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Chair: Mr. Turbék (Vice-Chair) . . . . . (Hungary)
later: Mr. Katota (Vice-Chair) . . . . . (Zambia)

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16-19047 (E)

In the absence of Mr. Danon (Israel), Mr. Turbék (Hungary), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.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 VII to IX of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

2. **Ms. Samarasinghe** (Sri Lanka), referring first to the topic "Protection of the atmosphere", said that her delegation was gratified to observe that the Commission's work on that important project was advancing in the right direction and that five draft guidelines and a preambular paragraph had been provisionally adopted.

3. Given that every year millions of people died prematurely due to air pollution, the subject clearly warranted consideration by the Commission. The Paris Agreement of 2015 had declared that climate change was a "common concern of humankind"; that concept should be included in the Commission's work.

4. The topic presented issues and complexities of both science and law. Her delegation firmly believed that the topic could not properly be discussed or developed in isolation from the scientific community. It therefore noted with appreciation that the Special Rapporteur had organized dialogues with the world's foremost atmospheric scientists to increase the familiarity of Commission members with the relevant scientific concepts and to encourage broader dialogue among expert scientific and legal bodies in the international community. Her delegation looked forward to the organization of more such dialogues as work on the topic progressed.

5. Draft guideline 3 (Obligation to protect the atmosphere) was a core provision of the project. Sri Lanka took note of the divergent views on its nature, in particular on whether it should be considered to be an obligation *erga omnes* in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts.

6. Atmosphere was a limited natural resource with limited assimilation capacity, and Sri Lanka therefore supported draft guideline 5 (Sustainable utilization of the atmosphere) and draft guideline 6 (Equitable and reasonable utilization of the atmosphere). Draft guideline 7 (Intentional large-scale modification of the atmosphere) was of particular importance. Geo-engineering, which was widely practised and would be even more frequently in the future, might have the potential for preventing adverse effects of disasters and hazards, but needed to be approached with great care.

7. The new fourth preambular paragraph on the special needs and situation of developing countries should be strengthened considerably. The reference in article 2 of the 2015 Paris Agreement to common but differentiated responsibilities should also be used in the Commission's project. The need to give special consideration to developing countries had been endorsed by several international instruments, including the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change.

8. **Ms. Boucher** (Canada), commenting on the topic of *jus cogens*, said that the Special Rapporteur's proposal for the Commission to undertake a thorough analysis of the variety of practice in that regard was timely, and her delegation looked forward to the greater clarity that such analysis would provide in respect of peremptory norms.

9. Any definition of *jus cogens* should be in line with the 1969 Vienna Convention on the Law of Treaties and should not result in, or be interpreted as, a deviation therefrom. That said, it would be beneficial for the Commission, in its analysis of *jus cogens*, to enlarge the idea of the acceptance and recognition of a peremptory norm by States to include other entities, such as international and non-governmental organizations and, more broadly, the international community. The elaboration of an illustrative list of norms that had acquired the status of *jus cogens* would be a useful exercise, as long as it focused on the most widely-accepted norms, which could not be contracted out by States. *Jus cogens* norms were developing along with changes in the international community, and the list should not be seen as final or exclusive, but as a

subset of examples of the most widely accepted peremptory norms.

10. Her delegation saw the benefit of analysing the concept of regional *jus cogens*, but it was important to distinguish that exercise from the one involving universal *jus cogens* norms. The methodology for those two areas of analysis would need to be very clear so as to establish the differences between the two concepts and avoid diluting the strength and legitimacy of universal peremptory norms. Moreover, if the Commission decided to pursue a comparison between *jus cogens* and *jus dispositivum*, it would have to be very clear about the justification for such an analysis and the differences between the two concepts.

11. She looked forward to the continued work of the Commission on the topic and hoped that future research into *jus cogens* norms would lead to greater clarity on current peremptory norms and the requirements for establishing them.

12. With regard to the topic "Protection of the atmosphere", her delegation believed it would be helpful to clarify how the 2013 understanding would be applied to the Commission's future work. Some of the provisions of the proposed guidelines raised questions, for example on scope and objectives.

13. **Ms. O'Sullivan** (Ireland), noting that a slightly more detailed statement would be made available, and commenting on the topic "Crimes against humanity", expressed her delegation's appreciation for the memorandum by the Secretariat entitled "Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission" (A/CN.4/698), which would form a useful basis upon which to assess proposed monitoring mechanisms for a convention on the subject.

14. Her delegation was pleased that article 28 of the Rome Statute had been used as a basis for draft article 5, paragraph 3, which dealt with the responsibility of commanders and other superiors. On the other hand, the Commission's decision to address, in paragraph 7, the liability of legal persons for crimes against humanity departed from the approach taken by the drafters of the Rome Statute, who had noted the deep divergence of views on the subject and had ultimately decided not to include such a provision in the Statute.

15. Her delegation agreed with the point made by the Special Rapporteur in paragraph 41 of his second report (A/CN.4/690) that criminal responsibility for corporations was not uniformly recognized worldwide and the approach adopted in jurisdictions where it was recognized could diverge significantly. The Commission itself noted in paragraph (38) of the commentary to draft article 5 that criminal liability of legal persons had not featured significantly to date in the international criminal courts or tribunals. Further consideration should therefore be given to whether to include draft article 5, paragraph 7.

16. Her delegation reiterated its view that it did not wish to see the Commission's work on the topic divert attention from the international initiative to elaborate a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes, and it therefore welcomed the Special Rapporteur's engagement with officials from the countries that had initiated that project. Her delegation noted the proposal that the Special Rapporteur's third report would address the rights and obligations applicable to the extradition of alleged offenders and the rights and obligations applicable to mutual legal assistance in connection with criminal proceedings, but believed that those issues would overlap significantly with the subject matter of the proposed multilateral treaty.

17. Turning to the topic of *jus cogens*, she said her delegation shared the Special Rapporteur's concern that attempting to provide an illustrative list of such norms could change the nature of the topic, blurring its fundamentally process-orientated nature by shifting the focus towards the status of particular primary rules. Ireland favoured an approach that addressed the way in which *jus cogens* rules were to be identified and the legal consequences flowing from them. It tended to agree that some examples of *jus cogens* norms would have to be cited in order to provide guidance as to their nature, the requirements for their elevated status and their consequences or effects. However, it saw little benefit in listing examples of jus cogens norms in an annex, since that might give rise to the very disadvantages associated with a list of norms, even if it was stated that the list was illustrative and non-exhaustive.

18. Her delegation agreed with the point made by the Special Rapporteur in paragraph 45 of the report that

what was important for the purposes of the Commission's work was whether *jus cogens* found support in the practice of States and jurisprudence of international and national courts, and that while the views expressed in the literature helped to make sense of the practice and might provide a framework for its systematization, it was State and judicial practice that should be the guide.

19. Her delegation agreed with the view that articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties should be central to work on the topic and that it was important to remain faithful to its provisions. Accordingly, it encouraged an in-depth study of the *travaux préparatoires* of the relevant provisions of the Convention. In particular, it was important to ensure that additional requirements for the recognition of *jus cogens* were not inadvertently created.

20. The Special Rapporteur's next report should consider sources of *jus cogens* norms and the relationship between *jus cogens* and non-derogation clauses in human rights treaties, with the consequences of *jus cogens* norms forming the basis of the third report. The criteria for elevation, and the manner of determining whether a *jus cogens* norm was "accepted and recognized" as such "by the international community of States as a whole" were critical aspects of the topic.

21. Her delegation was somewhat sceptical about applying *jus cogens* on a regional basis, although regional norms of a non-derogable nature might exist. It looked forward to the examination of that question, together with the applicability of the concept of persistent objector, in future reports.

22. **Ms. Chigiyal** (Federated States of Micronesia) said that the fragmentation of international law was a matter of serious concern for developing countries. Her delegation encouraged the Commission to keep the dangers of fragmentation at the forefront of its deliberations so as to ensure the development of as uniform a body of international law as possible.

23. Her delegation strongly believed that the protection of the atmosphere remained the most pressing challenge facing contemporary humankind. In the comments it had submitted to the Commission in January 2015, Micronesia had asserted that "only through the establishment of a comprehensive global regime to regulate the protection of the atmosphere in a robust manner can we safeguard the livelihoods — and the lives — of present and future generations of humankind".

