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Chair: Mr. Gafoor . . . . . (Singapore)

Contents

17-19026 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-ninth session (*continued*) **(A/72/10)**

1. **The Chair** invited the Committee to continue its consideration of chapters VI and VII of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

2. **Mr. Misztal** (Poland) said, with regard to the topic "Protection of the atmosphere" that his delegation wondered what the relationship was between paragraph 1 of draft guideline 9 provisionally adopted by the Commission (Interrelationship among relevant rules) and the conclusions of the Study Group on fragmentation, on which the draft guideline was based. Those conclusions, particularly in the context of the principle of a systemic interpretation enshrined in article 31, paragraph 3 (c), of the Vienna Convention of the Law of Treaties, were generally applied. Thus, his delegation was not sure whether it was absolutely necessary to repeat them, especially since the commentary to draft guideline 9, paragraph 1, was similar to typical commentaries to article 31, paragraph 3 (c), of the Vienna Convention.

3. Concerning draft guidelines 10 to 12 proposed by the Special Rapporteur, his delegation did not believe that general international law included the principle of mutual supportiveness. Moreover, separate guidelines referring to trade and investment law, the law of the sea and the human rights law might create a significant danger of moving beyond the scope of the topic.

4. On the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles provisionally adopted by the Commission, his delegation noted that the Commission had taken the unusual step of adopting draft article 7 (Crimes in respect of which immunity does not apply) by a recorded vote. Nevertheless, that provision could be considered as an effort to strike a balance between the law relating to immunity, which was rooted in the principle of sovereign equality, and the need to combat impunity for the most heinous crimes under international law.

5. His delegation agreed that that issue went to the heart of the understanding of international law as a system. Despite the important developments in international criminal justice over the past three decades, it was unquestionable that the State and its organs continued to be responsible for ensuring compliance with international law. Guaranteeing prevention and punishment with regard to the most serious crimes under international law was in the interest of the international community as a whole, but whether draft article 7 struck a balance between codification and progressive development needed to be given further consideration following the assessment of the procedural aspects of immunity.

6. With respect to the topic "Peremptory norms of general international law (jus cogens)", recalling the view expressed by his delegation during the Committee's discussions in 2016 said that the concept of regional jus cogens was by definition in contradiction with the very notion of norms of jus cogens and therefore should not be accepted, given that a prerequisite of such norms was acceptance and recognition by the international community of States as a whole. Work on the topic should not be focused on the development of an illustrative list of norms that had acquired the status of jus cogens, as that had already been done elsewhere by the Commission in the past.

7. In relation to the draft conclusions provisionally adopted by the Drafting Committee in 2017, it was very controversial to insert into draft conclusion 7, paragraph 3, the notion of a "a very large majority of States", whose acceptance and recognition was required for the identification of a norm as peremptory. Not only the number of States was significant, but also their representative character. In that connection, the Commission should draw on draft conclusion 8, paragraph 1, of the draft conclusions on identification of customary international law adopted by the Commission at its sixty-eighth session. In paragraph (3) of its commentary to that draft conclusion, that Commission stated that "It is important that such States are representative of the various geographical regions and/or various interests at stake". That logic should also be applied to peremptory norms of general international law.

8. Poland stressed the complex and difficult nature of the topic "Succession of States in respect of State responsibility" from the perspective of the codification and progressive development of international law. That was due to the scarcity of succession cases and of historical examples in which State succession had occurred. As a result, treaties relating to State succession enjoyed relatively narrow support. The Commission should take those circumstances into account. It would be more efficient to follow the approach taken in the work on the topics "The Most-Favoured-Nation clause" in 2015 and "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in 2014, namely to work towards a final outcome consisting of summary conclusions or a report.

9. **Mr. Joyini** (South Africa) said that his delegation noted with regard to the topic "Peremptory norms of general international law (jus cogens)" that the Special Rapporteur had taken article 53 of the Vienna Convention on the Law of Treaties of 1969 as the basis for the identification of such norms. That ensured that the Commission's work remained within the realm of treaty law and widely accepted customary international law. The Commission had made substantial headway towards creating a framework for the acceptance and recognition of such norms. Its recognition of the general nature of peremptory norms, set out in draft conclusion 2, accurately captured the foundational ideas inherent in the doctrine of peremptory norms, namely that they reflected and protected fundamental values, were hierarchically superior and were universally applicable. The Special Rapporteur was to be commended for striking a balance between current jurisprudence, academic writing and State practice and for providing draft conclusions that reflected the current status of peremptory norms within the body of general international law.

10. His delegation looked forward to the Special Rapporteur's work on the consequences that followed from a norm having a peremptory nature. It agreed with him that in order for a norm of general international law to acquire the status of jus cogens, it must be recognized by the "international community of States as a whole" as being non-derogable. As explained in his second report (A/CN.4/706), non-derogation itself was not a criterion for jus cogens status. Rather, the acceptance and recognition that the norm had that quality constituted the criterion for jus cogens. On its own, non-derogation was the primary consequence of peremptoriness. That consequence was what distinguished jus cogens norms from the majority of other norms of international law, namely *jus dispositivum*.

