whether only negotiating States or other States as well could agree on provisional application of treaties, whether an agreement on provisional application must be legally binding and whether such an agreement could be tacit or implied.

118. It would also be helpful if the Special Rapporteur could further substantiate his conclusion that the legal effects of provisional application were the same as those that followed the entry into force of the treaty and also investigate whether the termination or suspension processes were identical for both regimes. His delegation would also welcome further consideration of the legal regime and modalities for the termination and suspension of provisional application, and of possible grounds for such termination or suspension. It was important to identify the types of treaties and provisions in treaties that were often provisionally applied and to ascertain whether or not provisional application was treated in the same way in particular types of treaties. His delegation agreed on the usefulness of the development of draft model clauses in the context of the draft guidelines and looked forward to following the work on all the topics under consideration.

119. **Ms. Sarenkova** (Russian Federation) said that the topic of immunity of State officials from foreign criminal jurisdiction was a key topic on the Commission's current agenda. Her delegation agreed on the basic principles set out for the application of immunity *ratione materiae*, which only applied to acts performed in an official capacity and was not time bound. Of the draft articles provisionally adopted by the Drafting Committee, draft article 6, paragraphs 1 and 2, had her delegation's support, while paragraph 3 should highlight the applicability of such immunity to persons enjoying immunity *ratione materiae* and

ratione personae after they had left office. Failure to do so could lead to questions being raised, such as whether the immunity of former Heads of State, Heads of Government and Ministers for Foreign Affairs would be subject to rules developed by the Commission with respect to immunity *ratione materiae*. Referring to the concept of an "act performed in an official capacity", she said that her delegation shared the Commission's view that it was not necessarily the same as an *acta jure imperii*, in contradistinction to an *acta jure gestionis*. The latter could be performed by an official in an official capacity and would therefore be covered by immunity from foreign jurisdiction; the lawfulness or otherwise of the act was not a consideration.

120. As the Commission had noted, the issue of immunity was procedural in character and should be addressed in *limine litis* prior to its being established whether or not the act was lawful. The articles on responsibility of States for internationally wrongful acts offered guidance on what acts could be attributed to a State and were thus useful for understanding the exact nature of an "act performed in an official capacity". The fact that an act was performed by a person acting in an official capacity did not mean that the State to which the person belonged must bear responsibility for that act. For that to be so, it would be necessary to establish a breach of a State obligation under international law, with due regard for any circumstances under which the act might not be considered unlawful.

121. In draft article 2 (f), an "act performed in an official capacity" was defined as any act performed by a State official in the exercise of State authority, but the question then arose as to whether that remained true even when State officials exceeded their authority. According to the commentary to article 7 of the articles on responsibility of States, such acts should be treated separately from acts that were so divorced from official functions that they could be said to be acts by private persons. Her delegation therefore proposed the following rewording of that provision: "an act performed by an official in the context of exercising State authority". It would, however, be better simply to omit any definition; it was not by chance that international law contained no definition of what constituted an act performed in an official capacity.

122. It was advisable to maintain some flexibility in the matter. The stipulation contained in paragraph 1 of draft article 6 that State officials enjoyed immunity *ratione materiae* only with respect to acts performed in an official capacity was sufficient, particularly if accompanied by a detailed commentary. Her delegation urged the Commission to focus at its next session on procedural issues, which played a vital role in the application of immunity of State officials.

123. Turning to the topic of provisional application of treaties, she said that various aspects of the operation and effect of provisional application were determined by its legal nature, which therefore needed to be clarified. That should be the starting point for consideration of its procedural aspect. The specificity of provisional application should be established, as compared with entry into force, which should be regarded as a norm for a treaty, indeed as its essential raison d'être. The validity of a treaty entailed the fullest legal consequences for the parties thereto. The purpose of provisional application was neither to stabilize nor to destabilize treaty relations; functionally, it was a step towards the entry into force of a treaty allowing the provisions of that treaty to be applied prior to entry into force, as was highlighted by the words "pending its entry into force" in article 25 of the 1969 Vienna Convention.

124. Questions remained, such as whether there were time limits to provisional application and whether one could truly speak of provisional application when it was used without the intention of having a treaty enter into force. A comprehensive study should be made on the topic, embracing all the possible forms that could be taken by provisional application. Her delegation was pleased to note that the Commission had begun its analysis of the validity of various provisions of the 1969 Vienna Convention from the perspective of provisional application and looked forward to the further development of that analysis, which should focus on the applicability of articles 17, 19 to 23, 30, 41 and 60. Her delegation agreed that treaties between international organizations and States or between international organizations should be subject mutatis mutandis to the same regime with regard to provisional application as treaties between States.

125. **Ms. Jacobsson** (Special Rapporteur on protection of the environment in relation to armed conflicts) thanked the members of the Committee for their insightful comments, which had given her a clearer view of the position of States regarding the topic entrusted to her. Those comments would be helpful to her as she prepared her third report and the

commentaries thereto for consideration by the Commission at its next session and would be studied very carefully by herself and by the Commission. She stressed the utmost importance of the information provided by States on their practice and legislation, particularly in regard to her own topic, and encouraged them to submit information in response to the questions set out in chapter III of the Commission's report (A/70/10). She would also welcome any other relevant information they might wish to convey to her.

126. **Ms. Escobar Hernández** (Special Rapporteur on immunity of State officials from foreign criminal jurisdiction) said that she was grateful for the opportunity to interact with members of the Committee and thanked them for their comments, which would be duly taken into account. She had noted, in particular, that the majority of speakers favoured the removal in draft article 2 (f) of the reference to the potentially criminal nature of an act performed by a State official. The position expressed by the representatives of Romania and Mexico that that provision must be understood teleologically was relevant only to that draft article which, by the very nature of the topic, must address the potentially criminal nature of the act. She recognized the need, however, to amend the wording of the definition in order to guard against any misinterpretation; she would accordingly propose changes to draft article 2 (f) in her next report.

127. She had also taken due note of comments on the need to keep a direct link between the person performing the act and the act performed in an official capacity, while studying in greater depth such issues as *ultra vires* acts and the concept of de facto officials. She would be addressing those issues in her fifth report in relation to the question of limits and exceptions to immunity, with due reference also to concerns expressed on that question. She would consider in particular whether international crimes should be treated as exceptions or included within the scope of immunity from foreign criminal jurisdiction. She would take account to the fullest possible extent of the practice of States belonging to different regions and with different legal regimes and would endeavour to reflect their concerns, as expressed both orally and in writing. She reminded members of the Committee that the contributions of States were essential for the work of the Commission in the codification and progressive development of international law and called on all States that had not yet done so to provide in good time information on their relevant legislation and practice.

128. **Mr. Singh** (Chairman of the International Law Commission) said that the views expressed by members of the Committee, both orally and in writing, formed an integral part of the working methods of the Commission, on whose behalf he wished to thank all delegations that had participated in the debate. He reminded them that specific aspects on which the comments of Governments were particularly welcome were listed in chapter III of the Commission's report on the work of its sixty-seventh session (A/70/10). He also renewed the request to Governments to submit their comments on the draft articles on the protection of persons in the event of disasters adopted on first reading; they would be of invaluable assistance for the second reading. He assured the members of the Committee that the Commission, as a collective body, would take into account all their comments and observations as it advanced further in its work.

The meeting rose at 1.20 p.m.