24. Her delegation welcomed the Commission's provisional adoption of draft guideline 3, which was perhaps the core guideline in the entire exercise. It noted the Commission's adoption of the Special Rapporteur's proposal to differentiate between two dimensions of the protection of the atmosphere: transboundary atmospheric pollution and global atmospheric degradation. However, there was no practical difference between the two; the atmosphere above a particular State was not distinct from the global atmosphere. As defined in draft guideline 1, the atmosphere was an "envelope of gases surrounding the Earth". Logically, the effects of a State's activities on the atmosphere above it would invariably affect the atmosphere above other States, as well as above areas beyond national jurisdiction.

25. The Commission's main hesitation with regard to conflating transboundary atmospheric pollution and global atmospheric degradation apparently stemmed from the difficulty of ascribing or tracing a particular harm to the global atmosphere to specific activities of individual States. However, that difficulty was immaterial in respect of the individual and collective obligations of all States to protect the atmosphere. As the Commission's interactive dialogue with scientists on the topic demonstrated, there were clear links between transboundary atmospheric pollution and global atmospheric degradation, especially in the form of climate change. Any activity of a State that harmed the atmosphere above it or an area beyond national jurisdiction had the potential to harm the global atmosphere as a whole. That potential was enough to trigger the obligation of the State to take appropriate protective measures, individually or in cooperation with other States, to prevent, reduce or control the harmful impact of its activities. It was therefore Micronesia's view that the obligation to protect the atmosphere was an obligation *erga omnes*.

26. Her delegation noted that the Commission, in paragraph (7) of its commentary to draft guideline 3, signalled a distinction between measures taken by States to address transboundary atmospheric pollution

on the one hand and global atmospheric degradation on the other. The implication was that international law provided clearer guidance on how States could address the transboundary atmospheric pollution they caused than it did on how States could address the harmful impact they had on the global atmosphere. However, as the Commission itself noted, there was significant support in international law, for example in the numerous international conventions cited in footnote 1255 of the Commission's report and in the case law of the International Court of Justice and other international tribunals, for the notion that States had a general obligation to prevent, reduce, or control global atmospheric degradation. Thus, when a State was required to discharge its obligation to protect the atmosphere, it should not be allowed to dilute that obligation by claiming a lower standard of protective measures to address global atmospheric degradation. Any activity under the jurisdiction or control of the State that had the potential to cause transboundary atmospheric pollution also had the potential to cause or to even accelerate global atmospheric degradation; therefore, every reasonable measure available to address the former should also be available to address the latter.

27. The international community had taken a number of significant steps in the past year to ensure the protection of the atmosphere. The adoption of the Paris Agreement and its speedy entry into force were testaments to the global recognition that, in the words of the Paris Agreement, "climate change is a common concern of humankind" and that all States must work towards ensuring the "integrity of all ecosystems" by taking concrete domestic and international measures to address climate change. Earlier in the current month, the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer had adopted the Kigali Amendment, a legally binding international agreement to phase down the consumption and production of hydrofluorocarbons (HFCs), a greenhouse gas several orders of magnitude more potent than carbon dioxide, whose elimination would potentially result in the avoidance of half a degree Celsius of average global warming.

28. Micronesia had participated actively in the negotiations for the Paris Agreement as a small island developing State and was one of the countries to have expeditiously ratified it. It had also spearheaded international negotiations for the Kigali Amendment, being one of the first parties to propose an amendment to the Montreal Protocol to deal with HFCs as well as being the proponent of the Micronesia Declaration, which called on all parties to take early action on HFCs. Domestically, Micronesia was committed to taking steps to revamp its energy sector to rely less on fossil fuel consumption, even though its greenhouse gas emissions were minimal compared to those of developed countries and certain developing countries.

29. Her delegation strongly supported the Special Rapporteur's suggestion that the Commission should deal with the interrelationship of the law of the atmosphere with other fields of international law, in particular the law of the sea and international human rights law. The degradation of the atmosphere had clear links to the degradation of the ocean — including its living and non-living resources — as well as to the degradation of core human rights. The greenhouse gases and other harmful substances that humankind pumped into the atmosphere eventually led to the warming and acidification of the ocean, resulting in coral reef bleaching, unpredictable migrations of valuable fish stocks and deep disruptions of the maritime food chain. The degradation of the atmosphere, especially as manifested in climate change, undermined human rights, including the right to life, to development, to adequate water, to health, to an adequate standard of living, to the productive use and enjoyment of property, to cultural practice and traditions and to self-determination. As a small island developing State with a sizable maritime entitlement and long-standing historical and cultural connections with the natural environment, Micronesia looked forward to participating in the future discussion of those issues.

30. **Mr. Hirotano** (Japan) said that his delegation acknowledged the importance of the topic of crimes against humanity in filling the legal gaps between obligations of prevention and punishment, and it had consistently supported the Commission's work on the subject. Japan welcomed the codification of norms which defined those crimes and related obligations, including the establishment of jurisdiction. The fight against impunity for the most serious crimes required coordinated actions by the international community. Japan hoped that the Commission would continue its

deliberation of the topic in a cooperative and constructive manner.

31. On the topic "Protection of the atmosphere", his delegation believed that draft guideline 3, on the obligation to protect the atmosphere, had been one of the most important outcomes under the topic at the sixty-eighth session. It appreciated that the Commission had analysed and discussed the differentiated obligations relating to transboundary atmospheric pollution and global atmospheric degradation. It seemed appropriate to discuss both aspects together when addressing climate change. The dialogue held with scientists during the sixty-eighth session of the Commission was a good approach for dealing with the legal aspects of scientific topics.

32. Japan recalled that the Commission had hesitated at its past session to refer to the concept of the common concern of humankind. The third preambular paragraph merely stated that "the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole", whereas the eleventh preambular paragraph of the 2015 Paris Agreement had referred to a "common concern of humankind". The Commission should reconsider that paragraph in future sessions and update the discussions on that concept.

33. With regard to the topic of *jus cogens*, Japan valued the Special Rapporteur's practical approach of not addressing the debate on natural law theory and positive law theory. That made it possible to concentrate on analysing and discussing practical aspects. His delegation also welcomed the Special Rapporteur's detailed survey of the historical development of the concept of *jus cogens*. It appreciated his recognition that the general approach and conceptual issues raised in his first report were necessarily provisional and that those issues would need to be reassessed and adjusted as work on the topic continued.

34. On the question of whether the Commission should provide an illustrative list of *jus cogens* norms, Japan was aware of the difficulty of identifying examples and hoped that the Commission would carefully examine that issue in future sessions. As several members of the Commission had pointed out, it was neither desirable nor part of its mandate for the Commission to modify the provisions of the 1969 Vienna Convention. At the current stage, it was not clear whether the topic could make significant discoveries of unidentified norms. However, considering the importance of the topic, the Commission should review the discussion and practice with regard to various aspects of *jus cogens*. His delegation hoped that the Commission could produce a useful stock-taking document in the future.

35. **Mr. Adamhar** (Indonesia) said that Indonesian legislation had criminalized nine of the acts constituting crimes against humanity set out in the draft articles on the topic. The Indonesian National Commission of Human Rights was empowered to investigate cases of grave violations of human rights. Indonesia was carrying out a major revision of its Penal Code, in which crimes against humanity would be codified. It looked forward to providing the Commission with information regarding its domestic legislation on the subject. Given the legal intricacies of the subject matter, the Commission and the Special Rapporteur should give careful consideration to States' views on the topic.

36. Indonesia attached great importance to the topic of protection of the atmosphere. The day before, it had deposited its instrument of ratification of the Paris Agreement. In his delegation's view, the obligations under draft guidelines 3, 4 and 8 on the topic, namely to protect the atmosphere, to undertake environmental impact assessment and to cooperate, were inseparable and mutually reinforcing: they constituted the pillars of atmospheric protection. In particular, the obligation to protect entailed the obligation to prevent and to carry out enforcement measures in cooperation with other States.