11. His delegation welcomed the Special Rapporteur's intention to address non-derogation in his third report in 2018 and looked forward to his fourth report, planned for 2019, which would deal with remaining miscellaneous issues as well as proposals for an illustrative list of jus cogens norms. However, there were doubts as to whether an illustrative list should be produced or developed. Such a list would soon become outdated and, although it might be instructive, it would not assist international lawyers in providing tools to determine for themselves whether norms had achieved the status of jus cogens or not. The presence of a list or its absence did not reflect on the ultimate goals of the project. If the Commission were to include a list, making explicitly clear that it was illustrative and not exhaustive, that could provide helpful guidance to States, but if it ultimately decided not to include a list, the conclusions would stand regardless and would allow for peremptory norms to be further identified and developed.

12. In relation to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that his delegation had called for a careful study must be made of the possible limitations to immunity *ratione personae* and immunity *ratione materiae*. In that connection, it welcomed the fact that the Commission had considered the report of the Drafting Committee at its 3378th meeting and provisionally adopted draft article 7 by recorded vote. It subscribed to the view that draft article 7 referred to crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* did not apply. The draft article complemented the normative elements of immunity from criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6. His delegation appreciated that, while the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of apartheid", "torture" and "enforced disappearance" belonged to well-established categories in contemporary international law, the Commission had been mindful that the fact that draft article 7 referred to "crimes" meant that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what was meant by each of the above-mentioned crimes.

13. His delegation was pleased that the Commission had decided to include draft article 7 because there had been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constituted crimes under international law. That was reflected in decisions by national courts; in rare cases, in the adoption of national legislation providing for exceptions to immunity *ratione materiae* in relation to the commission of international crimes; in the literature; and, to some extent, in proceedings before international tribunals. The Commission had also taken into account the fact that the draft articles were intended to operate within an international legal order, whose unity and systemic nature could not be ignored.

14. South Africa reiterated its view that a careful balance must be struck between the need to protect the traditional norm of immunity of representatives of States from the jurisdiction of foreign States, which was based on fundamental international law principles such as equality of States, and norms on the protection of human rights and the prevention of impunity for

international crimes. Finding the appropriate balance called for a critical assessment of the existence of immunity in law and State practice, the extent of such immunity, and any exceptions. Draft article 7 had the potential to serve as a good starting point for achieving such a balance.

15. In relation to the topic "Protection of the atmosphere", his delegation reiterated the views the views expressed by his delegation during the Committee's discussions in 2016 that the international community's efforts to protect the atmosphere were crucial to the world's sustainable development and well-being. The atmosphere was a common resource of global concern, and the effects of human interference in the atmosphere had impacts beyond national borders. Protection of the atmosphere should therefore be addressed in international law to the extent possible.

16. The protection of the atmosphere under international law had evolved through treaty-making and through State practice, ultimately giving rise to customary law norms. Nevertheless, such development had not always been systematic or consistent, and specialized legal instruments had been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law as a whole.

17. South Africa reiterated its concern about the blanket exclusion of many rules and principles that, in its view, were an integral part of the law on the protection of the atmosphere. It was not clear how the Commission could possibly study the international law on the topic while ignoring critical rules and principles, such as the precautionary principle, the preventive principle, the polluter-pays principle and the principle of common but differentiated responsibilities.

18. The draft guidelines must deal with the issue of responsibility in an appropriate manner, possibly drawing on the body of international law on State responsibility to identify principles on responsibility that would be particularly helpful in guiding States in the field of atmospheric pollution and degradation.

19. Concerning the topic "Succession of States in respect of State responsibility", South Africa welcomed the two draft articles on scope and use of terms provisionally adopted by the Commission. Although State succession was becoming an increasingly rare occurrence, the Commission's work on the topic could bring clarity to the legal issues that States might face when it occurred. Transfer of a part of a State's territory, secession, dissolution, unification or the creation of a new independent State often led to disputes and uncertainty. It would be very helpful if some clear legal principles could be invoked to ensure an orderly and peaceful resolution of such cases. The principle of State consent should, however, remain central to the Commission's consideration of the topic. Predecessor States, successor States and third States with claims derived from State succession should always have the option of resolving disputes arising from State succession through consultation and negotiation. Since State succession was an exceptional and usually an historic event, each case had its own causes, features and concomitant political, economic and social challenges and required a tailor-made approach. While the parties concerned would benefit from clear legal guidelines and the fair and unbiased support of the international community, it would ultimately be up to them to ensure that any disputes arising from State succession were settled peacefully and amicably. His delegation looked forward to the Special Rapporteur's next report and draft articles that were practice-based and respectful of State sovereignty.

20. **Ms. Lind** (Estonia) said that in her delegation's view, the topic of protection of the atmosphere, by its very nature, was one that affected the international community as a whole and called for international cooperation. With regard to the draft guidelines provisionally adopted by the Commission, her delegation noted that draft guideline 9, paragraphs 1 and 2, created a link between the rules relating to the protection of the atmosphere and other relevant rules of international law. It supported the Commission's approach of making an express reference to the principles of harmonization and systemic integration, with a view to avoiding conflicts between any new rules relating to the protection of atmosphere and rules in other legal fields. It was important for the draft guidelines not to compete with, but to complement, the existing international legal regime.

