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Chair: Mr. Holovka (Vice-Chair) . . . . . (Serbia)

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15-19643 (E)

In the absence of Mr. Charles (Trinidad and Tobago), Mr. Holovka (Serbia), Vice-Chair, took the Chair.

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 (A/70/10) (*continued*)

1. **The Chair** invited the Committee to continue its consideration of chapters IX to XI of the report of the International Law Commission.

2. **Ms. Telalian** (Greece), referring to the topic of the protection of the environment in relation to armed conflicts, said that the Special Rapporteur's second report (A/CN.4/685) paved the way for the identification of a complete set of principles. In subsequent reports, she should focus more on the interrelationship between the information she provided and the content of the proposed draft principles, especially with regard to the general principles of international environmental law. It was indeed timely to reflect on the applicability during armed conflict of the principles identified by the Special Rapporteur in her preliminary report (A/CN.4/674 and Corr.1), with particular attention to how they operated in wartime and to how they interacted with the principles of international humanitarian law referred to in the draft principles. Rule 44 of the 2005 study by the International Committee of the Red Cross on customary international humanitarian law deserved respectful consideration in that regard, given that it proposed a coordinated application of the obligation to take precautions in attack, as provided under article 57 of 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), and the precautionary principle of general environmental law.

3. Consideration should also be given to whether there might be common points between the duty of care enunciated in article 55 of Additional Protocol I and the no-harm rule of environmental law, which contained a due diligence standard, and to whether the precautionary principle might be useful to a State in determining the required level of care. A subsequent report of the Special Rapporteur should also consider the extent to which the international humanitarian law threshold of widespread, long-term and severe damage to the environment differed from that of "significant harm" embodied in the no-harm rule. It would be important, in the commentary to the "Purpose" paragraph of the draft principles, to elucidate the meaning of "damage to the environment" and to provide a comprehensive definition of "preventive measures" and "remedial measures". Her delegation would submit additional comments on such measures via the Committee's PaperSmart portal.

4. In addition to the general principle of care to protect the environment against widespread, long-term and severe damage, it might be useful to set out an obligation that was both more focused and more general, in the sense that it referred not just to the prohibition of serious damage. The relevant wording might be inspired by rule 44 in the aforementioned study by the International Committee of the Red Cross. While the draft principles should focus on general rules and standards, the commentary should also explore, in an indicative manner, some strictly regulated methods of warfare that were more likely than others to affect the environment adversely, such as the use of incendiary weapons or attacks against works or installations containing dangerous forces in cases where the latter were military objectives.

5. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation agreed with the Special Rapporteur's conclusion that the distinction between "acts performed in an official capacity" and "acts performed in a private capacity" was not equivalent to the distinction between "*acta jure imperii*" and "*acta jure gestionis*" or to the distinction between lawful and unlawful acts. While the identification of acts performed in an official capacity might ultimately be done on a case-by-case basis, the inclusion in the draft articles of a definition of the notion, encapsulating the main characteristics of such acts, would, if combined with well-crafted commentaries, greatly assist practitioners, including national courts. In that connection, her delegation was inclined to agree with the Drafting Committee's reformulation of draft article 2 (f) and looked forward to reviewing the commentary on that paragraph.

6. As noted by the Special Rapporteur in her fourth report (A/CN.4/686), the view that international crimes such as torture were devoid of any official or functional dimension in relation to the State was at odds with the facts. Whether or not acts of State officials were considered to have been performed in an official capacity did not depend on their legality in

international or domestic law, but on how and why they were performed. The effects of acts that were crimes under international law should be further explored from the standpoint of possible exceptions to immunity, rather than in terms of the definition of what constituted an act performed in an official capacity. Any definition of such acts adopted by the Commission should not prejudice future consideration of the matter. Her delegation would submit its comments on draft article 6 in writing via the PaperSmart portal.

7. Greece continued to support the Commission's work on the topic of provisional application of treaties, which touched on questions of both doctrinal and practical interest. It acknowledged the merit of a concise set of draft guidelines for the purpose of providing States and international organizations with a practical tool and was open to the possibility of drafting model clauses that could further assist States in the negotiation and conclusion of treaties. The reaffirmation in draft guideline 3 as proposed by the Special Rapporteur in his third report (A/CN.4/687) of the general rule set out in article 25 (Provisional application) of the Vienna Convention on the Law of Treaties was welcome and should be the point of departure for the Commission's consideration of the topic. Given that the Drafting Committee's decision not to specify which States might provisionally apply a treaty marked a departure from the language used in article 25, her delegation would welcome a more thorough analysis of the cases in which States other than the negotiating States had provisionally applied a treaty.

8. With regarding to draft guideline 1, it would be advisable to consider the possibility of adding the qualifying phrase "by States and international organizations" in order to emphasize that the scope was broad enough to take account of the significant amount of practice developed by international organizations in relation to the provisional application of treaties. Draft guideline 2 accurately reflected the purpose of the draft guidelines, which was to provide guidance to States on provisional application of treaties without seeking to encourage such application. Her delegation could accept a reference to other rules of international law, in addition to article 25 of the Vienna Convention, provided that the commentary clearly indicated which rules were meant.

9. Given the silence of the Vienna Convention on the key issue of the legal effects of provisional application, the Special Rapporteur's view that those effects were the same as those stemming from a treaty in force should be further substantiated, taking into account various considerations. On the one hand, it would be not be desirable to allow States to hide behind the fact that a treaty was being provisionally applied as a means of denying the obligations resulting from provisional application. On the other hand, it should not be forgotten that, in accordance with article 25, paragraph 2, of the Vienna Convention, provisional application allowed for a simplified means of termination and also provided a way of circumventing national constitutional requirements regarding the expression of consent to be bound by a treaty. That might give rise to serious concerns, especially in situations where the treaty continued to be applied provisionally for a prolonged time.

10. **Mr. Pírez Pérez** (Cuba) said that his delegation found it worrying that the Commission's work on the topics currently under consideration and on the codification of international law with respect to pressing problems of humankind had not found a concrete reflection in the Sixth Committee. With regard to the topic of protection of the environment in relation to armed conflicts, he noted that such protection should be a constant concern of all inhabitants of the planet, not only from a practical point of view but also from a legal standpoint. Armed conflict often caused irreversible damage, and the Commission was to be commended for its timely efforts to establish the obligations that arose with regard to protection of the environment in conflict situations. The identification of clear principles that would apply to environmental protection before, during and after armed conflict could have a valuable preventive effect. At the national level, Cuba's legislation on national defence made provision for protection of the environment.

11. His delegation welcomed the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction" and reaffirmed its support for any initiative aimed at preserving the immunity of State officials on the basis of international conventions and principles of international law. From a conceptual point of view, there was a clear difference between the application of immunity and impunity. Article 31, paragraph 4, of the Vienna Convention on Diplomatic Relations established an excellent conceptual balance in that regard, which might serve as a point of reference for the further development of the topic.

12. The Commission should avoid the inclusion of exceptions to immunity that were not reflected in current international law and should also consider any exceptions that the domestic legislation of States might establish. Neither the principle of universal jurisdiction nor the obligation to extradite or prosecute should ever apply in respect of officials who enjoyed immunity. Cuban legislation clearly established the application of national jurisdiction in the case of officials who enjoyed immunity when crimes had been committed abroad, and the country's code of criminal procedure set out procedural requirements for high-level national officials enjoying immunity from criminal jurisdiction.

13. With regard to the topic of provisional application of treaties, the legal basis for a decision to provisionally apply a treaty could be found in the Vienna Convention on the Law of Treaties, specifically in articles 24 and 25, and in the principle of autonomy of the parties, which established by agreement the scope and duration of the obligations they would assume and determined the modalities for their termination. Article 26 of the Vienna Convention was also applicable to the legal concept of provisional application inasmuch as the obligations arising from such application would be governed by the principle of *pacta sunt servanda*, since they constituted a commitment by the parties to fulfil their obligations in good faith.

14. In Cuban practice, a provisional application clause applied only where the parties had agreed to immediate implementation, which was sometimes desirable in view of the circumstances in which treaties were concluded. Such application was not a substitute for entry into force, but for Cuba it did have the same legal effect. In Cuba it was ensured that treaties with a provisional application clause would, in most cases, enter into force. With regard to the interpretation of treaties, his delegation remained of the view that, through the sovereign act of entering into an international agreement, States parties assumed, in complex sociopolitical and economic contexts, certain rights and obligations in order to achieve a specific end.

