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Chair: Mr. Ahmad (Vice-Chair) . . . . . (Pakistan)

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16-19048 (E)

In the absence of Mr. Danon (Israel), Mr. Ahmad (Pakistan), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 78: Report of the International Law Commission on the work of its sixty-eighth session (*continued*) (A/71/10)

1. **The Chair** invited the Committee to continue its consideration of chapters X to XII of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

2. **Mr. Ahmed** (Sudan), addressing the topic "Protection of the environment in relation to armed conflicts", said that, instead of referring to the "natural environment", the draft principles should just use the term "environment", which was broader and encompassed all of the conditions and external factors affecting all living. With regard to the draft principles provisionally adopted by the Commission, draft principle 2 ("Purpose") stated that the draft principles were aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures. In order for that draft principle to be more comprehensive and readily understood, it should include the phrase "in accordance with international humanitarian law". That phrase would help the reader to understand the nature of the preventive measures in question and the fact that the measures would be governed by the procedures in respect of civilian objects that were set forth in Additional Protocols I and II to the Geneva Conventions of 1949. Water was an essential component of the environment and should therefore be addressed in specific draft principles.

3. The immunity of State officials from foreign criminal jurisdiction was firmly and unquestionably established in international law, customary international law and the judgments of the International Court of Justice. Although the term "State officials" appeared in several international instruments, it had not been specifically defined in general international law. It was therefore useful to define the term in the draft articles on immunity of State officials from foreign criminal jurisdiction. Because such immunity applied to individuals, it would be useful to expand the definition of an "act performed in an official capacity", contained in draft article 2 (f), to include acts performed by all individuals who represented the State or exercised State functions or held a position in the State, regardless of their position in the hierarchy. The concept of an act performed in an official capacity was closely linked with that of a State official. His delegation had already raised that argument at previous sessions of the Sixth Committee. It therefore believed that draft article 2 (f) should include all official acts performed by State officials in an official capacity. The core consideration was that the act in question should be an official act of the State, and should be of a governmental or official nature. The Special Rapporteur's fifth report (A/CN.4/701) could not be removed from the context of the previous reports and the commentaries.

4. The immunity of State officials reflected the principle of equal sovereignty of States, which was clearly stated in international law. Its purpose was to preserve national sovereignty and ensure peaceful international relations. In identifying the criteria for such acts, the practices and legal precedents of States should not be granted the same weight as those of international judicial tribunals, particularly the International Court of Justice. State practices could shift over time, and therefore could not be used to identify the scope of a given concept. While national courts dealt directly with issues regarding immunity, the practices and rulings of international courts were clearer and more consistent, and could make a more valuable contribution to deliberations on the topic.

5. In assessing whether a given act was an "act performed in an official capacity" or an "act performed in a private capacity", for the purposes of determining eligibility for immunity, the core criterion was the governmental or official nature of the act. The criminal nature of an act could not exclude that act from the category of an official act, and consequently, from the scope of immunity. His delegation therefore did not agree with the view that the criminal nature of an act deprived it of its official nature, and hence of immunity. Accordingly, all acts resulting from the exercise of elements of governmental authority should be covered by immunity. It had been suggested that the definition of an "act performed in an official capacity" could include a reference to the fact that the act must

be criminal in nature. However, such a definition would amount to saying that any act performed in an official capacity would be a crime, leading to the strange conclusion that an act performed in an official capacity was, by definition, a crime. An act was a crime not because of its nature, but because it had been criminalized in domestic or international law. In examining the current topic, it was important to preserve the distinction between the codification and progressive development of international law, to provide guidance to local courts that would be called upon to rule on issues of immunity in politically sensitive cases.

6. Reference had often been made to "values of the international community" and to several principles that remained disputed, if not in their intrinsic content then in the manner of their application. His delegation warned against citing certain legal systems and treaties on which consensus could be reached only with considerable effort.

7. His delegation looked forward to examining the Special Rapporteur's sixth report, which would address the procedural aspects of immunity. The comments of States should be reflected in the report, in the deliberations of the Commission and in the resulting recommendations and draft articles.

8. Lastly, the topic "Provisional application of treaties" should be approached in light of the 1969 Vienna Convention on the Law of Treaties, with which it was closely related.

9. **Ms. Melikbekyan** (Russian Federation) said it was regrettable that, when the Commission had begun its consideration of the fifth report of the Special Rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/701), the report had not yet been translated into all the official languages of the United Nations, contrary to the relevant rules. That had had a negative impact on the outcome of the Commission's work at its sixty-eighth session. Reports should not be considered until they had been translated into all the official languages of the Commission, and her delegation hoped that the case in question would not set a precedent for the Commission's future work.