21. Estonia also endorsed paragraph 3, concerning the plight of those who might find themselves in vulnerable situations because of atmospheric pollution and atmospheric degradation. Although the wording "may include, inter alia" indicated that the examples were not exhaustive, her delegation believed that reference should also be made to children, the elderly and poorer segments of the national population in the enumeration of particularly vulnerable groups.

22. The topic of immunity of State officials from foreign criminal jurisdiction was sensitive and important, since all States had a shared responsibility to ensure that perpetrators did not escape justice. Immunity should not be used in a manner that shielded individuals from accountability for the most serious crimes and defeated the purpose of laws on universal jurisdiction.

Her delegation welcomed the inclusion of torture, enforced disappearance and apartheid as separate crimes in the list in draft article 7, but regretted that the Drafting Committee had decided not to include the crime of aggression. Estonia would be very interested to read further comments from States on that matter.

23. The issue of limitations and exceptions to immunity of State officials from foreign criminal jurisdiction raised many questions and should be analysed in depth, since it was highly sensitive and at the same time had an important practical dimension. As the Drafting Committee had acknowledged at the outset of its deliberations on draft article 7, there was a need to consider the relationship between the question of limitations and exceptions to immunity and the procedural aspects of immunity.

24. Estonia endorsed the view that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* from the exercise of foreign criminal jurisdiction. Despite differing views regarding Ministers for Foreign Affairs, her delegation agreed with the International Court of Justice that immunity *ratione personae* was intended to ensure that Ministers for Foreign Affairs were able to exercise their functions.

25. Her delegation welcomed the inclusion of the topic of succession of States in respect of State responsibility in the Commission's programme of work. It would be useful to clarify whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States for internationally wrongful acts in situations of succession of States. Estonia agreed with the Special Rapporteur that the work on the topic should follow the main principles of succession of States concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State. More in-depth research on State practice would be useful, and attention should be given to practice in all regions.

26. **Mr. Kingston** (Ireland) said with regard to the topic "Immunity of State officials from foreign criminal jurisdiction" that his delegation expressed its concern about the division within the Commission on the provisional adoption of draft article 7 and the commentary thereto. While the Special Rapporteur's fifth report (A/CN.4/701) contained an extensive discussion of practice, the groundwork for a detailed consideration of the question of non-application of immunity had not been fully in place prior to the sixty-ninth session of the Commission. Thus, draft article 7 might not be fully grounded in widely accepted State practice. Further information on practice relating specifically to the non-application of immunity would be helpful. For those reasons, the Commission should continue to examine the basis for and content of draft article 7 in conjunction with the provisions on procedures and safeguards at its next session, with a focus on State practice.

27. Ireland noted the Special Rapporteur's comment, as reflected in paragraph 134 of the Commission's report (A/72/10), that the draft articles contained elements of both codification and progressive development. It was, however, unclear from the Special Rapporteur's report, the report of the Drafting Committee and the commentaries whether and in what respect draft article 7 sought to determine the scope of existing international law (*lex lata*) or the extent to which the Commission was following an emerging trend towards desirable norms (*lex ferenda*). Although the Special Rapporteur had stated that the Commission was not engaged in crafting "new law", Ireland took note of the comments by some Commission members that the text did not reflect existing international law or identifiable trends.

28. Although both codification and progressive development of international law were equally valid aspects of the Commission's mandate, for any topic the Commission should initially focus on establishing the current state of the law; only then should it move on to assess proposals for progressive development. That was particularly true with the current topic, which might give rise to practical issues that might be considered not only by foreign ministries and international lawyers, but also by domestic courts. Therefore, irrespective of the form of the outcome of its work on the topic, the Commission should articulate in detail and specify for each draft article or part thereof whether it sought to codify customary international law or to progressively develop it. That was not to suggest that his delegation was opposed to progressive development, but rather that elements of such development, based on emerging trends, should be clearly indicated. Ireland looked forward to the Special Rapporteur's report on the procedural aspects of immunity.

29. **Mr. Lefeber** (Netherlands), speaking on the topic of immunity of State officials from foreign criminal jurisdiction, said that his delegation welcomed the increased attention to national legislative practice in the Special Rapporteur's fifth report. As it had stated before, national legislation, in addition to national court decisions, was highly relevant for the determination of the existence of a rule of custom. His Government agreed with the Special Rapporteur that there was a

trend towards the recognition of exceptions to immunity *ratione materiae* at the international and national levels; indeed, it would support that trend. It therefore welcomed draft article 7, on crimes under international law in respect of which immunity *ratione materiae* did not apply. In his delegation's view, international crimes fell inherently outside the scope of acts performed in an official capacity and therefore should not be susceptible to the plea of immunity.

30. However, his Government shared the concerns expressed by some Commission members regarding the Drafting Committee's decision to include a limitative list of crimes, which left out certain crimes under international law, such as the crime of slavery. The inclusion of such a list would also hamper the development of the notion of crimes under international law to which immunity did not apply. His delegation would therefore prefer a general reference to "international crimes" as the crimes to which immunity *ratione materiae* did not apply. That would allow for the interpretation of the concept of "international crimes" in the light of customary international law and the development of international criminal law. Examples of those crimes might be mentioned in the commentary, as long as it was clear that they did not constitute a limitative list.