37. Indonesia took those obligations seriously, as could be seen in its response to atmospheric pollution caused by forest fires in recent years. It had imposed administrative sanctions on some 30 companies, and lawsuits were pending against several other companies. Indonesia had applied a moratorium on the issuance of permits for forest management, palm plantations and management of peat lands. Indonesia was also working to mitigate forest fire haze, which had worsened in recent years due to extreme weather and climate conditions. It was ready to make available its practice

in that regard so as to contribute to the Commission's work.

38. International cooperation on the protection of the atmosphere was imperative, in particular in the area of law enforcement in response to offences of a transnational nature committed by corporations. Countries in which corporations responsible for atmospheric pollution had their headquarters, management or assets were under an obligation to cooperate on ensuring that such entities were not granted a safe haven and that criminal, administrative and civil sanctions were enforced against them. The draft guidelines should reflect that concern.

39. Indonesia was developing its views on the topic of *jus cogens* and was prepared to contribute its comments on the Commission's work on the subject.

40. **Mr. Rao** (India), commenting on the topic of crimes against humanity, reiterated his delegation's position that, in view of the existing international mechanisms, including the International Criminal Court, an in-depth study and thorough discussion was required to avoid duplicating the work of those mechanisms.

41. On the topic of protection of the atmosphere, his delegation believed that the preambular paragraphs should highlight not only the special needs of developing States but also the historical responsibility of the developed countries, which, although they had played a major role in polluting the atmosphere, had been the first to benefit from the industrial revolution.

42. The principles of a common concern of humankind, environmental impact assessment, due diligence, equity and the sustainable use of the atmosphere and public spaces were regulated by many treaties on environmental law and general international law. One of the major challenges to protection of the atmosphere lay in combating climate change and ensuring climate justice. That called for a concerted effort by the international community to save the planet for future generations. A study of State practice and the capacity-building needs of developing States would go a long way towards strengthening the draft guidelines.

43. On the topic of *jus cogens*, his delegation noted that articles 53 and 64 of the 1969 Vienna Convention provided the legal basis for acceptance and recognition of a norm by the international community of States. With regard to draft conclusion 3, paragraph 2, there were conflicting views within the Commission in connection with the statement that *jus cogens* norms were hierarchically superior to other norms of international law; further elaboration was needed.

44. His delegation endorsed the Special Rapporteur's view that draft conclusions would be the appropriate outcome of the topic. It welcomed the future work suggested by the Special Rapporteur, in particular his proposal to study the rules on the identification of norms of *jus cogens*, including the question of their sources, and to consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties.

45. **Mr. Ojeda** (International Committee of the Red Cross (ICRC)) said he welcomed initiatives that contributed to the prevention and repression of international crimes in order to ensure accountability and end impunity. He commended the Special Rapporteur's commitment to ensuring that the draft articles on crimes against humanity and the commentary thereto were based on existing international law and complemented relevant treaties, in particular the Rome Statute. Any new instrument must be consistent with, and not conflict with or undermine, existing international law.

46. ICRC stressed the importance of the focus in the draft articles on improving national measures and cooperation between States and with international criminal tribunals to prevent and punish crimes against humanity. It was vital to ensure the universal character and integrity of the Rome Statute and to continue working to achieve its effective implementation. The promotion of complementarity under the Rome Statute remained important in terms of better prevention and repression of crimes against humanity at the national level, to which a strengthening of national capacities and international cooperation would contribute. He thanked the Special Rapporteur for consulting with ICRC on the topic and for taking into account many of its comments.

47. **Mr. Murase** (Special Rapporteur on the topic "Protection of the atmosphere") thanked the members of the Sixth Committee for their comments, proposals and criticism, which would be fully reflected in his fourth report. He noted that fruitful discussions had

recently been held on the concept of climate justice at an informal meeting of Legal Advisers of Ministries of Foreign Affairs, organized by the Permanent Mission of India to the United Nations, and at an interactive dialogue session organized by the Permanent Missions of Austria and Sweden.

48. The topic of protection of the atmosphere was science-heavy and science-dependent, and collaboration with scientists was very useful. Article 16 of the Commission's Statute authorized and encouraged it to consult with scientific institutions and experts. He had worked closely with the atmospheric scientists of the United Nations Environment Programme, the World Meteorological Organization and the United Nations Economic Commission for Europe over the years. Since the members of the Commission and of the Sixth Committee had considered it useful to have dialogue sessions with scientists, he intended to organize a similar event in 2017. He hoped that the Sixth Committee would continue to support the important topic of protection of the atmosphere.

49. **Mr. Tladi** (Special Rapporteur on the topic "*Jus cogens*"), thanking the Committee members for their useful comments, said that the interaction between the Sixth Committee and the Commission was very important, and it was essential for the Commission to continue to hear from States to ensure that its work reflected their views, which would find their way into the work of the Commission and future reports of the Special Rapporteur.

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

51. **Mr. Comissário Afonso** (Chairman of the International Law Commission), introducing chapters X to XII of the Commission's report, said that a more detailed statement would be made available on the Committee's PaperSmart portal. The Commission had had before it the third report of the Special Rapporteur (A/CN.4/700) on the topic "Protection of the environment in relation to armed conflicts" (chapter X), which focused on identifying rules of particular relevance to post-conflict situations, while also addressing some issues relating to preventive measures to be undertaken in the pre-conflict phase, as well as the particular situation of indigenous peoples. It proposed nine draft principles, three on preventive measures, five concerning the post-conflict phase and one on the rights of indigenous peoples. The draft principles addressed matters concerning implementation and enforcement, status of forces and status of mission agreements, peace operations, peace agreements, post-conflict assessments and reviews, remnants of war on land and at sea, access to and sharing of information, and the rights of indigenous peoples.

52. The report had been discussed by the Commission in the plenary, and the nine draft principles proposed therein had been referred to the Drafting Committee. The Drafting Committee had provisionally adopted the nine draft principles, taking into account the debate on the third report. The Chairman of the Drafting Committee had delivered a statement to the plenary of the Commission on the work of the Drafting Committee on those nine draft principles. That statement, dated 9 August 2016, was available on the Commission's website. To facilitate reading, the draft principles provisionally adopted by the Drafting Committee were also reproduced in a footnote in chapter X. It should be emphasized, however, that those provisions had not yet been considered or adopted by the Commission in full. The Commission would consider those draft principles, and the draft commentaries thereto, at a future session.

53. In addition to the referral of the nine draft principles proposed in the third report, the Commission had also decided to refer back to the Drafting Committee the draft introductory provisions and draft principles that had been taken note of in 2015 in order to address some technical issues, including numbering of the draft principles as a whole. Upon consideration of the report of the Drafting Committee on those draft principles, the Commission had provisionally adopted draft principles 1, 2, 5 and 9 to 13, together with commentaries.

54. Structurally, the entire set of draft principles were divided into three parts following the initial part, entitled "Introduction", which contained draft principles on the scope and purpose of the draft principles. Part One concerned guidance on the protection of the environment before the outbreak of an armed conflict but also contained draft principles of a

more general nature that were of relevance for all three temporal phases. Part One was therefore entitled "General principles". It was envisaged that additional draft principles might be added to that part at a later stage. Part Two pertained to the protection of the environment during armed conflict, and Part Three related to the protection of the environment after an armed conflict.

55. Draft principle 1 defined the scope of the draft principles and provided that they applied to the protection of the environment during three temporal phases — before, during or after an armed conflict. It was important to underline that not all draft principles would be applicable during all phases and also that there was a certain degree of overlap between the three phases. It should also be noted that the Commission had not yet decided whether a definition of the term "environment" should be included in the text of the draft principles and, if so, whether the term "environment" or "natural environment" was preferable for all or some of those draft principles. As indicated in the text, the Commission would revisit that matter.

56. Draft principle 2 concerned the purpose of the draft principles, which was to enhance the protection of the environment in relation to armed conflict, including through preventive and remedial measures. Like the provision on scope, that provision covered all three temporal phases.

57. Draft principle 5 [I-(x)] provided that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. While draft principle 5 was situated in Part One of the draft principles, which generally concerned guidance on the protection of the environment before the outbreak of an armed conflict, it should be noted that Part One also contained draft principles that were relevant to the other temporal phases. Draft principle 5 therefore did not exclude instances in which the designation of protected zones could also take place either during or soon after an armed conflict. In addition, it had a corresponding draft principle, draft principle 13 [II-5], placed in Part Two of the draft principles concerning the protection of the environment during armed conflict.