15. **Mr. Adamov** (Belarus) said that the Commission's work on the topic of protection of the environment in relation to armed conflicts was timely, as there was a need to systematize the rules of the law of armed conflict as they pertained to environmental protection, on the one hand, and the rules of environmental law as they applied in situations of armed conflict, on the other. His delegation believed that the discussions on the topic reflected States' growing concern at the use during armed conflict of methods and means that were capable of causing serious damage to the environment. In that context, it was appropriate to establish clear and robust rules on the responsibility of parties to an armed conflict to prevent harm to the environment and repair any damage done. It would be difficult for his delegation to accept, however, that environmental law had *lex specialis* status in relation to armed conflicts or to consider other areas of international law, such as human rights law, within the scope of the topic.

16. With regard to the draft principles proposed by the Special Rapporteur in her second report (A/CN.4/685), his delegation shared the concerns expressed by some members of the Commission regarding the description of the environment as civilian in nature. The concept of "civilian object" had a specific meaning under international humanitarian law and should not be extended to all theatres of armed conflict, such as the natural environment. Draft principle 2 should be brought more into line with the fundamental rules of the law of armed conflict, and the principle of "environmental considerations" in draft principle 3 should be further developed, possibly by linking it with humanitarian principles and drawing a clearer distinction between military objectives and civilian objects. The Commission's examination of the question of designation of demilitarized zones on the basis of environmental considerations could make a tangible contribution to the progressive development of international law.

17. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, the elucidation of the legal content of the concept of an "act performed in an official capacity" could be one of the main contributions of the draft articles to the codification and progressive development of international law. In general, his delegation agreed with the Special Rapporteur's views regarding the close relationship between individual and State responsibility and considered that in the event that conduct was attributed to a State official, that conduct would, a priori, fall within the definition of an "act performed in an official capacity". By asserting the immunity of one of its officials, a State automatically assumed responsibility for the unlawful actions of that official.

18. Further elaboration on the three features characterizing acts performed in an official capacity would be of interest to his delegation, particularly in

relation to the often expressed view that acts of a criminal nature could not be defined as part of the State's function or as elements of governmental authority. It was not appropriate to identify the criminal nature of the act as one of the defining features of an act performed in an official capacity. The idea was implicit in the draft articles and its specific identification in the definition of such acts could lead to illogical conclusions, as had been noted in the Commission's discussion. With regard to draft article 6, his delegation looked forward to further work on the temporal aspects of the application of immunity *ratione materiae*, particularly as it related to immunity *ratione personae*. It had some doubts about paragraph 3 of that draft article, however, as it might be misconstrued to mean that two different types of immunity might arise in respect of the same act performed by the same person, depending on whether the issue of immunity was raised during or after an official's term of office. A more logical approach would be to consider that immunity *ratione personae* would apply to all acts performed by the individual, irrespective of when the question of criminal responsibility arose.

19. His delegation shared the Special Rapporteur's view on the topic "Provisional application of treaties" that the Commission's aim should be to provide practical recommendations to States and possible model language with regard to provisional application of treaties. All due consideration should be given to the domestic legislation and practice of States and to the practice of international organizations, although clearly that practice was not uniform. His delegation also shared the Special Rapporteur's assessment that the legal effects of a provisionally applied treaty were, in principle, the same as those of its entry into force. It would be interested in further exploration, perhaps in the commentary to the draft guidelines, of whether the provisional application of an international treaty would entail any express or implicit obligation on the part of the provisionally applying State with respect to the principle of legal certainty.

20. Termination of the provisional application of a treaty was certainly permissible from the standpoint of the law of treaties. At the same time, his delegation would not exclude the possibility of identifying a set of obligations based on international practice and the general principle of good faith and predictability. Such obligations might include, for example, providing timely advance notice of a State's intention to terminate provisional application. It would be important to undertake a more detailed and comprehensive analysis of situations in which provisional application was allowed to the extent that it was not inconsistent with the domestic legislation of States. Such situations could create considerable uncertainty in treaty relations between States, particularly with respect to the scope of the rights and obligations arising from provisional application. Further consideration should also be given to the legal nature and consequences of the provisional application of multilateral treaties containing rules on provisional application and the intention not to apply such a treaty provisionally prior to its entry into force.

21. **Ms. Shefik** (United Kingdom), referring to the topic of protection of the environment in relation to armed conflicts, said that the Commission should not seek to modify the law of armed conflict, which applied as *lex specialis* during armed conflict, nor should it broaden the scope of the topic to examine how other legal fields, such as human rights, interrelated. With regard to the future of the topic and its eventual outcome, the preparation of non-binding guidelines or principles could be useful, but her delegation remained unconvinced of the need for new treaty provisions in the area. As to the draft principles provisionally adopted by the Drafting Committee (A/CN.4/L.870), they should be more closely aligned with the existing law of armed conflict. The commentaries should make it clear that there was no basis for treating the environment as a whole as a civilian object for the purposes of the laws of armed conflict. In addition, her delegation could not accept the blanket prohibition against reprisals in draft principle II-4, which did not reflect the current state of customary international law and reservations by States to article 55, paragraph 2, of Additional Protocol I, and it remained doubtful about the legal basis for draft principle I-(x) and its practical application during armed conflict.

22. In more general terms, her delegation supported an approach that excluded certain subject matter from the scope of the topic, including the exploitation of natural resources, the protection of cultural heritage and areas of cultural importance and the effect of particular weapons. Internal disturbances and tensions such as riots and law enforcement activity should also be excluded.

23. The topic of immunity of State officials from foreign criminal jurisdiction was of genuine practical

significance, and a clear, accurate and well-documented proposal by the Commission would be very valuable. The Commission's work to date had encompassed elements that reflected existing law as well as elements that represented progressive development of the law. Accordingly, the appropriate outcome of the Commission's work was likely to be a treaty, inasmuch as it contained proposals for the progressive development of law. The success of such an approach would depend on the extent to which the text was generally acceptable to States. Her delegation therefore encouraged the Commission to work towards an outcome that reflected a high degree of consensus.

24. The provisional adoption of draft articles 2 (f) and 6 was welcome, although it might be necessary to reconsider the text in the light of the commentaries. Since important aspects of the draft articles remained to be developed, including those relating to possible exceptions from immunity and the procedures for claiming and waiving immunity, her delegation's comments should be regarded as provisional. With respect to exceptions to immunity *ratione materiae*, she recalled the well-known decision of her country's House of Lords in the *Pinochet* case, which had found that, for those States that had ratified it, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment constituted *lex specialis*, or an exception to the usual rule on immunity *ratione materiae* of a former Head of State, because under the Convention's definition of torture it could be committed only by persons acting in an official capacity. She was not aware of similar reasoning in judgements in respect of other treaties which required the criminalization of certain conduct and the assertion of extraterritorial jurisdiction, but she recalled another case in which immunity of State officials had been considered — the case of *Khurts Bat v. Investigating Judge of the German Federal Court* — which suggested that a plea of immunity *ratione materiae* would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State.

25. As to immunity *ratione personae* from the exercise of foreign criminal jurisdiction for those identified in draft article 3 (Persons enjoying immunity *ratione personae*), her delegation considered that the current state of international law allowed for no exceptions from immunity, other than by waiver. It was important to note, however, that the topic concerned immunity from national jurisdiction; different considerations applied to prosecutions before the International Criminal Court and ad hoc tribunals.

26. Her delegation considered analysis of State practice an important contribution to the consideration of the topic of provisional application of treaties. It favoured a flexible approach and supported the preparation of guidelines with commentaries, which could assist decision-makers at various stages of the treaty process, with due consideration of State practice, while avoiding the unnecessary prescriptiveness of draft articles or model clauses or principles. Further exploration of the relationship of provisional application to other provisions of the 1969 Vienna Convention would be valuable.