31. His delegation agreed with other Commission members that it was important to consider the substantive aspects of immunity *ratione materiae* in conjunction with the procedural aspects, since immunity continued to be a procedural matter. It looked forward to the Special Rapporteur's report on that question.

32. **Mr. Sunel** (Turkey), referring to the topic of protection of the atmosphere, said that the need to protect the atmosphere from pollution had long been a subject of discussion in the context of international regulation, and several legal regulations were in place to that end. Although the guidelines that it was developing might bring added value to the subject at hand, the Commission should acknowledge past work, including existing treaties, and should avoid imposing additional obligations on States. Instead, it should focus on better streamlining the existing legal framework. Referring to the draft guidelines provisionally adopted by the Commission, he said that draft guideline 4 (Environmental impact assessment), which set out the obligation for States to ensure that an environmental impact assessment was undertaken of proposed activities under their jurisdiction or control which were likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution and atmospheric degradation, must be treated with caution and required further consideration.

33. **Mr. Metelitsa** (Belarus) said that the full text of his delegation's statement on the topics "Protection of the atmosphere" and "Immunity of State officials from foreign criminal jurisdiction" would be made available on the PaperSmart portal. Referring to the draft articles on immunity of State officials provisionally adopted by the Commission, he said that it remained an open question whether or not exceptions to immunity constituted a customary norm, a point acknowledged by the Commission in its commentary to draft article 7. His delegation disagreed with the conclusion in paragraph 184 of the Special Rapporteur's fifth report (A/CN.4/701) that there were sufficient elements pointing to the existence of a customary norm that recognized international crimes as a limitation or exception to immunity.

34. Firstly, there was not sufficient State practice confirming the presence of such a customary norm. For instance, in the case which it had brought before the International Court of Justice against France, Equatorial Guinea had argued that France did not have jurisdiction over the Vice-President of Equatorial Guinea, and it had therefore contested the existence of an exception to immunity. Moreover, in paragraph 165 of her report, the Special Rapporteur had rightly cited the example of the adoption by the African Union of the Malabo Protocol establishing the International Criminal Law Section of the African Court of Justice and Human Rights, in which the African States had agreed not to commence charges against senior State officials during their tenure of office.

35. Secondly, in the conclusions of the International Court of Justice referred to in paragraphs 63 and 66 of the Special Rapporteur's report, the Court had rightly considered that there were no exceptions to the immunity enjoyed by the "troika" (Heads of State, Heads of Government and Ministers for Foreign Affairs) for official acts, including after such persons ceased to hold office.

36. Thirdly, article 98 of the Rome Statute of the International Criminal Court also supported the position that exceptions to immunity *ratione materiae* were not a customary rule of international law, since it stipulated that the Court could not request a State to act inconsistently with its obligations under international law with respect to the State immunity of a person of a third State, unless the Court could first obtain the cooperation of that third State. Thus, the agreement of the State of which that person was an official was required. For the above-mentioned three reasons, his delegation concluded that exceptions to immunity *ratione materiae* were not a customary norm of international law, but a proposal for the creation of a

new norm. Whether or not a State agreed or disagreed with such a proposal would to a large extent depend on the quality of the draft articles on the procedural aspects of exceptions to immunity.

37. A second question regarding draft article 7 concerned the list of crimes. His delegation agreed with the Commission's decision not to include the crime of aggression in view of the specific nature of the crime. However, it did not agree with the inclusion of torture and enforced disappearance in the list. That position was borne out by the 2005 World Summit Outcome, which had been adopted by consensus in the presence of 152 Heads of State and Government, and in which genocide, crimes against humanity and war crimes had been deemed to be crimes which entailed the responsibility of the international community as whole. Belarus considered those three categories to be crimes under international law. Other crimes, such as enforced disappearance, torture, slavery and persecution on racial and other grounds, came under the category of crimes under international law only if they were perpetrated on a broad scale or in a systematic fashion. His delegation therefore concluded that torture and enforced disappearance were not established norms of international law. If there was a desire for progressive development in order to establish such norms, it would be preferable to introduce amendments to the Statute of the International Criminal Court.

38. **Mr. Martín y Pérez de Nanclares** (Spain), speaking first on the topic of protection of the atmosphere and the draft guidelines on the topic provisionally adopted by the Commission, said that his delegation was pleased that draft guidelines 9 and 12 had been merged. However, it was somewhat dissatisfied with the wording of the resulting draft guideline 9 (Interrelationship among relevant rules). To start with, it did not see the relevance, in an instrument for the protection of the atmosphere, of a guideline that merely referred to the relationship between different fields of international law without favouring the atmosphere. Spain did not advocate the establishment of a kind of *pro atmosphera* principle; it simply pointed out that, expressed in such neutral terms, the provisions of paragraphs 1 and 2 of the draft guideline made no sense. As to the terms employed, no matter how much they followed or sought to follow the conclusions of the Commission's Study Group on fragmentation of international law, from a technical viewpoint they were not as precise as they should be.