10. The question of limitations and exceptions to immunity — henceforth, for convenience, she would refer only to exceptions — was very complex, especially bearing in mind the ever more politically charged nature of the debate on individual responsibility for international crimes. The issue must therefore be considered prudently, as noted by her delegation on a number of occasions and reflected in the views of Commission members set out in the report. The Special Rapporteur had proposed an unusual approach to the question of exceptions to immunity, by attempting to present exceptions as established norms that were appropriate for codification, but also suggesting that there was an all but objective need for exceptions to immunity. That idea was based not on State practice or *opinio juris* but rather on subjective considerations regarding the need for a balance between various components of the system of international law, whereby all those components could exist and function without coming into conflict with each other. Through that approach, the Special Rapporteur was apparently seeking to progressively develop international law in the area in question.

11. Her delegation could not support such an approach. First, it did not agree that the proposed draft article on exceptions to immunity (draft article 7) reflected an established norm of customary international law. The Special Rapporteur had been unable to demonstrate convincingly the existence of such a norm, and the examples of practice presented in her report did not even demonstrate that such a norm was emerging. Furthermore, the proposed draft article could not be seen as progressive development when its provisions eroded one of the basic norms of international law and could give rise to new sources of tension in intergovernmental relations because of the inevitable increase in the number of attempts to prosecute officials of one State in another State.

12. The question of violations of the immunity of the State and of State officials had been discussed many times in recent years by international courts, demonstrating the sensitivity of the issue. While ending impunity for serious international crimes was certainly an admirable goal, attempts to manipulate the norms of international law that underpinned contemporary international relations must be avoided. Immunity did not preclude responsibility and did not equate to impunity. State officials could be prosecuted for the most serious international crimes before

international courts and tribunals; they could also be tried by the court of a foreign State if their own State decided to waive immunity, and of course there were no restrictions on the prosecution of officials in their own State. Thus, given that conventional means existed for holding accountable officials who committed serious crimes, the introduction of exceptions to immunity from foreign criminal jurisdiction would serve only as an additional means for some States to exert political pressure on others, using the need to avoid impunity as justification. In fact, there was no reason to believe that impunity would be reduced as a result, perhaps in part because there was a general lack of momentum among States to limit the immunity both of foreign officials and of their own officials. Her delegation hoped that the Commission would have fruitful discussions on the question of exceptions to immunity and that its work on the issue would in future follow established working procedures.

13. Concerning the topic of provisional application of treaties, which was of great practical significance for States, the Commission's work at its sixty-eighth session had been somewhat complicated by the need to give consideration to diverse aspects of the topic, as requested by States. Bearing in mind the Commission's view that the provisional application of a treaty produced the same legal effects as if the treaty were in force, nothing prevented a State from formulating reservations at the time when it agreed to provisional application. In that regard, article 19 of the Vienna Convention on the Law of Treaties provided that a State could formulate a reservation when signing an international treaty.

14. With regard to the relationship of provisional application to other provisions of the 1969 Vienna Convention, her delegation was puzzled by the suggestion that article 60 could be used as the basis for the suspension or termination of a provisionally applied treaty only in the relations between a State that had breached the treaty and the State affected by the breach, when article 25 provided a simpler mechanism for the termination of provisional application, namely notification of the intention not to become a party to the treaty. Her delegation would like to know the Commission's views on whether the provisional application of a treaty could also be terminated by other means, without a notification of intention not to become a party, and on what basis the provisional application of a treaty could be terminated by a State for which the treaty had already entered into force in its relations with a State for which it had not entered into force but was being provisionally applied.

15. The draft guidelines provisionally adopted by the Commission were fully in line with existing practice, although the majority of them were rather general in nature and contributed little to the regime already established by the 1969 Vienna Convention. The examples presented in the report and during the discussions suggested that a number of pressing issues required additional attention, particularly the question of limitation clauses and the principles governing their formulation and means of expression. The Commission could perhaps concentrate on such aspects of provisional application in its future work. It should also study the special nature of provisional application in the case of different types of international treaties: bilateral and multilateral treaties, and treaties with a limited circle of States parties. Her delegation welcomed the Special Rapporteur's intention to prepare model clauses, and hoped that the Commission's work on the topic would result in the systematization of existing practice and the provision of appropriate guidance.

16. **Mr. Hitti** (Lebanon) said that his delegation noted with interest the proposals made to encourage interaction between the Committee and the Commission. Such exchanges should be continuously enhanced. Concerning the topic "Protection of the environment in relation to armed conflicts", Lebanon was fully committed to the three-phase approach and was encouraged by the Drafting Committee's adoption of the set of draft principles proposed by the Special Rapporteur in her first three reports. The Commission should continue to discuss the topic, particularly in the context of the adoption of the 2030 Agenda for Sustainable Development and the Paris Agreement in 2015, as well as the consensus adoption, in May 2016, of United Nations Environment Assembly resolution 2/15, entitled "Protection of the environment in areas affected by armed conflict", which acknowledged the ongoing work of the Commission in the relevant sphere.