58. Turning to Part Two of the draft principles, he said that draft principle 9 [II-1] provided broadly for the protection of the natural environment during armed conflict. It reflected the obligation to respect and protect the natural environment, the duty of care and the prohibition of attacks against any part of the environment, unless it had become a military objective.

59. Draft principle 10 [II-2] provided that the law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precaution in attack, must be applied to the natural environment, with a view to its protection. Its overall aim was to strengthen the protection of the environment in relation to armed conflict, and not to simply reaffirm the law of armed conflict. While certain principles and rules under the law of armed conflict were explicitly identified in the draft principle as being of particular relevance, that should not be understood to be an exhaustive list.

60. Draft principle 11 [II-3] stipulated that environmental considerations must be taken into account when applying the principle of proportionality and the rules of military necessity. It was closely linked with draft principle 10 [II-2], but was more specific with regard to the application of the principle of proportionality and the rules of military necessity. It was therefore of operational importance; it aimed to address military conduct and did not deal with the process of determining what constituted a military objective as such.

61. Draft principle 12 [II-4] provided that attacks against the natural environment by way of reprisals were prohibited and mirrored article 55, paragraph 2, of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Its content had generated much debate in the Commission, and some members had maintained their concerns over its current formulation. The divergent views had centred around three main points: (a) the link between draft principle 12 and article 51 of Additional Protocol I; (b) whether the prohibition of reprisals against the environment reflected customary international law; and (c) if so, whether both international and non-international armed conflicts were covered by such a rule.

62. Draft principle 13 [II-5], referring back to draft principle 5, stipulated that an area of major environmental and cultural importance designated by

agreement as a protected zone must be protected against any attack, as long as it did not contain a military target. The conditional protection it provided for was an attempt to strike a balance between military, humanitarian and environmental concerns. That balance mirrored the mechanism for demilitarized zones as established in article 60 of Additional Protocol I.

63. With regard to Chapter XI of the Commission's report, on the topic "Immunity of State officials from foreign criminal jurisdiction", the report reflected two stages of consideration of the topic. The first aspect dealt with the Commission's work in 2016, while the second aspect was a continuation of work on the topic in 2015. The Commission had had before it the Special Rapporteur's fifth report (A/CN.4/701), which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. The report addressed methodological and conceptual questions and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. It drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae* or to identify a trend in favour of such a rule. On the other hand, the report reached the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 (Crimes in respect of which immunity does not apply).

64. Given that, at the time of its consideration at the Commission's sixty-eighth session, the Special Rapporteur's fifth report had been available to the Commission in only two of the six official languages of the United Nations, the discussion of that report had commenced at that session, involving some members wishing to comment, but would be continued at the sixty-ninth session. The summary of the debate should be considered with that fact in mind.

65. Those members who had spoken had welcomed the Special Rapporteur's fifth report, which contained rich, systematic and well-documented examples of State practice as reflected in treaties and domestic legislation, as well as in international and national case law. It had been readily recognized that the subject matter, in particular the question of limitations and exceptions, was legally complex and raised issues that were politically highly sensitive and important for States. It had also been recalled that disagreements existed within the Commission and in the views among States. Some members had pointed to the need to proceed cautiously with the topic. A summary of the full debate, including the summing-up by the Special Rapporteur, would be available after the debate was concluded in 2017.

66. In 2017, the Special Rapporteur was also expected to address the procedural aspects of immunity of State officials from foreign criminal jurisdiction. Accordingly, she would appreciate being provided by States with information by 31 January 2017 on their national legislation and practice, including judicial and executive practice, with reference to the following issues: (a) the invocation of immunity; (b) waivers of immunity; (c) the stage at which the national authorities took immunity into consideration (investigation, indictment, prosecution); (d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity was or might be considered; and (e) the mechanisms for international legal assistance, cooperation and consultation that State authorities might resort to in relation to a case in which immunity was or might be considered.

67. At the previous session, the Commission had considered the fourth report of the Special Rapporteur (A/CN.4/686), which had addressed the material scope of immunity *ratione materiae*, the definition of an "act performed in an official capacity" and the temporal element of such immunity. The Commission had subsequently taken note of the report of the Drafting Committee (A/CN.4/L.865) containing draft article 2 (f) (defining an "act performed in an official capacity") and draft article 6 (Scope of immunity *ratione materiae*), provisionally adopted by the Drafting Committee. In 2016, the Commission had proceeded to provisionally adopt those articles and the commentaries thereto.

68. Draft article 2 (f) defined the concept of an "act performed in an official capacity" for the purposes of

the draft articles as any act performed by a State official in the exercise of State authority. The term "act" referred to both actions and omissions. Moreover, the expression "in the exercise of State authority" was intended to reflect a link between the act and the State. There had to be a direct connection between the act in question and the exercise of State functions and powers, since it was that connection that justified the invocation of immunity, consistent with the principle of the sovereign equality of States.

69. The formulation "State authority" was sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State. It also covered the functions set out in draft article 2 (e), which referred to any individual who "represents the State or who exercises State functions". While the attribution of an act to the State was a prerequisite for an act to be characterized as having been performed in an official capacity, that did not prevent the act from also being attributed to the individual, as a single act could engage both the responsibility of the State and the personal responsibility of the perpetrator, especially in criminal matters.

70. The definition of an "act performed in an official capacity" as set out draft article 2 (f) was without prejudice to the question of limits and exceptions to immunity, which the Commission was currently considering.

71. Draft article 6 addressed the material and temporal scope of immunity *ratione materiae*. It complemented draft article 5, which referred to the persons enjoying immunity ratione materiae. The two draft articles together were intended to address the general regime applicable to immunity *ratione materiae*, which applied exclusively to acts performed in an official capacity. That meant that acts performed in a private capacity were excluded. Unlike immunity *ratione materiae*, immunity *ratione personae* applied to both official and private acts. The material scope of immunity *ratione materiae* did not prejudge the question of limitations and exceptions to immunity.

72. For the purposes of immunity *ratione materiae*, it was irrelevant that the official on whose behalf the immunity was invoked still held office when immunity was claimed or had ceased to be a State official. Such immunity "continues to subsist after the individuals concerned have ceased to be State officials". The term "individuals" reflected the definition of "State official" as previously adopted in draft article 2 (e). Individuals who had enjoyed immunity *ratione personae* in accordance with draft article 4 and whose term of office had come to an end continued to enjoy immunity with respect to acts performed in an official capacity during such term of office.

73. With respect to chapter XII of the Commission's report, the Commission had had before it the fourth report of the Special Rapporteur (A/CN.4/699) on the topic "Provisional application of treaties", which included a proposal for a draft guideline 10 (Internal law and the observation of provisional application of all or part of a treaty).

74. Following the plenary debate, the Commission had decided to refer the draft guideline, as proposed by the Special Rapporteur, to the Drafting Committee. The primary focus of the Drafting Committee, however, had been on completing the consideration of the draft guidelines referred to it in 2015 that it had not been able to address, owing to a lack of time. The Drafting Committee had been unable to conclude its work at the 2016 session on all the draft guidelines referred to it. It was anticipated that the Drafting Committee would continue and conclude its consideration of the remaining draft guidelines at the 2017 session.

75. On 9 August 2016, the Commission had received a report from the Chairman of the Drafting Committee containing draft guidelines 1 to 3 and draft guidelines 4 and 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions, respectively. The report had been made available on the Commission's website. To facilitate reading, the draft guidelines provisionally adopted by the Drafting Committee were also reproduced in a footnote in chapter XII. It should be emphasized, however, that those provisions had not yet been considered or adopted by the Commission in full. The Commission had taken note of the draft guidelines as presented by the Drafting Committee. It was anticipated that the Commission would take action on the draft guidelines and commentaries thereto at the 2017 session.

76. In his current statement, he would focus only on the Commission's debate on the Special Rapporteur's fourth report (A/CN.4/699), which had continued the

analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and of the practice of international organizations with regard to provisional application. An addendum to the report (A/CN.4/699/Add.1) contained examples of recent European Union practice on provisional application of agreements with third States.