27. The question of the legal effects of provisional application was a key aspect of the draft guidelines and would have implications for the consideration of the consequences of failure to comply with obligations arising from provisional application. Draft guideline 4 as proposed by the Special Rapporteur in his third report (A/CN.4/687) therefore merited further consideration, in particular with regard to the meaning of "legal effects". In relation to draft guideline 1, her delegation welcomed the Drafting Committee's deletion of the expression "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" in its reformulation of the text as draft guideline 3. It was important to ensure consistency with article 46 of the Vienna Convention (Provisions of internal law regarding competence to conclude treaties) and to avoid any suggestion that the provisions of domestic law could be relied upon to avoid an international obligation.

28. **Mr. van den Bogaard** (Netherlands) said that the topic of protection of the environment in relation to armed conflicts raised many complex questions that would need to be addressed in the Commission's future work. His delegation welcomed the use of the term "draft principles", rather than "draft articles", as it adequately reflected the intention not to develop a new convention. It noted that the draft principles provisionally adopted thus far did not include a definition of "armed conflict"; indeed, such a definition was not needed. An attempt to define the term would unnecessarily complicate the Commission's work and could entail a risk of unintentionally lowering the

threshold for the protection of the environment and the application of international humanitarian law.

29. The provision in draft principle II-3 that environmental considerations must be taken into account when applying the rules on military necessity raised some questions. The scope of the term "rules on military necessity" was not clear. Military necessity was only one element of the relevant rules of international humanitarian law concerning the protection of specific categories of persons or objects. In addition, it was not immediately clear how environmental considerations might be applied in determining military necessity. Presumably, something either was or was not necessary to reach a military objective: it was not a question of weighing different factors. In that regard, his delegation noted that the draft principle proposed by the Special Rapporteur referred to the principle of proportionality. Clarification as to the practical operation of that principle would be useful.

30. Draft principle II-4, which referred to "the [natural] environment" as a single entity, appeared to be inconsistent with draft principle II-1, which referred to "part of the [natural] environment", suggesting that the environment was not a single entity. Underlying both draft principles was an assumption that the natural environment was a civilian object. His delegation concurred with the view that considering the natural environment as a whole as "civilian in nature" could lead to significant difficulties with regard to application of the principle of distinction.

31. A number of questions arose in that regard. For instance, how would the military use of any part of the environment affect the status of the environment as a whole? What, specifically, were the constituent parts of the environment? Might pollution occurring, for example, as a result of the exhaustion of fumes in the air be considered an "attack" on the environment? As to draft principle II-5, his delegation wondered what its added value was with respect to draft principle II-1, paragraph 3. In fact, by requiring that an area be of major environmental and cultural importance, draft principle II-5 would appear to diminish the protection afforded to the natural environment under draft principle II-1.

32. The topic of immunity of State officials from foreign criminal jurisdiction also raised difficult conceptual issues, particularly with regard to the relationship between the law on immunities and the law on State responsibility. His delegation questioned the Special Rapporteur's view that domestic legislation relating to the scope of an act performed in an official capacity should serve only as a complementary interpretive tool. Domestic legislation was part of State practice (and occasionally *opinio juris*) and would therefore be important for determining what constituted an act performed in an official capacity under customary law. The Special Rapporteur had attached more weight to national judicial practice, although she had also rightly concluded that the approach of national courts did not demonstrate a consistent pattern. An overview of national legislation, in addition to an examination of court decisions, would perhaps have yielded firmer conclusions.

33. With respect to the relationship between the law on State responsibility and the law on immunities, the issue of attribution, including in instances of *ultra vires* conduct, was particularly complex and required more in-depth analysis. An *ultra vires* act was attributable to a State under the law of State responsibility when performed by one of its organs, regardless of the nature of the act. The question that arose with regard to immunity was whether the individual appeared to act in an official capacity, not whether the act was one carried out on the instructions of his or her government. The official nature of the conduct made it an act performed in an official capacity and hence one covered by immunity. What mattered was determining what constituted an *ultra vires* act and whether such an act, although it appeared to be performed in an official capacity and thus by a State organ, was in fact an act performed in a private capacity.

34. An appropriate balance must be struck between the weight attached to the nature of the act and to that of the person performing the act. The presumption must be that a person acting in an official capacity should enjoy immunity, even if the act itself was not immediately recognizable as an official act. The notion embodied in the articles on State responsibility that States were also responsible for acts that they considered private acts but that were generally considered public acts could not be used as a means of denying immunity for acts that were performed in an official capacity but were deemed by a foreign court not to be official acts. The scope of the concept of "acts performed in an official capacity" was broader than that of "official act", and it was the former that must be covered by immunity *ratione materiae*. The

notion of dual responsibility did not entirely solve the problem, as it did not address the question of jurisdiction. Even if an official might be individually responsible for a crime for which his or her State was also responsible, a foreign court still might not have jurisdiction to prosecute the crime because of the immunity enjoyed by the official.

35. With regard to the topic of provisional application of treaties, a conceptual distinction should be maintained between, on the one hand, the means of expressing consent to be bound by a treaty with the intention of becoming a party to the treaty once it entered into force for the State concerned and, on the other hand, the provisional application of a treaty that obliged a State to give effect to treaty provisions for as long as the treaty had not entered into force for that particular State or for as long as that State had not indicated its intention not to become a party to the treaty. The same conceptual distinction was relevant for other purposes, particularly in respect of termination.

36. The provisional application of a treaty also had to be distinguished from the obligation not to defeat the object and purpose of the treaty. Although both related to the phase prior to the entry into force of a treaty, they differed in their objectives: whereas the aim of provisional application was the execution of the treaty, or parts thereof, as though the treaty were in force, the obligation not to defeat its object and purpose was intended to ensure the proper execution of the treaty from the moment it entered into force. His delegation questioned the notion that provisional application of a treaty presumed that the treaty was not in force. A multilateral treaty might well have entered into force as a result of its ratification by the requisite number of parties, although its entry into force for a particular State remained pending, in which case the State might decide to apply it provisionally. Draft guideline 5 should be adjusted to reflect that fact.

37. There could be no doubt that provisional application of a treaty had legal effects and, consequently, that a State must fulfil any obligations arising from its decision to apply a treaty provisionally. Contrary to what was suggested in paragraph 59 of the Special Rapporteur's third report (A/CN.4/687) and in his proposed draft guideline 5, any obligations incurred as a result of the provisional application of a treaty, and hence the application of *pacta sunt servanda*, might not end with the termination of provisional application of the treaty. In situations where termination of provisional application by a State would adversely affect third parties acting in good faith, obligations emanating from the provisional application of a treaty might well outlive that termination, which might in turn necessitate a transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application.

38. The Special Rapporteur's examples of the provisional application of treaties involving international organizations showed that State practice with regard to the interpretation and application of article 25 of the 1969 Vienna Convention had been characterized by flexibility. That being the case, the formulation of draft guideline 2 might be too limited. States enjoyed considerable freedom and might come to a pragmatic agreement on provisional application, including on the basis of a resolution of an international organization. Such a resolution, however, could not be equated with a formal agreement establishing provisional application. Lastly, the reference to the internal law of States or the rules of international organizations in draft guideline 1 did not seem appropriate. The topic of provisional application should be approached from the standpoint of international law and well-established practice.

39. **Mr. Logar** (Slovenia), referring to the topic of protection of the environment in relation to armed conflicts, said that his delegation supported the Commission's efforts to identify common principles for the protection of the environment before, during and after armed conflict. In so doing, it would be important to carefully consider the interrelatedness of the topic with existing rules on armed conflict and to examine the adequacy of the rules of international environmental law in the context of armed conflict.

40. Regarding the scope of the topic, the work should cover both international and non-international armed conflicts, as the latter were the most prevalent form of conflict; due attention should be paid, however, to the differences between the two types of conflict. With respect to the first temporal phase — the period before an armed conflict — his delegation would welcome the inclusion of other preventive measures in the draft principles, such as national legislation on the protection of the environment, the training of armed forces and the dissemination of instructive materials. It would also welcome additional consideration of the description of the environment as being civilian in nature, as proposed by the Special Rapporteur in draft principle 1,

contained in her second report (A/CN.4/685). Although that description was intended to characterize the environment as distinct from military objectives, it required further clarification in order to avoid ambiguity.