17. With regard to the latest set of draft principles proposed by the Special Rapporteur in her third report (A/CN.4/700), the addition of a draft principle

concerning the enhanced protection of the environment through preventive measures strengthened the three-phase approach. His delegation also appreciated the inclusion of draft principles relating to remnants of war and remnants of war at sea. Concerning the draft principles as provisionally adopted by the Drafting Committee, draft principle 15 (Post-armed conflict environmental assessments and remedial measures) could have been formulated in a more prescriptive manner. It would also have been preferable to have treated the issue of remedial measures as a stand-alone subprinciple, by dividing the draft principle into two parts, one dealing with environmental assessments and the other covering remedial measures. As for draft principle 17, it would have been more appropriate to retain the reference to "public health or the safety of seafarers", as originally proposed by the Special Rapporteur, given that the draft principle covered the specific situation of remnants of war at sea.

18. More generally, the human dimension of the environmental impact of armed conflicts fell within the scope of the topic, since environmental degradation had a direct impact on the population. The Commission could perhaps explore that dimension in the future, together with the issue of liability and responsibility, and provide clarification regarding the principles of proportionality and precaution as applied to the environmental context.

19. **Mr. Racovită** (Romania), speaking on the topic of protection of the environment in relation to armed conflicts, the consideration of which was particularly important and timely, said that the draft principles provisionally adopted by the Commission accurately reflected current law in the field. With regard to the Special Rapporteur's third report (A/CN.4/700), his delegation agreed that indigenous peoples were dependent on the environment of the territories they inhabited and that damage to that environment had direct consequences for their existence. However, such damage during armed conflict in fact had direct consequences for all people who depended, for example, on agriculture, including animal husbandry, in those territories, even if they were not indigenous peoples. The Commission might therefore wish to consider a more general statement aimed at the protection of people who had a close connection to the environment of the territories they inhabited.

20. Romania attached great importance to the protection of the environment in the context of military activities. Its Criminal Code provided for up to 10 years' imprisonment for any person who carried out a military attack as part of an international armed conflict in the knowledge that it would cause extended, lasting and grave environmental damage that was visibly disproportionate to the overall military advantage. Furthermore, Romanian legislation provided for the Ministry of Defence to play a specific role in relation to environmental protection. Among other activities, it was responsible for supervising observance by its personnel of rules concerning the protection of the environment, enforcing penalties for violation of relevant legislation by military personnel, and ensuring that the environmental impact of military activities was assessed. A strategy had also been adopted in order to ensure application by the Romanian army of national legislation and other regulations concerning environmental protection, with a view to reducing the environmental impact of its military activities. Act No. 291/2007 concerning foreign forces stationed on Romanian territory contained provisions on environmental protection, as did agreements concluded by the Romanian authorities regarding the status of visiting forces and their activities, and technical arrangements for the conduct of military exercises.

21. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation commended the Special Rapporteur's efforts to find a balanced approach to the question of limitations and exceptions to immunity and welcomed her analysis of the immunity of State officials in relation to other provisions of the international law system, including the Rome Statute. The Commission should primarily focus on codifying the norms of international law in relation to the topic, including with regard to the issues of limitations and exceptions, which were rather controversial in international relations. Although attention should also be paid to the progressive development of international law, in order for the draft articles to reflect fully the legal nature of the immunity of State officials from foreign criminal jurisdiction, such progressive development should not be addressed until after the question of codification had been resolved. In addition, more consideration should be given to identifying the emergence of international

custom with regard to limitations and exceptions to immunity from the exercise of jurisdiction by other States, since the conclusion of the Special Rapporteur in that regard was not supported by sufficient State practice and *opinio juris*. In particular, his delegation doubted the existence of international custom concerning limitations and exceptions to immunity with regard to the crime of corruption.

22. His delegation agreed that a distinction should be made between immunity *ratione personae* and immunity *ratione materiae* for the purpose of the exercise of foreign criminal jurisdiction. Immunity *ratione personae* was a procedural bar to jurisdiction, which could not conflict with substantive rules of international law, especially when an international treaty to which a State in question was party imposed the obligation to prosecute or extradite in respect of a certain international crime. There was therefore merit in identifying those acts which, even if performed in an official capacity, could not be subject to immunity *ratione materiae*, and which could therefore come under foreign criminal jurisdiction once immunity *ratione personae* had ceased.

23. A distinction should also be preserved between the horizontal exercise of inter-State jurisdiction, which should pay due consideration to principles of international law and relevant rules of customary international law, and the vertical exercise of jurisdiction by an international criminal forum drawing its mandate from an international treaty, the latter being exceptional in nature. Careful analysis would be required before the practice of such international criminal forums could be considered applicable at the horizontal level; moreover, such a scenario would come under the progressive development of international law.