77. As to the relationship with other provisions of the Vienna Convention, the Special Rapporteur had focused on analysing the relationship between provisional application and the provisions on reservations, invalidity of treaties, termination or suspension of the operation of a treaty as a consequence of its breach under article 60, State succession, State responsibility and an outbreak of hostilities under article 73. The Commission's debate had largely addressed questions of methodology, which had reflected the underlying question as to whether the legal effects of provisional application were the same as those after the entry into force of the treaty.

78. Members had generally welcomed the Special Rapporteur's decision to examine the question of the relevance of internal law for provisional application. They had observed, however, that further clarifications concerning the different situations involved or the legal consequences that resulted therefrom were necessary. The Special Rapporteur had been encouraged to analyse further the interplay between international law and internal law in the context of provisional application in order to provide a more in-depth understanding on the various scenarios for the purpose of the topic.

79. Suggestions concerning possible future work had included undertaking an exhaustive treatment of treaty provisions concerning provisional application to gain a more in-depth understanding of the topic; a comparative analysis of relevant treaty provisions to assist in understanding provisional application and its relationship with the full application of a treaty; and a comparison of clauses in agreements providing for provisional application that conditioned such application on internal law. While several members had welcomed the Special Rapporteur's intention to prepare model clauses on provisional application, caution had been advised against attempting to analyse the meaning of each clause, which could affect the meaning already ascribed by States to such clauses in existing treaties. Members had continued to support the Special Rapporteur's approach of preparing draft guidelines to provide States and international organizations with a practical tool.

80. In chapter III of the report, the Commission had noted that it would appreciate being provided by States with information on their practice concerning the provisional application of treaties. Such information should include domestic legislation pertaining to provisional application, including examples, in particular concerning: (a) the decision to provisionally apply a treaty; (b) the termination of such provisional application; and (c) the legal effects of provisional application.

81. He again drew attention to the Commission's decision, as found in paragraph 258 of its report on the sixty-eighth session, to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the past 20 years with the Secretary-General, which provided for provisional application, including treaty actions related thereto.

82. *Mr. Katota (Zambia), Vice-Chair, took the Chair.*

83. **Ms. Cujo** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia, the former Yugoslav Republic of Macedonia and Turkey; the stabilization and association process country Bosnia and Herzegovina; and, in addition, the Republic of Moldova and Ukraine, said that the European Union took a keen interest in the topic "Provisional application of treaties". The European Union's founding treaties foresaw the possibility of provisional application, and such application was widely used in European Union practice.

84. There did not seem to be a common view in the Commission regarding the methodology for the current work. While the Special Rapporteur proceeded on the basis of commentary on individual articles of the Vienna Convention and then largely drew conclusions by way of analogy, the Commission's report reflected a wide variety of views held by its members. Several members questioned the reliance on simple analogy and pointed to the need to examine relevant international practice.

85. There was some truth to that methodological dilemma. Analogy went quite far, but it should be appropriately combined with an examination of practice concerning selected or targeted questions for the work to bear fruit. The problem perhaps stemmed ultimately from article 25 of the Vienna Convention itself. On the one hand, article 25, paragraph 1, provided that a treaty or a part of a treaty could be applied provisionally and thus confirmed that it had legal effects. Yet it did not, for instance, specify which articles of the Convention applied, nor did it limit the legal effects of provisional application so as not to defeat the object and purpose of a treaty, as in the case of signature (article 18). On the other hand, article 25, paragraph 2, permitted disengagement from the treaty obligations without formalities attached to it, for example with regard to the form of notification or the notification period.

86. The European Union welcomed the Commission's request to the Secretariat, as referred to in paragraph 258 of its report, concerning a memorandum analysing State practice in respect of provisional application. The draft guidelines would be best served if such an analysis focused on the main trends of treaty practice and on broad and recurring issues related to the topic.

87. It would be useful to consider whether provisional application was provided for in the agreement itself or whether it was agreed in some other manner; whether provisional application was used for the entire agreement or certain parts of it; which provisions were subject to provisional application — the substantive/technical provisions or also the provisions of institutional nature; whether the fields in which provisional application was being used, or was most often used, could be grouped in a useful way; whether there was any correlation between the degree of complexity of the agreements and provisional application; whether the agreements contained separate provisions for the termination or suspension of provisional application; and whether the mechanism of provisional application differed in any manner depending on the treaty's being bilateral or multilateral.

88. The Commission should be able to form a general view of the categories around which the issues connected with provisional application could be usefully arranged. The outcome of the draft guidelines should be simple and clear, confining itself to the issues most often faced in practice. That approach could also usefully be reflected in the model clauses that the Special Rapporteur intended to propose as well as in the commentaries. On the other hand, an expression of views on isolated agreements or issues might not serve, or might even distract from, the main interest of the draft guidelines, which should be to advance the stability of treaty relations when provisionally applied and provide guidance on the principal issues.

89. A more detailed version of her statement would be made available on the Committee's PaperSmart portal, which would contain additional comments on specific issues in the 2016 reports of the Commission and the Special Rapporteur.

90. **Mr. Hernes** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said with reference to the topic "Protection of the environment in relation to armed conflicts" that experience showed that armed conflicts caused not only severe human suffering and extensive damage to civilian property and infrastructure, but also widespread destruction and degradation of the environment, whose consequences were often severe, wide-reaching and long-lasting, both for nature itself and for civilian populations who depended on natural resources for their survival.

91. For that reason, the Nordic countries had long worked to enhance the protection of the environment before, during and after armed conflict. In that context, they welcomed the adoption of the resolution on protection of the environment in areas affected by armed conflict at the second session of the United Nations Environment Assembly, including the call therein for States to implement all related international law. A clarification of relevant existing rules and principles of international law might help to achieve that goal.

92. The Nordic countries expressed their general support for the third report (A/CN.4/700) and draft principles as presented, which had formed a good basis for the discussions on the issue. They noted with appreciation that the Drafting Committee had provisionally adopted nine draft principles based on the nine draft principles proposed by the Special

Rapporteur and looked forward to their adoption by the Commission and the commentary thereto in 2017.

93. The Nordic countries emphasized the central importance of draft principle 4 (Measures to enhance the protection of the environment), pursuant to which States must take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict, in conformity with international law. While views might differ on the exact scope and content of obligations regarding the protection of the environment in situations of armed conflict, all States had an obligation to respect and ensure respect for their obligations under international humanitarian law.

94. In the view of the Nordic countries, draft principle 8, on the environmental impact of international peace operations, and draft principle 14, in which parties to a conflict were encouraged to settle all matters relating to the restoration and protection of the environment in their peace agreements, merited further discussion.

95. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said the Nordic countries fully agreed with the Special Rapporteur's conclusion that limitations and exceptions to the immunity of State officials clearly applied in the context of immunity *ratione materiae* for core international crimes; that was the case for both international tribunals and national jurisdictions. They also supported the inclusion of genocide, crimes against humanity, war crimes, torture and enforced disappearance as categories of crimes to which immunity *ratione materiae* did not apply, and they did not rule out the possibility of adding other categories of crimes to that list.

96. As to the theoretical distinction between "limitation" and "exception", the Nordic countries supported the approach suggested by the Special Rapporteur. By using the simple phrase "immunity shall not apply", the proposal cut through the theoretical aspects of the nature of immunity and established a clear rule.

97. The Nordic countries welcomed the extensive debate on the topic of exceptions from immunity before national jurisdictions that had been initiated by the Commission and would be continued in 2017. They supported the view that the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* should be construed narrowly, relating specifically to immunity *ratione personae*. However, they reiterated their view that for genocide, crimes against humanity and war crimes, no rules of immunity should apply in national jurisdictions.

98. The Nordic countries emphasized the importance of legal consistency with the rules pertaining to immunity before international courts, in particular the regime established by the Rome Statute, article 27 of which reflected a well-established norm of international law. While recognizing the differing rules of international law regarding exceptions to immunity in national jurisdictions in relation to *ratione personae* and *ratione materiae*, they encouraged the Commission to take article 27 into account by including the phrase "without any distinction based on official capacity".

99. The Nordic countries fully supported the inclusion of a "without prejudice" clause explicitly referring to cooperation obligations that might arise from other regimes to which a State was bound.