41. Concerning draft principle 2, while the effort to ensure strong protection of the environment in the context of armed conflict was commendable, it was important to find the right balance, taking into account *lex lata* and, where appropriate, *lex ferenda* with respect to the law on armed conflict and protection of the environment, as well as the practical characteristics of the environment that distinguished it in the context of an armed conflict from civilians and civilian objects. His delegation endorsed the view that caution should be exercised in attempting to transpose provisions of the law of armed conflict, as they applied to civilians or civilian objects, to the protection of the environment.

42. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation agreed that the definition of an "act performed in an official capacity" in draft article 2 (f) had needed redrafting in order to avoid the implication that any act performed in an official capacity was considered a crime. The draft article dealt with a key aspect of the topic and would require a thorough examination and clear understanding; a set of commentaries would prove useful in that regard. His delegation was pleased that the Special Rapporteur had addressed the relationship between official acts in the context of immunity and the rules on the attribution of State responsibility; the matter might call for additional explanation, however. On the question of whether the topic should also cover the actions of persons acting under governmental direction and control, Slovenia favoured a restrictive approach with regard to the possibility of broadening the scope of immunity.

43. The subject to be addressed by the Special Rapporteur in her fifth report, limits and exceptions to immunity, was one of the most challenging aspects of the topic. His delegation reaffirmed its view that, while the immunity of State officials from foreign criminal jurisdiction was based on the principles of the sovereign equality of States, non-intervention and the interest of States in maintaining friendly relations, it should also be addressed against the backdrop of the growing prominence of legal humanism and the fight against impunity and, in particular, through the prism of the progressive development of international law and developments in international criminal law. As a member of the International Criminal Court, Slovenia wished to underline the need for the Commission's work to remain consistent with the Rome Statute.

44. With regard to the provisional application of treaties, his delegation noted with pleasure the Special Rapporteur's proposal to consider in future reports the relationship between provisional application and succession of States with respect to treaties. It also agreed on the need to analyse further the relationship between article 25 of the Vienna Convention and its other provisions. In that respect, it might be useful to consider the applicability of the Convention's regime for unilateral termination and its consequences. With regard to the termination of provisional application, article 18 of the Convention (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) would require further analysis, as it differentiated between two manners of termination, depending on whether or not consent to be bound had been expressed. Comparison with that and other relevant provisions of the Vienna Convention could also clarify the interpretation of article 25 and provide guidance as to whether and to what extent it constituted *lex specialis* in relation to them. His delegation would reserve further substantive comment until the draft guidelines were at a more advanced stage of consideration. The addition of commentary elucidating the underlying reasoning for them would be helpful in that regard.

45. **Ms. Benešová** (Czech Republic), speaking on the topic of protection of the environment in relation to armed conflict, said that, under her country's Constitution, obligations arising from treaties relating to prohibition of the use of methods and means of warfare that caused widespread, long-term or severe damage to the environment were directly applicable to its armed forces. From her reading of the reports of the Special Rapporteur (A/CN.4/685) and the Commission (A/70/10), it did not seem clear what conclusions could be drawn from States' relevant views and practice, which were heterogeneous. That might be partly because the overall orientation and goals of the Commission's work on the topic were not clear. Before proceeding with the formulation of draft principles, the Commission should therefore clarify the current needs of the international community with regard to the topic and determine how those needs could best be addressed.

46. With respect to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation believed that the relationship between the criteria for attribution of State responsibility and those concerning immunity *ratione materiae* required further analysis. Not all of the criteria contained in articles 4 to 11 of the articles on State responsibility might be relevant to the topic. The scope of immunity *ratione materiae* covered only acts performed by State officials in their official capacity and was narrower than the material scope of the articles on attribution for the purposes of State responsibility. However, the attribution criteria concerning the conduct of State officials, including article 7 (Excess of authority or contravention of instructions), had to be taken into account when considering the immunity *ratione materiae* of State officials.

47. The question of immunity *ratione materiae* for de facto officials acting under governmental direction and control should also be thoroughly analysed, bearing in mind that the nature of the acts performed lay at the heart of immunity *ratione materiae*. An analysis of the relationship between the attribution of conduct under the articles on State responsibility and the scope of immunity *ratione materiae* should also help to clarify the complex question of limitations and exceptions to such immunity.

48. Her delegation would reserve its comments on the draft guidelines on provisional application of treaties until after they had been adopted by the Commission together with commentaries. The three reports submitted thus far by the Special Rapporteur (A/CN.4/664, A/CN.4/675 and A/CN.4/687) touched upon a broad spectrum of issues relating to provisional application. In order to ensure a successful outcome, the work on the topic should remain focused on those aspects of provisional application that were common to most treaties and on the international dimension of such application. Accordingly, attributing any relevance at the international level to the provisions of domestic law concerning provisional application of treaties would represent a significant departure from the Vienna Convention regime.

49. Clarification of many issues relating to provisional application would be a matter of interpretation of the treaty in question, in accordance with article 31 of the Vienna Convention (Application of successive treaties relating to the same subject-matter). The Commission's work, however, could help to clarify the concept of provisional application. Above all, it should make it clear that provisional application of all or part of a treaty was, in fact, application of the treaty. The nature of the rights and obligations envisaged under the treaty was not altered by their implementation on a provisional basis. Such obligations were real legal obligations, which acquired their binding character, at the latest, at the moment when provisional application commenced. Consequently, any breach of a treaty obligation while the treaty was being applied provisionally would be subject to the rules governing international responsibility. In that connection, her delegation endorsed the view expressed by the Special Rapporteur in his draft guideline 6.

50. Provisional application of a treaty was not just an option available as a unilateral choice of States or as a courtesy that States simply reciprocated; rather, it was a firm legal commitment in accordance with the *pacta sunt servanda* principle. Unilateral termination of provisional application in violation of the conditions for such termination should therefore be considered a breach of an international obligation, which would also entail international responsibility. Determining the conditions for termination would be a matter of interpretation of the treaty in question. Concerning the relationship between article 25 and other articles of the Vienna Convention, the Commission should limit its focus to situations for which there existed sufficient international practice and, in particular, to areas where analysis of that practice had revealed problems with regard to the application of articles of the Convention.

51. Her delegation would submit additional written comments on various topics via the Committee's PaperSmart portal.

52. **Ms. Badea** (Romania), referring to the topic "Protection of the atmosphere" as discussed in chapter V of the Commission's report, said that her delegation recognized the difficulties surrounding the topic and wished to commend the Special Rapporteur for his second report (A/CN.4/681). The clear definition of the term "atmosphere" could prove useful even beyond the purposes of the guidelines. With regard to the definition of "atmospheric pollution", in addition to human life and the Earth's natural environment as elements that could be endangered by atmospheric degradation, mention should be made of living resources, as in the 1979 Convention on Long-Range Transboundary Air Pollution. Her delegation fully endorsed the clear statement in draft guideline 5

of States' obligation to cooperate. Such cooperation was crucial to global efforts to protect the atmosphere.

53. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation supported the approach taken by the Special Rapporteur in her fourth report (A/CN.4/686), and in particular agreed that the conclusion that an international crime could not be regarded as an act performed in an official capacity was based on the assumption that such crimes could not be committed in exercise of elements of the governmental authority or as an expression of sovereignty and State policies. Given the nature of international crimes and the particular gravity accorded to them under contemporary international law, an analysis of the effects of such crimes in respect of immunity could be explored more fully in the context of exceptions to immunity. However, in the future work on the topic, caution should be exercised in attempting to establish whether exceptions existed, as State practice might not be uniform.

54. Her delegation had certain questions about the relevance of the "single act, dual responsibility" model proposed by the Special Rapporteur. The interrelationship between the law of State responsibility — for which attribution to a State was relevant — and immunity from criminal jurisdiction — for which attribution to an individual was relevant — should be better elucidated. With regard to the definition of an "act performed in an official capacity", the elimination of any reference to the criminal nature of the act was welcome; it was important to avoid wording that might lead to the conclusion that any act performed in an official capacity constituted, by definition, a crime. Given the complexity of the issue, her delegation would encourage a simple and flexible definition that would favour a case-by-case analysis. With respect to draft article 6, both the initial proposal of the Special Rapporteur and the proposal of the Drafting Committee were acceptable to her delegation.