24. Concerning the topic "Provisional application of treaties", his delegation agreed with members of the Commission that more examples of practice were needed in order to substantiate the conclusions drawn. While Romania, for reasons relating primarily to legal certainty, viewed provisional application as an exceptional and therefore limited treaty action, practice had nonetheless been accumulating over the years. In analysing that practice, the Commission should pay particular attention to the nature and characteristics of each treaty. His delegation maintained the comments it had previously submitted on the topic, many of which had not yet been taken into account in the research conducted by the Special Rapporteur. It also supported the idea of examining the question of interpretative declarations made by States provisionally applying a treaty and the suggestion that an indicative list of model clauses could be developed.

25. **Mr. Stephen** (United Kingdom), speaking on the topic "Protection of the environment in relation to armed conflicts", said that the international legal basis for a number of the draft principles on that topic was unclear. Specifically, his delegation noted the controversy surrounding the formulation of draft principle 12 (Prohibition of reprisals) and the Special Rapporteur's description of its inclusion as promoting the progressive development of international law. In that regard, as it had stated in the Committee's debate the previous year, his delegation agreed with the Special Rapporteur that the Commission should not seek to modify the law of armed conflict. In general, the United Kingdom remained unclear about the future of the topic, since the draft principles covered a range of issues and it was difficult to see what the eventual outcome of the Commission's work would be. While the preparation of non-binding guidelines or principles could be useful, his delegation was unconvinced of the need for new treaty provisions in the area.

26. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that the topic 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. Accordingly, the appropriate outcome of the Commission's work was likely to be a treaty, inasmuch as it contained proposals for progressive development.

27. Draft article 2 (f), concerning the definition of an "act performed in an official capacity" and draft article 6, on the scope of immunity *ratione materiae*, together with the commentaries thereto, covered some difficult issues and would need to be reviewed in the light of the draft articles and commentaries as a whole. For example, the question of whether or not acts *ultra vires* could be considered as official acts for the purpose of immunity still had to be addressed. His delegation also

noted that the Commission's debate on the Special Rapporteur's fifth report had been only preliminary in nature and had involved relatively few Commission members. Even so, it seemed clear that views within the Commission were deeply divided on the question of exceptions to immunity. As the debate had yet to be concluded and the Commission had taken no action as yet on proposed draft article 7, his delegation would reserve its full statement on the matter until the following session. Moreover, until the text of all the draft articles was available, its comments on those adopted to date must be regarded as provisional.

28. His delegation welcomed proposed draft article 7, paragraph 2, which provided that any exceptions to the immunity of State officials did not apply to persons who enjoyed immunity *ratione personae*. Given that, according to draft article 4, paragraph 1, immunity *ratione personae* applied only during the term of office of those individuals who benefited from it, the final five words of draft article 7, paragraph 2, might be considered superfluous. His delegation had no difficulty with the substance of draft article 7, paragraph 3.

29. With regard to draft article 7, paragraph 1, it recalled that a violation of a *jus cogens* norm pertaining to a criminal offence did not necessarily constitute an exception to immunity. As a matter of treaty law, States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had implicitly waived the immunity of their officials in relation to torture, since that offence, as defined in the Convention, could only be committed by those acting on behalf of the State, and each State party had an express duty to establish jurisdiction over such offences whenever a suspect was present on its territory and not extradited. However, his delegation considered that an equivalent exception to immunity did not exist in respect of the other offences enumerated in draft article 7, paragraph 1(a), and would not be appropriate even as progressive development. In particular, crimes of corruption should not form an exception to immunity, even as progressive development. The international legal basis for such an exception was unclear, and its adoption might undermine the immunity of State officials by facilitating spurious or politically motivated prosecutions in foreign jurisdictions. There was no reason to single out corruption among the many other crimes covered by international conventions.

30. Lastly, his delegation noted that the procedural aspects of the topic, which the Special Rapporteur intended to cover in her sixth report, had already been effectively addressed in the third report of the former Special Rapporteur (A/CN.4/646). Those aspects would form an important part of the Commission's eventual output.

31. On the topic "Provisional application of treaties", his delegation supported the preparation of draft guidelines, since provisional application was a matter that often arose in practice and on which there was not always clarity. It was pleased to note the development of draft guideline 10, concerning the obligation not to invoke internal law as justification for non-compliance with international obligations undertaken by means of the provisional application of all or part of a treaty. While it was the Special Rapporteur's view that, because the provisional application of treaties produced legal effects, a State could, in principle, formulate reservations as from the time of its agreement to the provisional application of a treaty, the interplay between provisional application and the formulation of reservations deserved further consideration. In that regard, an analysis of the practice of States and international organizations would be useful in order to allow a full and comprehensive consideration of that issue.

32. **Ms. Patto** (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 formulate draft principles aimed at enhancing the protection of the environment through preventive and remedial measures and minimizing damage to the environment during conflicts. The topic should be approached in a comprehensive manner and should include the human rights dimension of environmental damage caused in the course of armed conflicts. Her delegation therefore shared the view of those Commission members who supported the inclusion of references to human rights in the draft principles. That said, references to environmental damage and environmental protection must be clearly expressed in the text of the draft

principles, especially draft principles III-3 (Remnants of war) and III-4 (Remnants of war at sea), given that the focus of the work was the protection of the environment.