100. Noting that in 2017 the sixth report of the Special Rapporteur would address procedural aspects of immunity of State officials from foreign criminal jurisdiction, the Nordic countries underlined the importance of procedural safeguards applicable to the decisions of independent prosecutors in order to ensure that all relevant aspects of cases involving claims of immunity were taken into consideration. They remained firmly convinced that robust mechanisms based on the rule of law were important for safeguarding against proceedings that were politically motivated or constituted an illegitimate exercise of jurisdiction. Key questions remained to be addressed, concerning who should be given authority to make prosecutorial decisions relating to immunity, and how to ensure that control mechanisms were in place to guarantee that all relevant factors were considered before decisions of that kind were made.

101. The Nordic countries continued to support the Commission's work on the topic "Provisional application of treaties". Further study might be required on the issue of international responsibility for a breach of a treaty applied provisionally, which the Special Rapporteur's fourth report (A/CN.4/699) had

addressed to a certain degree. When the Nordic countries agreed on applying treaties provisionally, they considered the treaties to produce the same legal effects as if they were formally in force. That same conclusion had been reached by the Commission after the Special Rapporteur's third report and had been reconfirmed by the Special Rapporteur in his fourth report.

102. The fourth report had done well to address the question of the provisional application of treaties by international organizations. The Nordic countries were pleased to note that the Special Rapporteur had gathered and analysed the practice of multilateral treaty depositaries, something that the Nordic countries had called for earlier, as there seemed to be variations in practice. The list included in the addendum (A/CN.4/699/Add.1) clearly showed that it was common to resort to provisional application in respect of cooperation agreements entered into by the European Union and its member States with a third State. The Nordic countries emphasized, however, that the topic should not be considered closed in relation to international organizations, since questions remained.

103. The Nordic countries welcomed the Commission's request to the Secretariat, as referred to in paragraph 258 of its report, concerning a memorandum analysing State practice in respect of provisional application. It was interesting to note that a large part of the treaty registrations had taken place after the entry into force of the 1969 Vienna Convention. The Special Rapporteur had previously gathered comments on State practice, but the number of comments had remained insufficient. The Nordic countries believed that attempts to categorize States and their practice based on whether their internal law allowed for provisional application was fraught with difficulty and should be approached with caution. As the Nordic countries had stated before, whether or not a State resorted to provisional application was essentially a constitutional and policy matter.

104. The Nordic countries welcomed the Special Rapporteur's new proposal for a guideline 10 (Internal law and the observation of the provisional application of all or part of a treaty) and also the Drafting Committee's revised versions of the earlier guidelines. It looked forward to the outcome of the next session of the Commission, during which action was to be taken on the draft guidelines and the commentaries thereto. As noted before by the Nordic countries, draft guidelines had the potential to serve as a practical tool for States and international organizations.

105. The Nordic countries were pleased that, concerning future work on the topic, the Special Rapporteur intended to analyse the provisional application of treaties that enshrined rights of individuals and to propose model clauses. The five countries had suggested earlier that it would be useful if the Commission developed model clauses on provisional application, since completion of constitutional requirements for ratification could take some time, and model clauses could make it easier to resort to provisional application. On the other hand, the formulation of such clauses posed a challenge, owing to differences in national legal systems.

106. **Mr. Tichy** (Austria), commenting on the new draft principles provisionally adopted by the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts", questioned the need in draft principle 4, on measures to enhance the protection of the environment, for the qualifier "effective" before "legislative and other measures". The wording in paragraph 1, which provided that States must take such measures "pursuant to their obligations under international law", could be construed as restricting the obligations to measures already required by existing international law and excluding new obligations.

107. The scope of draft principle 8, on peace operations, might need to be clarified, since the term "peace operations" was not defined in international law, including in international humanitarian law. Similarly, draft principle 14, on peace processes, raised the problem of the meaning of "peace", given that current armed conflicts were rarely terminated by formal peace agreements. It should also be understood that the provision contained in paragraph 2 of draft principle 14, on the role of international organizations in peace processes, did not broaden the powers of international organizations.

108. Paragraph 2 of draft principle 16, on remnants of war, seemed only partly applicable in situations of non-international armed conflict, since non-State parties would hardly be in a position to enter into formal agreements with other States. To remedy that

shortcoming, “agreements” in the context of the draft principle must be understood broadly or must be replaced with another word.

109. The wording of the commitment under draft principle 17, on remnants of war at sea, was too sweeping and vague, as the scope of such a commitment depended on the status of the relevant maritime space where the remnants were located. For instance, any commitment to cooperate with respect to remnants of war situated in a territorial sea must be seen in the context of the rights of the coastal State concerned.

110. On the topic “Immunity of State officials from foreign criminal jurisdiction”, his delegation would refrain from commenting on the questions of theory discussed at the 2016 session, preferring to wait for the results of the 2017 discussions.

111. As on previous occasions, his delegation referred again to the question of whether acts of a private nature of a State (acts *jure gestionis*), such as the purchase of prohibited war material, would fall under the immunity addressed in the draft articles. The definition in draft article 2 (f) of an “act performed in an official capacity” as “any act performed by a State official in the exercise of State authority” did not make it clear whether it also comprised acts of a private nature. The question arose as to whether “State authority” was only authority *jure imperii* or whether it comprised all acts attributable to a State, including acts of a private nature.

112. The national laws referred to in the Special Rapporteur’s report contained different solutions, since some of them did not recognize immunity for acts of a private nature while others did. The Commission’s report seemed to exclude acts *jure gestionis* from immunity, apparently on the assumption that State authority only meant sovereign authority, as State authority was understood in the United Nations Convention on Jurisdictional Immunities of States and Their Property. However, the absence of the qualifier “sovereign” in draft article 2 (f) did not necessarily suggest that interpretation. Paragraph (3) of the commentary to draft article 2, which referred to the link between the act and the State, did not shed sufficient light on the issue either.

113. On the Special Rapporteur’s proposal for draft article 7, his delegation accepted the idea of restricting immunity in certain criminal proceedings. However, such restrictions could be abused for political or even fraudulent purposes. Therefore, if provided for certain crimes, restrictions on immunity should be combined with an international mechanism to prevent abuse. Such a mechanism, to be set up under a future convention on immunity of State officials from foreign criminal jurisdiction, could be based on the provisions concerning interim measures and other urgent procedures before international courts and tribunals. The establishment of its jurisdiction could be a precondition for an exception to immunity in certain cases.

114. On the substance of exceptions, obvious candidates were those enumerated in the proposed draft article 7, paragraph 1(a), namely genocide, crimes against humanity, war crimes, torture and enforced disappearances. Whether there should be an exception for “crimes of corruption” was a matter for further debate: it was sometimes very difficult to prove corruption, and allegations of corruption were especially susceptible to abuse. The crimes in paragraph 1 (c) relating to harm to persons or property, which drew on article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, also required further discussion. It must be assessed whether acts causing harm only to property should entail the loss of immunity. A possible exception to immunity for espionage activities should also be considered.

115. As to draft article 7, paragraph 2, Austria concurred with the view that persons enjoying immunity *ratione personae* would not be affected by the exceptions in paragraph 1. Thus, former heads of State who only enjoyed immunity *ratione materiae* after the end of their term of office would not enjoy immunity for the crimes listed in paragraph 1.

116. On the topic “Provisional application of treaties”, his delegation agreed that reservations could be made to provisionally applied treaties. With regard to the new draft guideline 10, Austria was satisfied with the current implicit and explicit references to articles 27 and 46 of the 1969 Vienna Convention, but was in favour of further elaboration of the problem of valid consent. The question of internal prerequisites,

primarily in constitutional law, for the provisional application of treaties was one of the most important areas in that field of treaty law.

117. As already stated in 2015, his delegation concurred with the underlying notion that once a State had committed itself internationally to the provisional application of a treaty, it could not avoid its obligations thereunder. However, whether a commitment could be made by a State to provisionally apply a treaty depended not only on the provisions of the treaty, but also on the State's internal law. While that might seem implicit in the reference in the new draft guideline 10 to article 46 of the Vienna Convention, a more explicit confirmation, at least in the commentary, would be useful and would also underline the link between provisional application and its democratic legitimation under the internal law of each individual State.