39. On paragraph 1, his delegation did not believe that an integrative interpretation of the rules of international law relating to the protection of the atmosphere and other physical environments gave rise to "a single set of compatible obligations". Each instrument would give rise to its own obligations; the goal was for the instruments in which those obligations originated to be interpreted in a way that they were mutually compatible, so that the resulting obligations were mutually compatible as well. In reality, the conclusions of the Study Group on fragmentation referred to "a single set of compatible obligations" when dealing with different rules regarding the same issue, and not with rules referring to different fields, which was what the Commission was dealing with in the current case. Paragraph 1 also referred to the principle of harmonization; it was not clear that that had a place in international law. The reference to the principles of harmonization and systemic interpretation could be deleted without it having the slightest effect on the meaning of the text. His delegation understood the principle of harmonization to call for interpretation in conformity with different sources of international law, an idea that was already expressed elsewhere in paragraph 1. Moreover, the principle of systemic or systematic interpretation was enshrined in article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, a precept which was expressly cited.

40. As for paragraph 3, concerning persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, his delegation was not convinced that that provision should be presented as a criterion to guide the application of the preceding paragraphs. Rather, it should be a specific draft guideline, because a new consideration was being introduced.

41. In relation to the topic "Immunity of State officials from foreign criminal jurisdiction", but also with respect to all other topics, the Commission should always make it clear whether it was acting on a *lex lata* or *lex ferenda* basis, and it should avoid giving the impression of creating law. Otherwise, the effect would be the opposite of the one intended. It was clear, for example, that the immunity *ratione personae* of former Heads of State and Government and former Ministers for Foreign Affairs should be considered as customary international law, but the same could not be said about limitations and exceptions to immunity *ratione materiae*. Identifying and perhaps also analysing both State practice and *opinio juris* in that regard was particularly difficult. State practice was scarce, and the necessary legal consensus did not exist, as could be seen in the fact that, on at least two occasions, the International Court of Justice had avoided giving an opinion on whether or not the issue was of a customary nature.

42. The lack of consensus had become evident within the Commission itself: it was striking that draft article 7 had been adopted by recorded vote in the Commission, and it was no less striking that the commentary also contained the minority opinions. Both circumstances, which were exceptional, weakened the draft article, and above all, they placed States in an impossible position, because they were forced to decide whether or not there was a trend toward the inapplicability of immunity for certain international crimes. If the Commission intended to make a *lex ferenda* proposal, the least that could be expected was that there should be agreement within the Commission on the matter; otherwise, the proposal would be stillborn. If there was such a "trend", the most recent Spanish legislation would of course be in line with it. The legislation on immunity of States and international organizations based in Spain, which was adopted on 25 October 2015, and which regulated inter alia the immunity of former Heads of State and Government and former Ministers for Foreign Affairs, excluded immunity for the crimes of genocide, enforced disappearance, war crimes and crimes against humanity that they might have committed while in office. Those four crimes were included in draft article 7, paragraph 1.

43. When defining the crimes in paragraph 1, there had been two options: refer to the definitions contained in the relevant treaties, or restate those definitions. The former option had been chosen, whereas in the draft articles on crimes against humanity, the definitions in the Rome Statute had been restated. It was unclear why the Commission had taken a different approach.

44. His delegation agreed with the Special Rapporteur that the issue of limitations or exceptions to immunity (identification of cases in which immunity *ratione materiae* did not apply) was one that should be dealt with before addressing the procedural aspects of immunity. However, questions such as waiver of immunity for State officials might not involve procedural issues whose treatment could be left to the end. As a case in point, in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, the waiver of immunity was covered in Part II (General Principles), and not in Part V, which dealt with procedural aspects.

45. The reference in the draft article's heading and text to immunity *ratione materiae* prompted his delegation to reiterate a point it had made at the sixty-seventh session of the Sixth Committee with regard to draft article 6, paragraph 3: in draft article 7, the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs whose term of office had come to an end should be explicitly referred to as immunity *ratione materiae*. It should also be made clear in draft article 7 that such immunity was applicable to those persons.

46. **Mr. Tupouniua** (Tonga) said his delegation was pleased that the Commission had retained the topic "Protection of the atmosphere" in its long-term programme of work. It welcomed the dialogue which had taken place between the Commission and a group of scientists and encouraged its continuation in the future, given the important role that scientific findings had played in the development of the draft guidelines on the topic. The disruptions to the atmosphere caused by anthropogenic activities continued to have a significant detrimental impact on the planet. While his delegation recognized that complex regimes in international law existed which addressed climate change and ozone depletion, their fragmented approach remained a challenge to endeavours to protect the atmosphere through concerted efforts at the national, regional and international levels. As acknowledged in numerous studies and reports, including the Special Rapporteur's fourth report (A/CN.4/705 and A/CN.4/705/Corr.1), small island developing States like Tonga were particularly susceptible to the impact of climate change.

47. His delegation was pleased that the Special Rapporteur had taken into account its concern about the interrelationship of the draft guidelines on the topic with existing legal instruments by considering the interrelationship between the law on the protection of the atmosphere and other fields of international law, namely international trade and investment law, the law of the sea, and international human rights law, and by analysing the importance of those fields of law for the protection of the atmosphere.