33. Her delegation continued to support a three-phase temporal approach to the topic, although the structure of the draft principles did not need to follow that approach strictly and further analysis might be helpful. It encouraged the Commission to focus its attention on the responsibility of non-State actors, and also to maintain and foster consultations with such entities as the International Committee of the Red Cross, the United Nations Educational, Scientific and Cultural Organization and the United Nations Environment Programme, as well as other international organizations with relevant expertise. In an interdependent world, the connection between related fields of knowledge was crucial for effective development of the law.

34. Concerning the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation reaffirmed its conviction that 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. The Commission's preliminary debate on the fifth report of the Special Rapporteur (A/CN.4/701), addressing questions of vital importance such as exceptions and limitations to immunity and the legal nature of immunity, had revealed divergent opinions regarding the approach followed by the Special Rapporteur and the way ahead for the Commission. Bearing in mind that the Commission would be continuing its debate on the Special Rapporteur's report at its next session, it would be premature to make substantive comments at the current stage. Such a sensitive and highly complex issue must be considered comprehensively and in depth; her delegation would therefore reserve its position until the following year.

35. With regard to the topic "Provisional application of treaties", the Commission's work was of important practical value for legal advisers. The topic was also of considerable political interest, given that the increasing need for rapid responses in international relations was not fully compatible with the sometimes slow process by which international treaties entered into force. The Commission's 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 1969 Vienna Convention on the Law of Treaties. However, its work on the topic should not go beyond article 25 of the Convention, especially since the domestic legislation and constitutions of many States, including her own, restricted their ability to accept the provisional application of treaties. It would be useful for the Commission to undertake a comparative study of domestic provisions and practice on provisional application, bearing in mind that there were major differences in domestic law from State to State and that it was important to reflect such diversity of practice in the Commission's work.

36. The Commission's decision to request the Secretariat to prepare a memorandum analysing State practice in respect of treaties which provided for provisional application, was a positive step in that direction. It would also be useful to include in that study the practice of regional international organizations. In that regard, her delegation welcomed the addendum to the fourth report of the Special Rapporteur (A/CN.4/699/Add.1), which contained examples of recent European Union practice on provisional application of agreements with third States. The European Union had an extensive practice of provisional application, which took into account the different national regimes of its member States and could therefore demonstrate how to reconcile the interest in ensuring the rapid application of an international agreement with the need to respect the domestic requirements of the States concerned.

37. Her delegation welcomed the text of draft guidelines 1 to 4 and draft guidelines 6 to 9, as provisionally adopted by the Drafting Committee. The revised version of those guidelines met many of the concerns that Portugal had previously expressed. However, draft guideline 5, concerning the issue of provisional application by unilateral declaration, warranted a cautious approach.

38. **Mr. Rogač** (Croatia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the list of crimes in respect of

which immunity did not apply, as enumerated in proposed draft article 7, was central to the topic. However, the Commission's definition of those crimes should be streamlined. Given that the definition of torture in the Convention against Torture differed from that adopted as part of the Commission's ongoing work on the topic of crimes against humanity, and bearing in mind the explicit reference in the Special Rapporteur's report (A/CN.4/701) to torture as a crime against humanity, it would, in particular, be necessary to clarify which of those two definitions applied to torture as a crime in respect of which immunity did not apply. His delegation supported the wider definition contained in article 1, paragraph 2, of the Convention against Torture.

39. Turning to the topic "Provisional application of treaties", he said that the draft guidelines and commentaries on how to provisionally apply treaties in practice were very useful for his Government, which made use of the provisional application mechanism. The legal effects of provisional application primarily arose from the principle of *pacta sunt servanda*, in other words, the duty to fulfil in good faith the obligations stemming from the legal relationship established by such application, including the obligation to refrain from defeating the object and purpose of the treaty. In that regard, draft guideline 2 (Purpose), as provisionally adopted by the Drafting Committee, should be expanded in order to reiterate that the practice of provisional application of treaties should adhere not only to the 1969 Vienna Convention and other rules of international law but also to the principles of international law.

40. The principle of *pacta sunt servanda* was crucial to understanding why one State's breach of a treaty applied provisionally could give rise to the termination or suspension of provisional application by another State, as discussed in the report of the Special Rapporteur (A/CN.4/699). His delegation agreed that article 60 of the 1969 Vienna Convention was, *mutatis mutandis*, applicable in its entirety to provisionally applied treaties. It also fully concurred with the Special Rapporteur that a trivial violation of a provision that was considered essential might constitute a material breach under article 60 of the Vienna Convention. In assessing which treaty provisions were essential in that regard, account should be taken of the reasons motivating the conclusion of the treaty, since it was precisely those reasons that could constitute evidence of whether an essential provision had been breached. The most authoritative commentators on the Vienna Convention had agreed that it was what mattered to the parties that was important; regrettably, however, an ad hoc international tribunal had recently disregarded that approach.