118. **Ms. Benešová** (Czechia) said that a more detailed statement would be made available on the Committee's PaperSmart portal. Commenting on the topic "Protection of the environment in relation to armed conflicts", her delegation noted that draft principle 2 did not explain the purpose of the work on the topic or how the goal of "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" could be achieved through a non-binding text.

119. Concerning draft principle 1, her delegation was surprised that the Commission considered it necessary to deal, on the level of principles, with such a technicality as the temporal scope of their application. Moreover, given that the Commission was not preparing a draft of a potentially legally binding instrument, Czechia did not consider it appropriate to introduce the notion of "application". As the temporal element was sufficiently clear from the titles and content of the proposed draft principles, there was no need for draft principle 1. Instead of draft principles 1 and 2, a simple statement clarifying the scope (i.e. subject matter) of the draft principles would suffice.

120. Czechia had no problem with draft principles 5, 9, 10, 11, 12 and 13. It noted, however, that, whereas draft principle 5 dealt with areas of major environmental and cultural importance, principles 9 to 12 only addressed the environmental aspect. Her delegation therefore reserved its final position on those draft principles until it could see them in the context of other proposed principles.

121. On the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation noted with regard to the exceptions to immunity *ratione materiae* that it might sometimes be difficult to identify clearly established rules of customary international law, since State practice in that regard was somewhat varied and the legal issues involved were complex and sensitive. Nevertheless, Czechia shared the view of the Special Rapporteur and some other members of the Commission that there appeared to be a clear trend in the practice of States, reflected also in the doctrine, in support of the existence of an exception to immunity *ratione materiae* from foreign criminal jurisdiction for the commission of crimes under international law, namely genocide, war crimes and crimes against humanity, as well as other crimes defined in relevant treaties. That trend seemed in principle to be duly reflected in draft article 7, paragraph 1(a).

122. With regard to draft article 2 (f), on an "act performed in an official capacity", Czechia was still unconvinced that the definition was necessary or that it added any substance or specificity to the concept. The commentary to draft article 2 (f) should provide further clarification of the Commission's views on the relationship between immunity *ratione materiae* and the attribution of conduct to a State under international law.

123. Her delegation agreed with the conclusion, expressed by the first Special Rapporteur on the topic and echoed in the memorandum prepared by the Secretariat, that there appeared to be no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility and for the purposes of immunity. Importantly, any differentiation between the concept of "official capacity" for the purposes of State responsibility and for the purposes of immunity *ratione materiae* could, incorrectly, "give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator" (A/CN.4/686, para. 125), thus eliminating the international responsibility of States for such official crimes. In addition, that principle of symmetry between

the rules on attribution for the purposes of State responsibility and rules on immunity *ratione materiae* appeared to be compatible with the application of the suggested exceptions to immunity *ratione materiae*, namely crimes under international law and other treaty crimes subject to universal jurisdiction, as well as the "territorial tort exception".

124. **Ms. Bale** (Australia) said it was clear that the provisional application of treaties or certain treaty obligations was permitted by article 25 of the Vienna Convention. There were several practical reasons why States might want treaty obligations to apply prior to the treaty's entry into force. Formal treaty action in domestic systems could take time. Provisional application might be necessary to respond to an international crisis or to ensure the smooth transition of successive treaty regimes. For example, the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea had been provisionally applied to ensure that it did so at the time of entry into force of the 1982 Convention on the Law of the Sea. Similarly, aviation law agreements could require provisional application to ensure the continuity of commercial and technical standards relating to air services.

125. Concerning the final product, her delegation was in favour of guidelines, although it would also support model clauses. Guidelines or model clauses could provide States with useful guidance, without impinging on their domestic and constitutional requirements.

126. The Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. In examining that practice, it would be helpful to identify the types and provisions of treaties that were often the subject of provisional application and the motivations behind such application. Australia appreciated that State practice was scarce or inaccessible, which had meant that the Special Rapporteur's fourth report necessarily engaged in analysis by analogy. It therefore encouraged States to respond to the Commission's requests for information in order to provide a more representative sample of bilateral and multilateral treaties from various regions. Her delegation also supported the Commission's decision to request that the Secretariat provide a sample of relevant treaties deposited over the past 20 years, to serve as a basis for studying provisional application clauses and the actions of States in that respect.

127. Her delegation agreed with the conclusion that, in the absence of any clear prohibition in the treaty itself, nothing prevented a State from formulating reservations as from the time of its agreement to its provisional application. However, that situation should be distinguished from one in which a treaty expressly allowed a State to make a declaration excluding or limiting the treaty's provisional application. The treaty provisions cited by the Special Rapporteur in paragraphs 29 to 31 of the fourth report (A/CN.4/699) fell into that second category. Declarations made by States under such express provisions were not reservations to the treaty itself. Rather, they were declarations of the State's interpretation of the scope of an agreement on provisional application. Australia would welcome clarification on that issue and an exploration of further relevant examples of State practice.

128. Her delegation recognized that draft guideline 10 was based on article 27 of the 1969 Vienna Convention. It agreed that where a State had consented to the provisional application of treaty obligations, that State should not be able to invoke its internal law as justification for a failure to meet the international obligation. However, it welcomed the Special Rapporteur's acknowledgement that that situation was different from the permissible case of States limiting the provisional application of treaties by reference to their internal law. Australia would support either the expansion of draft guideline 10 or the development of separate guidelines or model clauses to cover that latter situation.

129. **Mr. Low** (Singapore), referring first to the topic "Protection of the environment in relation to armed conflicts", said that the Special Rapporteur's three reports and the Commission's work on that cross-cutting topic would help Member States address a difficult and very contemporary legal challenge.

130. On the topic "Immunity of State officials from foreign criminal jurisdiction", in the past his delegation had expressed disagreement with the characterization by the previous Special Rapporteur of the "predominant view" that there were no exceptions to immunity *ratione materiae*, and it therefore concurred

with the conclusion drawn by the current Special Rapporteur in her fifth report that limitations and exceptions did in fact apply.

131. Singapore took note of the Special Rapporteur's draft article 7. It appreciated the difficulties faced by the Special Rapporteur in attempting to specify a list of crimes which should be excluded from immunity *ratione materiae*. His delegation had previously suggested that a more pragmatic approach to the question might be to consider who was entitled to decide whether immunity *ratione materiae* existed in respect of a specific crime; whether the legal basis for such a decision would be custom or a treaty-based exception applicable only to States parties to the Statute of the International Criminal Court; and what evidential threshold was required to reach a conclusive finding that an exception existed in respect of a particular crime.

132. Framing the analysis in that way might be more useful than seeking to elaborate a list of crimes at the outset. Such an approach might also avoid the "odd" situation described by some members of the Commission that the invocation of immunity from foreign criminal jurisdiction, which was preliminary in nature and decided in *limine litis*, would otherwise depend on a determination of whether a crime had actually been committed. His delegation would be interested in the Special Rapporteur's analysis of the merits of the various legal bases for the exclusion of immunity *ratione materiae*, in particular with a view to developing a consistent approach towards the scope of, as well as limitations and exceptions to, immunity *ratione materiae*.

133. Concerning the relationship between immunity and responsibility, his delegation agreed with the view expressed by the Special Rapporteur and several members of the Commission that immunity could not be equated with impunity. As Singapore had previously stated in the Sixth Committee, immunity served only as a procedural bar to criminal proceedings and did not absolve a State official from all individual criminal responsibility on a substantive level.

134. With regard to the Commission's comments on draft article 7, his delegation agreed with the Special Rapporteur and some members of the Commission that the attribution of *ultra vires* acts of State officials to a State for the purpose of State responsibility was different from the issue of *ultra vires* acts which did not entitle the official concerned to immunity *ratione materiae*.

135. On the commentary to draft article 2 (f), Singapore looked forward to the Commission's future work on the question of whether or not acts *ultra vires* could be considered as official acts for the purpose of immunity from foreign criminal jurisdiction. It would also support further analysis on the scope of immunity *ratione materiae* vis-à-vis *acta jure gestionis*, acts performed in an official capacity but exclusively for personal benefit and acts of persons operating under governmental direction and control, such as private contractors.