48. His delegation commended the Commission for having captured those considerations in draft guideline 9 (Interrelationship among relevant rules) and the related preambular paragraphs. Paragraphs 1 and 2 thereof provided practical solutions for dealing with the fragmented nature of the existing regimes by identifying the relevant areas of law and encouraging States to interpret and apply existing obligations under international law and those relating to the protection of the atmosphere in a harmonious manner. The inclusion of the words "including inter alia" was essential in the listing of fields to ensure that the list was not exhaustive, as future developments might reveal other important areas of law.

49. Tonga also welcomed paragraph 3 and the related preambular paragraph, which set out the need for special consideration to be given to groups which were vulnerable to atmospheric pollution and atmospheric degradation. It appreciated, in particular, the reference

made to small island developing States that were placed in a vulnerable situation due to the impact of sea-level rise and its potential legal implications. In 2016, Tonga had underscored the need for further details on the action of States to meet their obligation to protect the atmosphere, and it recognized that that concern would be addressed in the Special Rapporteur's report in 2018, in which he was expected to address implementation, compliance and specific features of dispute settlement related to the law on the protection of the atmosphere.

50. **Mr. Smith** (United Kingdom), recalling that the need for the Commission's work on the topic of protection of the atmosphere and the fact that existing international obligations with regard to the protection of the environment generally covered many issues associated with the protection of the atmosphere, drew attention to the Secretariat's topical summary of the discussion held in the Sixth Committee during its seventy-first session (A/CN.4/703), where the Secretariat had noted in paragraph 16 that a "number of delegations [...] reiterated their doubts regarding the usefulness of the Commission's work on the topic in the light of existing international agreements".

51. His delegation also noted that existing agreements had proved to be flexible enough to address new challenges as they had arisen. A notable example had been the adoption of the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer in 2016, which had extended the scope of that agreement to include greenhouse gases alongside ozone-depleting substances.

52. One point arising from the interrelationship of the draft guidelines on protection of the atmosphere with other international obligations was illustrated by draft guideline 9, which expressly recognized that there were "other relevant rules of international law" concerning the protection of the atmosphere and cited the rules of international trade and investment law, the law of the sea and international human rights law. While the Commission indicated in paragraph (6) of its commentary to the draft guideline that those were indicative examples and were not intended to be exhaustive, the United Kingdom was concerned there was a risk that their inclusion, to the exclusion of other topics, implied the existence a special relationship between them and the protection of the atmosphere. That was unhelpful, and the ambiguity went to the heart of his delegation's concerns about the project as a whole. One way to begin to address that problem would be to remove the specific examples from the guideline altogether.

53. In a similar vein, the Commission had also noted in the same paragraph that nothing in that guideline "should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere". In the view of his delegation, the guideline itself should address that point in concrete terms.

54. Those concerns were underlined by the ambiguity in draft guideline 9 about the interrelationship with other obligations of international law. The draft guideline simply made a potentially unhelpful reference to certain provisions of the Vienna Convention on the Law of Treaties. Those rules already applied to States that were parties to the Convention and were in any event widely regarded as reflecting customary international law. It was difficult to see what their inclusion in the guideline added to long-standing rules and practice on treaty interpretation.

55. The United Kingdom welcomed the more balanced approach taken by the 2015 Paris Agreement, which reflected the principle of "common but differentiated responsibilities and respective capabilities". It was concerned that draft guideline 9 might undermine the evolution of such principles. Indeed, the principle of common but differentiated responsibilities had itself been refined further under the Paris Agreement, to apply "in the light of different national circumstances". That also underlined his delegation's point about the inherent ability of the international legal framework to tailor existing legal norms to evolving global challenges in a manner which was nuanced and context-specific.

56. The United Kingdom stressed its support for the need to protect the atmosphere and environment and to tackle climate change. Nothing in its comments on that aspect of the Commission's report should be taken as undermining its commitment to those important goals.

57. On the topic of immunity of State officials from foreign criminal jurisdiction, the United Kingdom welcomed the Special Rapporteur's conclusion in her fifth report (A/CN.4/701) that no exceptions existed under customary international law in respect of immunity *ratione personae*. With regard to draft article 7 as provisionally adopted by the Commission, however, the six exceptions to immunity *ratione materiae* listed therein did not have sufficient support in State practice to be regarded as established in customary international law. There was a lack of State practice to justify drawing that conclusion, and it was clear that the Commission itself was deeply divided on the issue. It was very unusual that the provisional adoption of draft article 7 was achieved only on the basis of a recorded vote. The same divergence in views had also been observed among

the members of the Drafting Committee itself. Moreover, the footnote to draft article 7 stated that the Commission would consider the procedural provisions and safeguards applicable to the draft articles at its seventieth session.

58. In view of the circumstances surrounding its provisional adoption, the United Kingdom was of the opinion that draft article 7 could not be considered to reflect existing international law (*lex lata*) or even the Commission's settled view of existing international law on the topic. Although it welcomed the Drafting Committee's decision not to include the crime of corruption in draft article 7, it was difficult to discern the rationale behind the other exceptions selected for inclusion.