41. As a State that had recently experienced the devastating effects of armed conflict, Croatia followed closely the Commission's work on the topic "Protection of the environment in relation to armed conflicts" and considered it appropriate for the Commission to further assess the possibility of transforming the draft principles into draft articles, in order to demonstrate their importance to the international community.

42. **Mr. Martín y Perez de Nanclares** (Spain), speaking on the topic "Protection of the environment in relation to armed conflicts", said that while the Special Rapporteur was to be commended for her excellent research on doctrine, jurisprudence and State practice, her third report (A/CN.4/700) was excessively long and the number of draft principles presented probably exceeded what was reasonable, particularly bearing in mind the technical complexity of the topic and the limited time available to States for its consideration. Furthermore, not all the draft principles appeared to be supported by sufficient analysis. Each draft principle should be accompanied by an explanation of how the rules of environmental law applied to armed conflicts; they should also clearly specify the environmental protection obligations that, consistent with the law of armed conflict, applied in each of the three phases of armed conflict. It was not always clear which materials had been presented in order to introduce a particular issue and which were intended to justify the draft principle in question.

43. A further problem was that it was impossible to identify clear boundaries between the three phases of armed conflict, making it necessary to read all three reports of the Special Rapporteur together. It seemed particularly complicated to delimit the first and third temporal phases. Consequently, it was difficult to determine the law applicable to the third phrase, which was the subject of her third report. While the principles corresponding to the second phase were well established in the law of armed conflict, those

applicable to the third phase were much less clear and there was little or no relevant practice, given that peace treaties or armistice agreements did not generally contain environmental protection provisions. Furthermore, in the Special Rapporteur's report, references to the phases before and during conflict were often brought into the discussion of the post-conflict phase. The topic covered a number of important issues that required greater attention and analysis, including the question of occupation, the practice of non-State actors, indigenous peoples, the question of responsibility and the applicability of the precautionary principle. All those issues, and the many related discussions in the Commission, attested to the difficulty, and probably also the lack of maturity, of the topic.

44. His delegation applauded the new structure of the draft principles, which began with general principles applicable to all three phases of an armed conflict (Part One) and then continued with provisions relating to the protection of the environment during conflict (Part Two). However, it was still not always clear why a provision had been placed in one part rather than another. For example, draft principle 9 appeared in Part Two (Principles applicable during armed conflict) even though, in the commentary, it was stated that paragraph 1 thereof was relevant during all three phases. Furthermore, it should be expressly stated in draft principle 1 (Scope) that the draft principles as a whole applied to both international and non-international conflicts. Given the importance of the issue, it was not enough simply to apply the principle *ubi lex non distinguit, nec nos distinguere debemus*.

45. Draft principle 9 (General protection of the natural environment during armed conflict) comprised three paragraphs, each containing one specific provision. It was followed by four more draft principles, each of which consisted of just one provision. Although the importance of the provisions was unaffected by whether they were subsumed within a single draft principle or addressed separately, it would be worth explaining what lay behind the decision in each case. It would also be advisable to establish a link between the acknowledgement that part of the natural environment could be attacked if it became a military objective, based on draft principle 9, paragraph 3, and the prohibition of attacks against the natural environment by way of reprisals, contained in draft principle 12. To that end, it would perhaps be enough to include a "without prejudice" clause at the beginning of draft principle 12.

46. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that Spain had recently passed legislation that regulated, inter alia, the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs. With regard to draft article 2 (f), his delegation agreed with the proposed definition of an "act performed in an official capacity". Not only was it necessary to include such a definition in the draft articles, but the proposed formulation "State authority" was correct. Furthermore, his delegation concurred with the Commission that it was not possible to draw up an exhaustive list of acts performed in an official capacity, although the examples provided in the commentary were useful.

47. With regard to draft article 6 (Scope of immunity *ratione materiae*), first, it was not clear why, in paragraph 3, the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs whose term of office had come to an end was not explicitly referred to as immunity *ratione materiae*. His delegation saw no difficulty in using that expression, since those three categories of persons were covered by the definition of "State official" contained in draft article 2 (e) and, as such, they clearly benefited from immunity *ratione materiae*, as stated in draft article 5. The expression "immunity *ratione materiae*" was also used in draft article 4, paragraph 3, according to which the cessation of immunity *ratione personae* was without prejudice to the application of the rules of international law concerning immunity *ratione materiae*. Second, since Heads of State, Heads of Government and Ministers for Foreign Affairs were "State officials", draft article 6, paragraph 3, should perhaps refer to "officials" rather than "individuals", in order to avoid any inconsistency between draft article 5, which identified the persons enjoying immunity *ratione materiae* as State officials, and draft article 6, paragraph 3, which, although it did not specifically mention immunity *ratione materiae*, recognized that such immunity was applicable to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs.