55. As to the topic of provisional application of treaties, for reasons relating primarily to legal certainty, her delegation viewed such application as an exceptional and therefore limited treaty action. A comparative study of the provisions of domestic law on provisional application of treaties, as varied as they might be, could contribute to a better understanding of State practice in that regard. The will of the parties in cases of provisional application must be considered, and her delegation therefore called upon the Special Rapporteur to delve further into the question of which States might agree on the provisional application of treaties — only negotiating States or other States as well — and whether such agreements, tacit or implicit, could be legally binding. Further analysis was also needed on whether provisional application extended to the whole treaty or only to select provisions and whether the legal effects of such application could continue after its termination.

56. Future work should consider various aspects of provisional application, including the legal consequences thereof, and whether provisional application of a treaty had exactly the same effects as its entry into force. It would also be helpful to explore whether the termination and suspension processes in the two cases were the same. Her delegation encouraged the Commission to provide more guidance on whether unilateral termination or suspension of provisional application might give rise to State responsibility under customary international law. A more thorough analysis of the customary character of article 25, paragraph 2, of the Vienna Convention and its relationship with articles 19 (Formulation of reservations) and 46 (Provisions of internal law regarding competence to conclude treaties) of the Convention could also prove useful, especially for States such as Romania that were not parties to the Vienna Convention but applied it as customary international law.

57. Further examination of the provisional application of treaties by international organizations would be helpful as well, especially with regard to whether such arrangements were considered useful. In particular, her delegation would support a closer look at provisional application of headquarters agreements, which by their very nature needed to be implemented immediately. Other forms of agreement — such as the exchange of letters or diplomatic notes — should also be explored further.

58. **Mr. Hitti** (Lebanon) said that it was important to continue improving the interaction between the Commission and the Sixth Committee in order to work more effectively towards the progressive development and codification of international law. With regard to the topic "Protection of the environment in relation to armed conflicts", it was clear that such conflicts could have a devastating impact on the environment. The bombing of the Jiyeh power plant in Lebanon by the Israeli armed forces in 2006, for example, had resulted

in the release of between 10,000 and 15,000 tons of oil along the Lebanese coastline, which had also affected other parts of the Mediterranean basin. The oil spill had seriously undermined social and economic development in Lebanon and jeopardized public health and access to clean water and other natural resources.

59. His delegation welcomed the Commission's work on the topic, which had taken on even greater importance in the context of the recent adoption of the 2030 Agenda for Sustainable Development and the preparations for the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. The Commission's work would help to delineate a set of rules and principles in an area that had been marked by a lack of clarity, since there were few provisions relating to protection of the environment under the law of armed conflict and it was unclear how the rules of international environmental law applied during armed conflict. If compliance with legal rules was to be ensured, those rules must be clear and predictable.

60. His delegation supported the Special Rapporteur's three-phase temporal approach to the topic. It was important to clarify that the draft principles would apply to both international and non-international armed conflict. International humanitarian law did not currently include provisions concerning environmental protection in non-international armed conflicts, and an abstract reference to environmental protection during "armed conflict" might therefore cause confusion. The reference to "remedial measures" in the purpose of the draft principles seemed essential. As to the references to "environment" and "natural environment", it would be preferable to use a single, uniform term in order to ensure consistency. With regard to the designation of protected zones, an idea that his delegation noted with keen interest, it would be necessary to define what was meant by "an area of major environmental and cultural importance".

61. **Ms. O'Brien** (Australia) said that the topic of provisional application of treaties was of considerable practical importance to States. At the heart of the topic lay the distinction, in international law, between a treaty that was applied provisionally and one that was in force for a particular State. It was important in that regard for the Commission to give further consideration to the extent to which the legal effects of provisional application might differ, both in substance and in form, from those that arose when a treaty was in force. It would also be helpful to identify the types of treaties, and the treaty provisions, that were often the subject of provisional application and to explore the motivations behind such application.

62. Her delegation welcomed the Special Rapporteur's consideration of the intersection between article 25 of the Vienna Convention and other relevant provisions of that Convention. It was important that those provisions should be read alongside one another. For example, article 27 made it clear that a party could not invoke its internal law to justify non-performance of a treaty obligation; that article thus provided context for the interpretation of article 25. In that connection, her delegation supported removal of the reference to internal laws from draft guideline 1 as proposed by the Special Rapporteur in his third report (A/CN.4/687) in order to avoid creating the impression that States could turn to their internal laws to escape an obligation to provisionally apply a treaty. For similar reasons, the Commission's primary focus should be not on States' internal laws but on their obligations at the international level.

63. A State's domestic legal arrangements might give context to its practice, for example, by explaining why a State had not proceeded expeditiously from signature to ratification. However, the often complex distinctions between different domestic legal systems should not distract from the central enquiry into States' international legal obligations. In relation to bilateral treaties, the procedural aspects and substantive consequences of provisional application could be shaped by agreement of the parties to the treaty being provisionally applied. The Commission should ensure that the guidelines it produced did not unduly limit parties' discretion in that regard. That concern had already been addressed to a certain degree by the reference in the Drafting Committee's version of draft guideline 3 to a treaty being provisionally applied if it had been so agreed "in some other manner".

64. **Mr. Hennig** (Germany), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation was pleased that the Commission had refrained from mentioning a link with crime in the text of draft article 2 (f). It was of the view that to define an "act performed in an official capacity" by, inter alia, the criterion that such an act must constitute a crime could have been construed erroneously to mean that, by nature, any official act was a criminal act. It also appreciated the

Commission's recommendation to clarify in the commentary that the criminal nature of an act did not, in and of itself, disqualify the act from being an official act, and it welcomed the replacement of the expression "governmental authority" with "State authority", since the expression "governmental authority" could have been interpreted in an overly restrictive way that excluded legislative, judicial or even administrative acts. The absence of commentaries to the new draft articles was regrettable, as it would have enabled States to make a more substantiated assessment.

65. The matter of possible exceptions to immunity had permeated both the Special Rapporteur's fourth report (A/CN.4/687) and the Commission's discussions on the topic. The case law of international courts, particularly the International Court of Justice, provided ample evidence of the scope of immunity in international law, including any possible exceptions. In its judgment in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Court had limited exceptions to the immunity of State officials from foreign criminal jurisdiction to clear-cut cases that lent themselves to universal acceptance. One reflection seemed particularly pertinent in that context: in relations between sovereign States concerning *acta jure imperii*, national courts, which were by nature State organs, would probably not be well placed to deliver a neutral decision, unlike international courts, which did not have an allegiance to one specific State. His delegation would strongly advise against any attempt to develop the law on the issue without due consideration of State practice and *opinio juris*. Questions of immunity were politically sensitive, and it was necessary to strike an appropriate balance with regard to the sovereign rights of the States concerned. The rules of *lex lata* had shown themselves to be useful in that regard.

66. **Mr. Reinisch** (Austria), referring to the topic of protection of the environment in relation to armed conflicts, said that his delegation had taken note of the definitions proposed by the Special Rapporteur in her second report (A/CN.4/685), including a definition of armed conflict. His delegation was not convinced of the usefulness of a new definition of armed conflict for the purposes of the draft articles and reaffirmed its view that the definition used in international humanitarian law should be used. Concerning the draft principles provisionally adopted by the Drafting Committee (A/CN.4/L.870), his delegation did not consider it necessary to address the relationship between human rights and humanitarian law, which fell outside the scope of the topic. What was needed was an explanation of the relationship between environmental law and humanitarian law.

67. The introductory provision on the scope of the draft principles, which stated that they applied to the protection of the environment before, during or after an armed conflict, was far too broad and seemed to address environmental law in its entirety. Moreover, the protection of the environment was the objective of the principles, not their field of application. With regard to paragraph 148 of the Commission's report, which related to nuclear weapons and other weapons of mass destruction, his delegation believed that the draft principles should also apply to such weapons, which could unquestionably have a major detrimental effect on the environment.

68. Draft principle I-(x), which referred to the designation of protected zones in a general manner, raised problems, since State practice in the field of international humanitarian law had revealed the existence of a wide variety of protected zones, such as demilitarized zones and neutralized zones, with different legal consequences. The term "protected zone" did not yet exist in international humanitarian law, and if it were to be used its relationship with already existing special zones would have to be defined. The extent to which the designation of protected zones, in particular those declared unilaterally, would affect third States would also have to be discussed.