59. As noted in the Commission's report (A/72/10), the Special Rapporteur appeared to believe that the topic should be approached from the perspective of both codification and the progressive development of international law (*lex ferenda*). As a general proposition, that was not inconsistent with the Commission's mandate; however, the Commission's report recorded that some members of the Commission had questioned whether draft article 7 in fact aimed to set out "new law".

60. As the United Kingdom had stated previously in the Sixth Committee, the topic was of great practical significance. The immunity of State officials from foreign criminal jurisdiction occupied a pivotal role in the day-to-day conduct of international relations, bearing in mind that international travel by State officials, of whatever rank, was commonplace. Such immunity did not exist for the personal benefit of the individual, but to ensure that State officials could exercise their functions efficiently.

61. Accordingly, it was of vital importance for the Commission to indicate clearly those draft articles which it regarded as reflecting existing international law (*lex lata*) and those which it did not, whether because they constituted progressive development of international law or because they amounted to proposals for "new law". If the underlying aim of producing the draft articles was to provide a set of guidelines for use in domestic courts, then States, and also judges and practitioners, needed to know what the Commission considered to be existing international law. If the aim was to make proposals for "new law", to be adopted by States, as they saw fit, in treaty form, then that should be clearly stated. It was unfortunate that the Commission had not provided such clarification to date.

62. The United Kingdom noted that the Special Rapporteur's sixth report, to be submitted in 2018, would cover the procedural aspects of immunity. Those aspects had been ably dealt with by the former Special Rapporteur, Mr. Kolodkin, in his third report (A/CN.4/646) and would, as the Commission appeared to accept, form a crucial part of the Commission's output on the topic.

63. **Ms. Mousavinejad** (Islamic Republic of Iran) said that immunity of State officials from foreign criminal jurisdiction was deeply grounded in the principle of the sovereign equality of States and the premise that the State and its rulers were one and the same for the purposes of immunity; consequently, States and their officials must not be subject to the national jurisdiction of other States. That premise held true with regard to State officials other than the "troika" who were becoming increasingly involved in international affairs. Her delegation noted the unusual way in which draft article 7 had been provisionally adopted by the Commission, which indicated that there had been a fundamental division of opinions on certain issues, reflecting the difficulty of what were highly complex and politically delicate issues for States.

64. The Special Rapporteur had set out on the path of progressive development of international law by proposing draft article 7, which did not benefit from sufficient State practice. Accordingly, her delegation did not agree that the draft article was an appropriate means of addressing the issue. Instead of a list of specific crimes, exceptions to immunity *ratione materiae* from foreign criminal jurisdiction should be applied solely with regard to the most serious crimes of international concern. It was doubtful whether State practice and jurisprudence supported the inclusion of crimes of torture, enforced disappearance and apartheid under the scope of such exceptions. Like a number of Commission members, her delegation believed that the report, by relying mostly on civil rather than criminal proceedings, did not provide comprehensive relevant jurisprudence on the non-applicability of immunity *ratione materiae*.

65. Her delegation drew attention to paragraph (8) of the commentary to draft article 7, in which it was stated that it was not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precluded immunity from foreign criminal jurisdiction, and that immunity did not depend on the gravity of the act in question. Since the treaties listed in the annex to draft article 7 were not universally accepted, the definitions provided for in the annex did not enjoy universal acceptance.

66. Given the sensitivity of the nature of immunity as a direct consequence of the principle of sovereign

equality of States, her delegation suggested that the Commission should proceed more cautiously on the topic. Although the Commission did not determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion.

67. Her delegation looked forward to the Special Rapporteur's future work on the procedural aspects of immunity, which seemed more important and relevant than the substantive matters under consideration. In that connection, it was essential to respect the international legal order, which was based on the sovereign equality of States, since the development of any new framework in dealing with immunity of State officials, if not agreed, might well harm inter-State relations and even interfere with the objective of ending impunity for the most serious international crimes.

68. **Ms. Weir** (New Zealand) said with regard to the topic of immunity of State officials from foreign criminal jurisdiction that her delegation had taken note of the debate concerning draft article 7, and it supported the view that there were limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction *ratione materiae*, in particular in respect of certain types of behaviour that constituted the most serious crimes under international law.

69. The Special Rapporteur should give further consideration to the suggested alternative approach of reformulating draft article 7 on the basis of an obligation of a State either to waive the immunity of its officials before the criminal courts of a foreign State, or to undertake to fulfil its obligation to prosecute its own officials, thereby reducing any impunity gap.

70. Fighting impunity and ensuring responsibility for international crimes was an essential interest for the international community as a whole. Limitations and exceptions were closely linked to the procedural aspects of immunity, and her delegation therefore looked forward to the Special Rapporteur's next report on that subject.

71. In relation to the topic of peremptory norms of general international law (jus cogens), New Zealand supported the adoption of draft conclusions 4 to 9 and endorsed the approach of analysing the effects or consequences of jus cogens in 2018, with a view to developing proposals for an illustrative list of jus cogens norms in 2019.