136. On future work, his delegation agreed with the Commission's emphasis on the link between limitations and exceptions and the procedural aspects of immunity. It sympathized with the concerns expressed by several members of the Commission regarding the need to avoid proceedings that were politically motivated or an illegitimate exercise of jurisdiction. His delegation had previously highlighted that it would be useful to focus on safeguards to ensure that exceptions to immunity *ratione materiae* were not applied in a wholly subjective manner.

137. On the topic "Provisional application of treaties", his delegation commended the Special Rapporteur on his effort to engage with the views of States and his collaboration with the Treaty Section of the United Nations Office of Legal Affairs in verifying State practice. His delegation agreed with the view expressed in the Commission's report that more examples were needed in order to substantiate the conclusions supporting the draft guidelines provisionally adopted to date. That was also the case with draft guideline 10.

138. His delegation was struck by the relative absence of examples from Asia or from the members of the Association of Southeast Asian Nations (ASEAN). It had some sympathy for the Special Rapporteur's view that it was difficult to obtain the relevant information. It might, however, be useful to explore partnerships with institutions in Asia that had undertaken regional studies of treaty practice. One example was the Centre for International Law at the National University of Singapore. To assist the Commission, his delegation

would provide a written response by the stipulated deadline concerning the practice of Singapore.

139. Singapore looked forward to the Secretariat's memorandum analysing State practice in respect of treaties that provided for provisional application, and it acknowledged the invaluable assistance of the Secretariat in supporting that important work.

140. His delegation agreed with those members of the Commission who had expressed the view that further work was required on the relationship between provisional application and reservations. In particular, it would be interested in the Commission's views on the relationship between provisional application and the guidelines contained in the Guide to Practice on reservations to treaties which had been specifically highlighted in paragraph 275 of the Commission's report.

141. Singapore agreed that further work was required on invalidity of treaties. There was merit in distinguishing between the three situations described in paragraph 276 of the Commission's report. That analysis should be borne in mind when the Drafting Committee examined draft guideline 10 at the Commission's sixty-ninth session. Further analysis of State practice was required before the Commission could conclude work on the topic. Consequently, Singapore did not endorse the preparation of model clauses at the current time. Nor did it support the examination of the question of application of treaties that enshrined the rights of individuals, since the rules concerning provisional application would be the same unless separately and explicitly provided for in the relevant treaty.

142. **Mr. Celarie Landaverde** (El Salvador), referring to the topic of protection of the environment in relation to armed conflicts, said that his delegation endorsed its scope, which had abandoned the distinction between international and non-international armed conflicts, since both could cause irreversible damage to the environment. His delegation continued to support the division of the draft principles into temporal phases, but cautioned against drawing definitive dividing lines, since there would always be obligations which must be complied with at all times.

143. On draft principle 9 [II-1], his delegation pointed out once again that the rendering of "natural environment" in Spanish (*medio ambiente natural*) was redundant and that the word "*natural*" should be deleted. He noted that paragraph 2 was inspired by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and that its content with regard to the protection of the environment echoed the same terms and established the obligation to take care to protect the natural environment against widespread, long-term and severe damage. In his delegation's view, the word "and" should be replaced with "or". That way, States would not need to wait for damage to meet the triple cumulative standard; one of the three would be sufficient.

144. His delegation remained concerned that paragraph 3 continued to accept that the natural environment could be attacked if it was a military objective. Although the principle of distinction was important in armed conflicts, the wording of the paragraph should be changed, because it appeared to echo automatically the terminology of civilian and military property without considering the particularities of the protection of the environment and the irreversibility of certain damage.

145. There was a contradiction between draft principle 5 [1-(x)] and draft principle 9 [II-1], paragraph 3, since States could designate areas of major environmental and cultural importance as protected zones, whereas at the same time, principle 9 [II-1] admitted that the environment could be attacked when it had become a military objective, without specifying any exceptions. It was important to avoid the establishment of a general principle that made it possible to justify destruction of the environment for reasons of military advantage, without providing for exceptions. Moreover, there should be a direct link between the two draft principles to ensure that the designation of protected zones did not become completely ineffective when hostilities broke out.

146. Similarly, with regard to draft principle 13 [II-5] (Protected zones), which prohibited attacks unless the zone contained a military objective, his delegation noted that, according to paragraph (1) of the commentary, the word "contain" meant that all or part of the protected zone was concerned, but that was not reflected in the text itself; hence the need to broaden

the wording of the draft principle and to verify whether it was in harmony with the other draft principles on the same subject.

147. According to draft principle 11 [II-3], environmental considerations must be taken into account when applying the principle of proportionality and the rules on military necessity. That principle should be further clarified, because the notion of environmental considerations was very imprecise.

148. The new elements in the Special Rapporteur's report concerned subjects of major importance and should be discussed at length.

149. The draft principles concerning remnants of war on land and at sea were relevant and were closely linked to the protection of the environment, but given that they included references to weapons whose use was prohibited in international humanitarian law, it might be very restrictive only to establish post-conflict obligations in those cases. An armed conflict could last for decades. If the objective was to protect the environment, waiting until the cessation of hostilities to deal with the remnants of war would be too late. Even in cases of armed conflict, international human rights law continued to apply, many of whose fundamental obligations were directly linked to environmental protection.

150. El Salvador supported the inclusion of the situation of indigenous peoples in the draft principles, because they were particularly vulnerable groups whose environment required attention in cases of armed conflict.

151. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation was pleased that the Special Rapporteur had started a study of limitations and exceptions to immunity, which must be analysed in conjunction with contemporary international law, and in particular the principles and values of the international community.

152. From the outset, his delegation had urged the Commission to maintain a balanced approach to the issue of criminal immunity that would facilitate the proper functioning of States and of international relations without thereby affecting personal responsibility for the commission of serious international crimes. Thus, it supported the work aimed at identifying crimes for which criminal immunity did not apply. On methodology, El Salvador did not share the position of several members of the Commission who had called for prior proof of the existence of a customary norm in each case, because the Commission's work should not be limited to mere codification, but should also move towards progressive development.

153. The irrefutable existence of a rule of customary law was not the only way of addressing the question of limitations and exceptions. The absence of general practice might be an indication of impunity for serious international crimes and of the need to continue studying the topic. It should be borne in mind that in most cases the same crimes were at issue that the international community had sought to prosecute by establishing tribunals such as the International Criminal Court, which took action when States were unwilling to do so.

154. As for the methodological aspects of the topic, his delegation supported the continuation of the Commission's study; however, there was no obligation to accept the conclusions reached by the previous Special Rapporteur, in that further analysis might lead to new results. As for the new questions addressed, his delegation believed that the procedural nature of immunity could not be analysed as a concept completely separate from substantive law, especially with regard to norms of *jus cogens*, because the procedural aspect did not constitute an end in itself but was a means of ensuring that justice was done. Thus, procedural obstacles, in absolute terms, made it impossible to determine the individual criminal responsibility of a State official, including for serious crimes.

155. In view of the foregoing, his delegation supported the inclusion of the crimes set forth in the Rome Statute, namely war crimes, crimes against humanity and genocide, as well as enforced disappearance and torture as separate categories, given the existence of international treaties that reflected their particularly serious nature and established an obligation to prosecute.

156. El Salvador agreed with the Special Rapporteur about the difficulty of enlarging the scope of exceptions to include the crime of aggression. However, as the latter constituted a serious crime that tended to be committed by State officials, the final

decision on its inclusion should be postponed until a later stage.

157. His delegation reiterated its comment that it would be best to avoid using the word *beneficiarse* (benefit) in the Spanish version of the draft articles, since officials were not meant to derive any benefit from immunity. The word *gozar* (enjoy), the term agreed in the context of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, would be preferable.

158. With regard to the topic "Provisional application of treaties", his delegation underscored the importance of the study conducted on the relationship between provisional application and other provisions of the 1969 Vienna Convention, in particular those concerning reservations, invalidity and termination. However, it shared the concerns of some Commission members about the conclusions that might be drawn by analogy, in the sense of automatically applying the general regime to the provisional application of treaties; indeed, a number of questions on the law of treaties did not need to be addressed in the light of provisional application. His delegation reiterated its support for an in-depth analysis of the topic and stressed once again the need to clarify the functioning of the provisional application of treaties.

The meeting rose at 1.05 p.m.