69. It was appropriate for the Drafting Committee to concentrate in the short term on the phase during armed conflict, which was at the core of the principles. However, the absence of a definition of the term "environment" made it difficult to assess the scope of the principles drafted thus far. It seemed that the Commission had not yet reached a clear position on whether it should address the natural or the human environment. Since the various existing instruments used different definitions of the environment, it was essential to agree on the definition that would serve as the basis for the draft principles, which otherwise could not be interpreted clearly.

70. In draft principle II-l, paragraph 2, his delegation would prefer the wording used in article 55, paragraph 1, of Additional Protocol I, which directly

addressed warfare and therefore focused more closely on conduct in armed conflicts than did the general obligation created by the current wording. Paragraph 3 also suffered from the absence of a definition of the environment. His delegation was in favour of the general prohibition of reprisals in draft principle II-4 and believed that it should apply to all forms of armed conflicts, including those of a non-international nature, particularly given the growing difficulty of distinguishing international conflicts from non-international ones and the clear tendency to apply the same rules to both.

71. The topic of immunity of State officials from foreign criminal jurisdiction was of particular practical relevance for Austria. With regard to the fourth report of the Special Rapporteur on the topic (A/CN.4/686), it should be emphasized that there were major differences between the rules governing immunity from civil jurisdiction and those applicable to immunity from criminal jurisdiction. The former related to the State as an entity, whereas immunity from criminal jurisdiction related to individuals acting on behalf of a State. Criminal responsibility of juridical persons was an exception in some States, including Austria, and applied only for certain crimes. Accordingly, references to State immunity from civil jurisdiction, as established under the United Nations Convention on Jurisdictional Immunities of States and Their Property, were of limited help in the discussion of the topic.

72. The issue of criminal jurisdiction for acts of officials of a foreign State had to be addressed, irrespective of whether the acts concerned were acts *jure gestionis* or *jure imperii*. The definition of an "act performed in an official capacity" should therefore comprise all acts attributable to the State, not only those performed in the exercise of State authority. Whether or not an act was performed in the exercise of State authority depended on the internal rules of the State concerned, which meant that the distinction made between such acts and other acts attributable to the State could differ from State to State. If acts performed in an official capacity comprised all acts attributable to a State, there would be no need to distinguish acts performed as a manifestation of the State's sovereignty or governmental authority from other acts. A broad approach to the definition of "official acts" would require a thorough discussion of the exceptions to immunity for such acts. That discussion would probably show that many, but not all, acts *jure gestionis* fell outside the scope of the immunity enjoyed by State officials from foreign criminal jurisdiction.

73. The Secretariat's memorandum on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1) emphasized that State practice offered reasonable grounds for considering that *acta jure gestionis* performed by a State organ would still qualify as "official". It referred to a 1964 decision of the Austrian Supreme Court, which held that, unlike State immunity, the immunity of heads of State also covered *acta jure gestionis*. That decision showed that such acts could be considered official, not private, acts. The Commission should therefore put special emphasis on the criteria for the attribution of acts to a State. Although not all of the criteria set out in articles 4 to 11 of the articles on State responsibility would apply in the context of the topic, they nevertheless served as an appropriate starting point for further discussion. In particular, more debate on acts performed by de facto officials would be needed.

74. For the time being, the scope of the draft articles seemed to be limited by two conditions: first, the acts must have been performed by State officials, which excluded acts performed by persons who were not officials but acted on the instructions of a State, and, second, they must be attributable to a State. The commentary on the definition of "State officials" provisionally adopted by the Commission in 2014 (A/69/10, para. 132) indicated that the term had a relatively broad meaning, which expanded the number of acts that could be deemed to have been performed in an official capacity. That made it even more important to develop clear criteria for the attribution of acts to a State. The question of whether immunity would apply to *ultra vires* acts or acts performed in contravention of instructions merited further consideration and should be dealt with in the framework of limitations or exceptions to immunity, as should the issue of international crimes.

75. With regard to the topic of provisional application of treaties, his delegation was of the view that the outcome of the Commission's work should be a set of draft guidelines that could be used by treaty-makers contemplating provisional application. While it agreed with the Special Rapporteur's view that it was not necessary to undertake a detailed comparative study of the different national constitutional provisions on the matter, it did firmly believe that the possibility

of provisional application would always depend on the provisions of internal law. Draft guideline 1 as proposed by the Special Rapporteur in his third report (A/CN.4/687), which appeared to imply a presumption in favour of provisional applicability, should be reformulated so as to make that position clear. While a State could not avoid its obligations once it had committed itself internationally to the provisional application of a treaty, its internal law would determine whether or not it could make such a commitment.

76. His delegation supported the Special Rapporteur's approach to draft guideline 5, which limited the conditions under which the provisional application of a treaty could be terminated to those provided under the Vienna Convention on the Law of Treaties. The Commission should refrain from introducing any vague additional grounds, such as a prolonged period of provisional application.

77. With respect to the three draft guidelines provisionally adopted by the Drafting Committee, which seemed to contain only general introductory language, his delegation expected that the commentary to draft guideline 1 would spell out that it encompassed the provisional application of treaties by international organizations. With regard to draft guideline 2, it must be made clear that the reference to "other rules of international law" did not detract from the purpose of the guidelines, which was to supplement the rules of the Vienna Convention, not to suggest changes to them. As to draft guideline 3, some questions might arise with regard to the wording "or if in some other manner it has been so agreed", which went beyond the provisions of article 25 of the Vienna Convention. The latter referred only to the agreement of the negotiating States on provisional application. Thus, provisional application by other States would only be possible if the treaty so provided or if all the other negotiating States so agreed. Similarly, if only some of the negotiating States agreed on provisional application, it would have to be specified that such agreement was separate from the original treaty.

78. **Ms. Galvão Teles** (Portugal) said that the topic of protection of the environment in relation to armed conflicts had particular relevance in a world where more and more armed conflicts were affecting the environment. Her delegation therefore welcomed the Commission's efforts to draft principles aimed at enhancing the protection of the environment through preventive and remedial measures and minimizing damage to the environment during conflicts. Existing treaty rules on the matter under international humanitarian law were limited, particularly with respect to non-international armed conflicts, and the outcome of the Commission's work, regardless of its future form, could therefore make a significant contribution to the progressive development of international law.

79. The 2005 study by the International Committee of the Red Cross on customary international humanitarian law put forward rules 43, 44 and 45 as customary norms on the matter. Those rules reaffirmed that the general principles on the conduct of hostilities, including distinction, proportionality and military necessity, applied to the natural environment. They also established an obligation to take all feasible precautions to avoid or minimize damage to the environment and stressed that the use of methods or means of warfare that were intended, or might be expected, to cause widespread, long-term and severe damage to the natural environment was prohibited. The study indicated that some of the rules contained therein were also applicable in relation to non-international armed conflicts. The possibility of applying fundamental customary law principles to both international and non-international armed conflicts was an important element for the enhancement of environmental protection in the context of current conflicts and should therefore be taken into account by the Commission.

80. However, the draft principles should not weaken existing treaty law. Paragraph 2 of draft principle II-1, for example, might weaken the current rules as set forth in articles 35 and 55 of Additional Protocol I, since that paragraph provided only that care should be taken to protect the [natural] environment against widespread, long-term and severe damage; it lacked the prohibition contained in Additional Protocol I concerning the use of means and methods of warfare that might cause such damage. That prohibition should either be incorporated in draft principle II-1 or introduced in a separate draft principle. In addition, it would be advisable to clarify — perhaps in the commentary to the draft principles — the meaning of "widespread, long-term and severe damage", bearing in mind that the same threshold was also used in the Rome Statute of the International Criminal Court in relation to war crimes and in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

81. Her delegation continued to believe that the approach to the topic "Immunity of State officials from foreign criminal jurisdiction" should reflect a commitment to certain legal rights and values. The proposed draft articles should demonstrate the exceptional nature of the immunities regime and be based on a fair, equitable and reasonable assessment that would strike an appropriate balance between the need to safeguard the role of States and the need to recognize the dignity of the individual within the international system. Her delegation considered the distinction between immunity *ratione personae* and immunity *ratione materiae* to be essentially methodological, as immunities were functional in nature and were applied within strict limits and in respect of certain categories of acts. The definition of the concept of an "act performed in an official capacity" proposed by the Special Rapporteur in her fourth report (A/CN.4/686) was central to the topic, as it would ultimately provide the underlying reasoning for the immunity *ratione materiae* regime.