48. Concerning the topic “Provisional application of treaties”, the title of draft guideline 10 (Internal law and the observation of provisional application of all or part of a treaty) could be shortened to “Internal law and the observation of provisional application”, in order to bring it into line with the titles of other draft guidelines, which referred simply to provisional application without including the phrase “of a treaty” or “of all or part of a treaty”. It was also not clear why the scope of the draft guideline was limited to States. As was the case in other draft guidelines, such as draft guidelines 6 and 7, reference should also be made to international organizations, since, like States, they could not invoke the provisions of their internal regulations as justification for non-compliance with a provisionally applied treaty. It would be advisable to bring the language of draft guideline 10 into line with that of article 27 of the 1969 Vienna Convention, as well as with draft guideline 8 (Responsibility for breach). Wording more in line with those provisions would read: “A State or an international organization may not invoke the provisions of its internal law as justification for its failure to perform a treaty that is provisionally applied”.

49. His delegation was pleased to see that some of the draft guidelines provisionally adopted by the Drafting Committee at the current session, such as draft guideline 7, reflected comments it had made in the Sixth Committee the previous year. Since draft guideline 9 focused on just one of the reasons for termination of the provisional application of a treaty, namely, notification of intention not to become a party to the treaty in question, his delegation assumed that another draft guideline would address other reasons for termination, including, in particular, entry into force of the treaty.

50. As for the issue of provisional application and reservations, it would be important to distinguish whether the treaty in question had been provisionally applied before or after a subject of international law had expressed its consent to be bound by the treaty in question. If a treaty was provisionally applied after the subject had expressed its consent to be bound, the reservations set out in the instrument expressing consent to be bound would apply. If, on the other hand, the treaty was provisionally applied before the subject had expressed its consent to be bound, it would be necessary to determine whether or not reservations could be formulated; whether they should be formulated when the subject agreed to apply the treaty provisionally or when the treaty was first provisionally applied; and whether such reservations should be confirmed when the subject expressed its consent to be bound by the treaty, just as reservations formulated upon signing a treaty had to be formally confirmed by the reserving State when expressing its consent to be bound, in accordance with article 23, paragraph 2, of the 1969 Vienna Convention. The inclusion of model clauses in the draft text would be complicated, given the wide variety of clauses that might need to be included.

51. His delegation trusted that the Commission would also address a number of other issues — some of them problematic — relating to provisional application, including the question of whether all treaties could be provisionally applied or whether in some cases provisional application was not possible for reasons of treaty content or the implications of such provisional application; whether provisional application was possible *inter partes* or for just one State; whether the period of provisional application should be taken into account in determining the termination date of treaties of pre-established duration; and lastly, whether the termination of provisional application when not followed by the entry into force of a treaty produced effects *ex tunc* or *ex nunc*.

52. **Mr. Lippwe** (Federated States of Micronesia), speaking on the topic “Protection of the environment in relation to armed conflicts”, said that, as both an innocent bystander during major conflicts waged by foreign powers and a steward of rich natural ecosystems crucial to the livelihoods and cultural identity of its people, the Federated States of Micronesia took a keen interest in the topic. Remnants of intense fighting during the Second World War, in the form of wrecks of military ships and aircraft, as well as weaponry and unexploded ordnances, still littered the land and sea of Micronesia, posing persistent and significant threats to its natural environment and local population. It was unconscionable that some remnants of war had remained underwater for so long, without any clear prospects of being removed or rendered harmless by the responsible parties. His delegation was pleased that the related comments it had submitted to the Commission had been extensively cited in the Special Rapporteur’s third report (A/CN.4/700) and

that some of the interests and concerns it had raised, particularly with regard to the post-conflict phase, had been incorporated into the proposed draft principles.

53. With regard to the suggestion made in the Commission that the pre-conflict and post-conflict phases covered by the draft principles should be limited to the period immediately before and immediately after the hostilities, respectively, his delegation was strongly of the view that such a limitation was irrelevant and should not be adopted. An armed conflict did not always occur spontaneously but tended to develop over time; moreover, a belligerent was capable of systematically altering the natural environment of a potential theatre of war over months or years in preparation for an armed conflict, while the physical remnants of war could also pose persistent threats to the natural environment of a battleground for years or decades after the cessation of hostilities. Accordingly, any international legal obligations requiring belligerents to protect the environment in which they waged armed conflicts must recognize the extent and degree of the damage inflicted, whether actual or potential, and should not be subject to an arbitrary time schedule that did not correspond to the objective reality on the ground.