82. The text of draft articles 2 (f) and 6 as provisionally adopted by the Drafting Committee (A/CN.4/L.865) represented an improvement in terms of clarity and conceptual rigour. Her delegation noted in that regard that the Special Rapporteur had undertaken an exhaustive analysis of relevant case law and treaty practice and of relevant earlier work by the Commission, with a view to providing criteria for defining an "act performed in an official capacity". With respect to acts that might affect the scope of immunity, such as *ultra vires* acts and *acta jure gestionis*, her delegation had some reservations about the possibility of addressing them as limitations or exceptions. Rather, they should be envisaged as part of the general regime of State responsibility, or in other words outside the regime of immunities, which was exceptional in nature. As for international crimes, they should be treated in a separate draft article.

83. The Commission's work on the topic of provisional application of treaties was of important practical value for legal advisers and was also of considerable political interest, given the importance of the law of treaties and the increasing need for rapid responses to pressing events or situations. The Commission's work should not, however, go beyond article 25 of the Vienna Convention, particularly as many States had domestic requirements, including at the constitutional level, concerning the acceptance of provisional application of treaties. Since one of the Commission's objectives in relation to the topic should be to clarify the provisions of article 25, it would be of particular interest to elucidate the meaning of the phrase "or when they have in some other manner so agreed", which appeared in draft guideline 1 as proposed by the Special Rapporteur in his third report (A/CN.4/687). Draft guideline 2 was helpful in that regard, but it could be more explicit as to the meaning of "any other arrangement between the States or international organizations".

84. In addition, the phrase "internal law of the States or the rules of the international organizations do not prohibit such provisional application" in draft guideline 1 should be reformulated, as the current language did not seem to reflect correctly the domestic provisions and practice of States with regard to provisional application. As to draft guideline 4, it should be specified that provisional application of a treaty gave rise to legal obligations just as if the treaty were in force for the signatories applying it.

85. With regard to the scope of the work to be undertaken on the topic, her delegation would favour a comparative study of domestic provisions and State practice with respect to provisional application. Such a study would provide the information needed to enable the Commission to take a broad approach that reflected the diversity of provisions and practices at the national level. To that end, it would be useful for States to provide examples of their domestic practice and regimes. It would also be useful for the study to look at the practice of regional international organizations such as the European Union, which could provide numerous examples of relevant practice and of how the desire to ensure rapid application of an international agreement might be reconciled with the need to respect the domestic requirements of the States concerned. As to the final form of the work on the topic, her delegation remained of the view that the aim should be to produce a set of draft guidelines, possibly with model clauses, that would clarify the legal regime of provisional application contained in the Vienna Convention.

86. **Mr. Rogač** (Croatia), referring to the topic "Protection of the environment in relation to armed conflicts", said that his delegation favoured an approach that would seek to clarify and further elaborate the scope and content of the rules and principles of international environmental law

applicable in armed conflicts, without attempting to modify the rules of the law of armed conflict, in particular the rules on specific weapons. It welcomed the Commission's intent to include non-international armed conflicts within the scope of the topic, while excluding internal disturbances and tensions, although it recognized that the extent of protection and the rules applicable to international and non-international conflicts might differ, especially with respect to the first and third temporal phases to be addressed under the topic.

87. With regard to the use of terms, the definition of the term "armed conflict" under codified international humanitarian law was clear and should be applied in the work on the topic. As the term "environment" had been defined in various ways under existing international legal instruments, the definition adopted by the Commission in its work on the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities could provide an appropriate starting point. Should it be deemed necessary to address the treatment of cultural heritage in the work on the topic, a careful approach should be taken in order to avoid unnecessary expansion of the scope of the topic or revision of established international norms on the protection of cultural heritage. Moreover, a clear distinction should be made between the protection of the environment and the protection of cultural heritage, with due regard for existing legislation on the protection of cultural heritage in the event of armed conflict.

88. With regard to the draft principles provisionally adopted by the Drafting Committee (A/CN.4/L.870), his delegation strongly believed that it was not possible simply to transpose provisions of the law of armed conflict, as it applied to the protection of civilians or civilian objects, to the protection of the environment, and it therefore welcomed the Special Rapporteur's decision not to pursue her initially proposed formulation, which had defined the natural environment as being civilian in nature. His delegation supported draft principle II-1 as provisionally adopted by the Drafting Committee, which had to be read with reference to the most relevant principles and rules of armed conflict. As to draft principles I-(x) and II-5, the important question of the designation of protected zones required thorough examination. The Special Rapporteur should therefore be requested to continue her study of the matter, including with regard to differences in the degree of protection offered by the various ways of establishing such areas, and further elaborate on the proposed regime.

89. His delegation fully supported the formulation of a separate draft principle that would reflect a duty for States to undertake protection of the environment in relation to armed conflict through national legislative measures consistent with applicable international law. Croatia was currently a party to Additional Protocol I, the Rome Statute of the International Criminal Court and most other relevant international instruments. It was not yet a party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, but it had initiated the internal process that would lead to its accession. Croatia's national criminal code criminalized the launching of an attack in connection with an armed conflict if it was known that such an attack would cause widespread, long-term and severe damage to the natural environment. In addition, the internal rules and guidelines of the Croatian armed forces contained provisions for the protection of the environment during military exercises or combat activities.

90. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation supported the approach taken by the Special Rapporteur, including her intention to establish a clear definition of an "act performed in an official capacity". The proposed definition, particularly after the valuable revisions made by the Drafting Committee, would contribute to legal certainty on the matter. The elimination of the initially proposed link between an "act performed in an official capacity" and a crime would help to avoid giving the erroneous impression that official acts were, by definition, crimes.

91. The content of draft article 6 as provisionally adopted by the Drafting Committee did not, however, seem to correspond to its title (Scope of immunity *ratione materiae*). Paragraph 3, in particular, introduced the idea that persons who continued to enjoy immunity *ratione personae* after ceasing to be State officials would enjoy immunity *ratione materiae*. His delegation was not convinced of the need for that paragraph, the content of which might be better placed in the commentary; if it were to be retained, however, it should explicitly recognize and properly reflect the existing intersection of status-based immunity *ratione personae* and conduct-based immunity *ratione materiae*, which might help to clarify why the provision

contained in paragraph 3 had been introduced under draft article 6 and not, for example, under draft article 4 (Scope of immunity *ratione personae*), provisionally adopted in 2013 (A/68/10, paras. 48 and 49).

92. His delegation supported the "single act, dual responsibility" concept proposed by the Special Rapporteur, according to which any act of a State official performed in an official capacity was attributable not only to that person but also to the State. That concept was firmly established in international law and should be properly reflected in the draft articles. His delegation also strongly supported a restrictive approach to the issue of immunity from criminal jurisdiction. Such immunity was necessarily restricted by a number of limitations or exceptions, in particular with regard to international crimes, *ultra vires* acts, *acta jure gestionis* and acts of State officials accused by international courts or tribunals.

93. Turning to the topic of provisional application of treaties, he stressed that his delegation fully shared the Commission's understanding that the rights and obligations of a State that had decided to provisionally apply a treaty were the same as if the treaty was in force and that a breach of such obligations was an internationally wrongful act engaging the State's international responsibility. There were a number of principles and rules pertinent to provisional application that should, in one way or another, find their place in the draft guidelines. In particular, it should be made clear that provisionally applied treaties were enforceable and could not subsequently be called into question on the basis of the provisional nature of the treaty's application. In addition, the legal effects of provisional application encompassed not only the obligation to refrain from defeating the object and purpose of the treaty, but also very important obligations arising from the *pacta sunt servanda* rule and the duty to fulfil the treaty in good faith. Those principles and rules would generally come under or be derivable from draft guideline 4 as proposed by the Special Rapporteur in his third report (A/CN.4/687), which should be further developed or serve as a basis for the development of additional principles.