54. While some Commission members had expressed concerns that the proposed draft principles extended too far beyond environmental protection and addressed the environment from a natural resource and human rights perspective, it must be stressed that a natural environment could not be viewed as distinct from the people who inhabited it and relied on it, inter alia, for sustenance, shelter, cultural practices and sustainable development. The natural environment deserved protection in and of itself as a source of biodiversity and a component of various critical natural processes. However, there was no reason why provisions addressing the protection of the natural environment in relation to armed conflicts should not also address the effects on human populations of the destruction of the said natural environment in armed conflicts. The topic was not limited to the law of armed conflict but was broad enough to take in other international law disciplines dealing with obligations to protect the natural environment, including for the sake of its human inhabitants.

55. Where status of forces and status of mission agreements contained provisions regarding the protection of the environment, they could serve as a basis for draft principles on the topic, particularly bearing in mind that such agreements typically regulated activities that might have a negative impact on the natural environment in areas where armed conflicts were occurring or might occur. His delegation welcomed the provisional adoption by the Drafting Committee of draft principle 7, which urged States and international organizations to take heed of the potential environmental consequences of the presence of their forces and missions in foreign territories, including in pre-conflict and post-conflict phases. It also welcomed the Drafting Committee's provisional adoption of draft principle 15, which encouraged relevant actors in an armed conflict to cooperate with respect to post-armed conflict environmental assessments and remedial measures. While Micronesia understood that former belligerents were unlikely to cooperate immediately after the cessation of hostilities, certain non-State actors, including competent international organizations, could be encouraged to assist in conducting such assessments. Whatever approach was taken, primary responsibility for conducting those assessments should not fall on the third States in whose territories belligerents waged their armed conflicts. The belligerents in question had the responsibility both to conduct post-armed conflict environmental assessments and to implement remedial measures for the benefit of those third States.

56. His delegation was pleased that many Commission members viewed the draft principles on remnants of war as being highly pertinent for the topic. Draft principles 16 and 17, as provisionally adopted by the Drafting Committee, placed the onus squarely on the belligerents in an armed conflict, undertaking joint operations where appropriate, to remove or render harmless the remnants of war under their jurisdiction or control that were causing or risked causing damage to the environment. Under international law, certain remnants of war, warships in particular, remained the property of the belligerents that originally employed them, including long after the cessation of hostilities. It was therefore challenging for a third State on whose territory an armed conflict had occurred to take steps to remove or render harmless remnants of war over which it did not have legal ownership. In that connection, his

delegation was pleased that a separate draft article, draft article 16 (Remnants of war), recognized the specific challenge faced by third States in addressing remnants of war at sea, since the conventions and disciplines of international law that applied to such remnants were markedly different from those concerning remnants found on land. However, the draft principle should be expanded to ensure that toxic and hazardous remnants of war, including those no longer under the jurisdiction or control of belligerents but for which the belligerents should retain some responsibility under international law, were covered as comprehensively as possible.

57. It was a matter of concern that draft principles 16 and 17 no longer included the language proposed by the Special Rapporteur regarding the need to take necessary removal actions without delay after the cessation of active hostilities. Some remnants of war did have an immediate environmental impact, and any delay in their removal could be disastrous for the environment as well as posing a continuing hazard to the human population. His delegation was uncertain whether international law supported the understanding of some Commission members that the removal of remnants of war would only be considered a priority after the cessation of hostilities if such removal was necessary to satisfy the immediate needs of the population. While the law of armed conflict might lend credence to that understanding, many other relevant disciplines of international law, including international environmental law, the law of the sea and international human rights law, supported a prompt removal of threats to the natural environment irrespective of the immediate needs of the affected population. In that regard, language requiring the removal of remnants of war without delay after the cessation of active hostilities could be found in article 10 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices as Amended on 3 May 1996. If the obligations of States to protect the environment in relation to the armed conflicts waged by them extended to the post-conflict phase, those obligations should cover the entire post-conflict phase rather than just a certain part of it.

58. His delegation welcomed draft principle IV-1 (Rights of indigenous peoples), as proposed by the Special Rapporteur. While it noted the extensive debate in the Commission on the proposed draft principle and understood the concerns raised regarding the relevance of indigenous peoples' issues to the topic at hand, it firmly believed that the draft principles should clearly address the obligations of belligerents to take into consideration the traditional knowledge and practices of indigenous peoples in relation to their natural environment. Terrestrial and maritime areas and resources were typically of great importance for indigenous communities, being closely linked to their cultural practices, sociopolitical rankings, identities and sustenance. Protecting those natural environments was therefore equivalent to protecting the communities that depended on them, a connection that was underscored by a number of international law instruments. The interests of indigenous communities should be respected throughout all phases of an armed conflict, including by remediation in the post-conflict phase.

59. His delegation looked forward to the Commission's future work on the topic, especially regarding the issues of responsibility, liability and compensation. When belligerents engaged in armed conflicts in the territories of third States and communities, they had a responsibility to those third parties to protect their environment during all phases of the armed conflict. Furthermore, when they failed to discharge that responsibility, they should be required to provide sufficient remedies to the affected third parties who depended on or were stewards for the affected natural environment.

The meeting rose at 4.40 p.m.