94. The reference to resolutions adopted by an international conference in draft guideline 2 should be viewed with caution, as such resolutions did not necessarily constitute an agreement among the States participating in that conference with regard to provisional application of a treaty. At best, they allowed for the possibility of provisional application, subject to some form of later consent by each State concerned. Accordingly, for the sake of clarity, his delegation would propose omitting the reference to resolutions in draft guideline 2. With regard to draft guideline 5, it would favour a formulation in line with paragraphs 57 and 59 of the Special Rapporteur's third report. It would be helpful also to address the possibility of termination of provisional application because of a material breach or non-application of the treaty by other States concerned.

95. Croatia's legislation generally allowed provisional application of treaties and contained specific provisions regulating such application. Consent for provisional application was generally granted under the governmental decision leading to the signing of the treaty. At the same time, the law on conclusion and implementation of treaties reproduced almost verbatim the text of article 25, paragraph 2, of the Vienna Convention on the Law of Treaties, stipulating that if not otherwise provided by the treaty or by agreement of the negotiating parties, provisional application would terminate if Croatia decided not to become a party to the treaty and so notified other parties that were provisionally applying the treaty. Since 1991 Croatia had agreed to the provisional application of 76 treaties.

96. **Mr. Zamora Rivas** (El Salvador), referring to the topic of protection of the environment in relation to armed conflicts, said that his delegation supported the three-phase temporal approach adopted by the Special Rapporteur, which would make it easier for the Commission to identify and address the specific obligations existing during the period of armed conflict. His delegation also supported a broad approach encompassing both international and non-international armed conflicts. A focus on international conflicts alone would leave significant legal lacunae, since non-international conflicts could have the same irreversible consequences for the environment. Further, his delegation shared the view of some Commission members that the work on the topic should not attempt simply to transpose provisions of the law of armed conflict, as they applied to the protection of civilians or civilian objects, to the protection of the environment. It would not be appropriate to characterize the environment as a civilian object, since it was public, transnational and even universal in nature.

97. His delegation had some concerns regarding draft principle II-l as provisionally approved by the Drafting Committee (A/CN.4/L.870). Paragraph 3, which provided that no part of the environment could be attacked unless it had become a military objective, seemed particularly problematic as it failed to take account of the peculiarities of the environment and the irreversibility of some damages. The Commission should avoid establishing a general principle that could be interpreted as allowing the justification of destruction of the environment for reasons of military advantage without establishing appropriate exceptions. With regard to draft principle II-5, it would be useful to reconsider the types of obligations associated with protected zones. As such areas were of great environmental and cultural importance, the protection afforded to them should not be subject to the possibility that they could become military objectives.

98. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation concurred with the Special Rapporteur's view that the distinction between acts performed in an official capacity and acts performed in a private capacity was unrelated to the question of whether the acts were lawful or unlawful. Precisely for that reason, various criminal justice systems envisaged special crimes, or crimes that generated criminal responsibility only for the persons who possessed the qualities stipulated under the relevant rule, such as, for example, public officials in cases of crimes of corruption in the public sector.

99. His delegation therefore supported the Drafting Committee's reformulation of the definition of an "act performed in an official capacity" in draft article 2 (f). It had rightly excluded any reference to the criminal nature of the act as an element of the definition, which might have suggested that any official act was a criminal act, when in fact the criminal nature of the act could only be determined by the appropriate judicial authorities. Nevertheless, the text of draft article 2 (f) defined an act performed in an official capacity as one performed "in the exercise of State authority", which remained an abstract notion. His delegation would therefore recommend that examples of official acts be included in the definition. The Special Rapporteur's fourth report (A/CN.4/686) provided a number of examples.

100. While there was an undeniable relationship between acts performed in an official capacity and State functions, acts performed in an official capacity were not necessarily related to State responsibility. In determining State responsibility, account must be taken not only of the relevant rules regarding attribution of conduct, but also of the content of the primary rules applicable to each case and of whether that case concerned the violation of an obligation of the State at the international level. As the Commission had already developed articles on State responsibility, it would not be appropriate to propose a new approach to the relationship between individual responsibility and State responsibility in the context of the work on the topic of immunity of State officials from foreign criminal jurisdiction.

101. Lastly, his delegation considered that it was not appropriate to use the expression "benefit from immunity" in the draft articles, since State officials derived no added advantage from immunity. It would be preferable to use the term "enjoy", which was consistent with the language of the Vienna conventions on diplomatic and consular relations.

102. As to the topic of provisional application of treaties, draft guideline 1 as proposed by the Special Rapporteur in his third report (A/CN.4/687) was of great utility in that it reflected the voluntary nature of provisional application and allowed for the possibility of assessing such application in the light of internal law. Draft guideline 4 correctly stated that the provisional application of a treaty had legal effects; however, it would be necessary to delve more deeply into the specific obligations and effects that might ensue for a State that opted for provisional application. His delegation welcomed the Special Rapporteur's intention to distinguish between regulation of the provisional application of a treaty internally within a State and regulation at the international level and encouraged him to continue analysing international practice with a view to identifying all of the elements related to provisional application.

103. **Mr. Gorostegui Obanoz** (Chile) said that the immunity of State officials from foreign criminal jurisdiction was a manifestation of the principle of sovereign equality of States and was procedural in nature, as it involved determining whether a forum State could exercise its jurisdiction over another State, without regard to whether the conduct of the individual enjoying immunity was lawful or unlawful. Acts performed in an official capacity were also a manifestation of State sovereignty and a way of

exercising elements of the governmental authority. The definition given in draft article 2 (f) was straightforward and reflected the wording used by international courts, including the International Court of Justice, which had employed the same terminology in the *Arrest Warrant* case. Draft article 6 appropriately combined the material and temporal aspects of immunity.

104. His delegation looked forward to the discussion on the commentaries to the draft articles in 2016 and to the presentation of the Special Rapporteur's fifth report, in which she would address limitations and exceptions to immunity. In particular, it hoped for a discussion on the process of humanization of international law from the standpoint of ensuring that immunity from jurisdiction was not invoked as a means of securing impunity for serious crimes under international law and also ensuring consistency with the rules on territorial and extraterritorial jurisdiction of a State in dealing with such crimes.

105. With regard to the topic "Provisional application of treaties", it was important to give due consideration to aspects of domestic law that could, in practice, limit the provisional application of certain provisions of treaties where those provisions would require prior approval by the national legislature. In accordance with article 25, paragraph 1, of the Vienna Convention, a treaty could be applied provisionally only with the consent of the parties. The topic was important because provisional application of a treaty entailed legal effects and created rights and obligations. Hence, failure to comply with a treaty that was being provisionally applied might engage State responsibility. It was therefore essential that States indicate clearly whether they intended to exercise their sovereign right to apply, or not to apply, a treaty provisionally. In the absence of an explicit expression of intention by the State to be bound by the treaty before its entry into force, there could be no provisional application.

Agenda item 170: Observer status for the Community of Democracies in the General Assembly (A/C.6/70/L.7) (*continued*)

106. **The Chair** recalled that the Committee had decided at its 11th meeting to give interested delegations the opportunity to conduct informal consultations on draft resolution A/C.6/70/L.7. He had since been informed that, following those consultations, the sponsors had proposed that a decision on the matter should be deferred to the seventy-first session of the General Assembly.

107. **Mr. Celarie Landaverde** (El Salvador) announced that Denmark and Luxembourg had become sponsors of the draft resolution.

108. **The Chair** said he took it that the Committee wished to recommend that the General Assembly defer a decision on the request for observer status for the Community of Democracies in the General Assembly to its seventy-first session.

109. *It was so decided.*

Agenda item 173: Observer status for the International Conference of Asian Political Parties in the General Assembly (A/C.6/70/L.3) (*continued*)

110. **The Chair** recalled that the Committee had also decided at its 11th meeting to give interested delegations the opportunity to conduct informal consultations on draft resolution A/C.6/70/L.3. The sponsors of that draft resolution had since proposed that the Committee should recommend that the General Assembly defer a decision on the request for observer status for the International Conference of Asian Political Parties in the General Assembly to its seventy-first session.

111. *It was so decided.*

The meeting rose at 1.05 p.m.