72. On the topic of protection of the atmosphere, New Zealand favoured the idea that the rules of international law relating to the protection of the atmosphere and other relevant rules of international law should, to the extent possible, be identified, interpreted and applied in a coherent manner. In doing so, it would be important to consider the specific contexts in which existing obligations had arisen. Draft guideline 9 provided a useful starting point, highlighting the techniques in international law for addressing tensions between legal rules and principles. New Zealand also welcomed the recognition in the new preambular paragraphs of the close interaction between the atmosphere and the ocean, as well as the special situation of low-lying coastal areas and small island developing States due to sea-level rise.

73. New Zealand appreciated the Commission's decision to hold part of its 2018 session in New York. It looked forward to participating in the commemorations of the seventieth anniversary of the Commission. That might be an opportunity to start a conversation about where the Commission could add the most value in the future.

74. **Ms. Pino Rivero** (Cuba) said that her delegation stressed the importance of the topic of protection of the atmosphere because of the potential adverse impact of atmospheric pollution and degradation. Concerning draft guideline 2, it should be made clearer that the draft guidelines were without prejudice to questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, liability of States and their nationals, and the transfer of funds and technology to developing countries. Her delegation therefore proposed that the words "*se entiende sin perjuicio*" (are without prejudice) should be replaced with "*se aplica sin perjuicio*" (shall apply without prejudice).

75. With regard to draft guideline 7, her delegation questioned whether a large-scale modification of the atmosphere was permissible, even if conducted with prudence and caution, since it always led to atmospheric degradation. In draft guideline 8, paragraph 2, the words "joint monitoring" needed to be further clarified.

76. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that her delegation agreed that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* while in office. As indicated in the Commission's report (A/72/10), practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole. Her delegation welcomed the

fact that paragraph 1 of draft article 7 provisionally adopted by the Commission followed the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property. It preferred a list of crimes for which immunity did not apply, because a general formulation might lead to differing interpretations in its application.

77. Cuba recognized that the most controversial aspect of the topic was determining whether or not there were limitations or exceptions to the immunity of State officials. The Commission should therefore examine in more detail the practice of States and international courts and tribunals in that regard. It was also important to further consider the procedural aspects relating to the review, invocation and waiver of immunity and other relevant elements.

78. **Mr. Lippwe (**Federated States of Micronesia) said in relation to the topic "Protection of the atmosphere" that his delegation fully supported the approach taken by the Special Rapporteur in his fourth report (A/CN.4/705 and A/CN.4/705/Corr.1), where he examined the interrelationships between international law related to the protection of the atmosphere and various other fields of international law. To guard against the dangers of fragmentation in international law, the Commission must state forcefully that the numerous fields of international law did not exist in isolation, but were interlinked and interacted with each other, as underscored in the Special Rapporteur's report.

79. Micronesia supported the notion that fields of international law should — and frequently did — operate in in relation to one another. Harmonizing efforts across the numerous fields of international law would ensure the equitable participation of developing countries with limited capacities, like Micronesia, in the development, interpretation and application of international law. That was particularly true for fields of international law relating to the protection of the atmosphere, a topic that by definition was global and far-reaching in its legal and practical impact.

80. In that spirit, Micronesia acknowledged the Commission's provisional adoption of draft guideline 9, which was a consolidation of the original draft guidelines 9, 10, 11 and 12. It was unfortunate, however, that that consolidation had deprived the draft guidelines as a whole and the commentaries thereto of the rich discussions and conclusions featured in the fourth report about international trade law, international investment law, international human rights law and the law of the sea. Nevertheless, the Commission had retained some aspects of those discussions and conclusions in its commentary to draft guideline 9 and had also acknowledged that the list of relevant fields of international law in the draft guideline was non-exhaustive. Micronesia considered draft guideline 9 and the commentary thereto a major outcome of the Commission's work on the topic.

81. As a small island developing State with a sizable maritime entitlement, Micronesia welcomed the recognition in paragraph (9) of the commentary to draft guideline 9 that "[t]he protection of the atmosphere is intrinsically linked to the oceans and the law of the sea"; that "effective implementation of the applicable rules of the law of the sea could help to protect the atmosphere"; and that "the effective implementation of the rules on the protection of the environment could protect the oceans". It appreciated the Commission's provisional adoption of a preambular paragraph recognizing the "close interaction between the atmosphere and the oceans". 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. Indiscriminate exploitation of ocean resources and other irresponsible uses of the ocean could unleash greenhouse gases that had long been locked in the ocean.

82. Given the many multilateral legal regimes that governed activities in the ocean and addressed potential harm to the atmosphere, there was a pressing need for the international community to harmonize its consideration and implementation of rules of international law. The upcoming twenty-third Conference of the Parties to the United Nations Framework Convention on Climate Change would be an excellent opportunity to begin boing so, and draft guideline 9 could be of valuable assistance in that effort.

83. Micronesia was pleased that draft guideline 9, paragraph 3accorded special consideration to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, including people of small island developing States who were affected by sea-level rise. As a country with numerous low-lying atolls and coastal areas, Micronesia was keenly aware of the profound and complex challenges posed by sea-level rise, including the loss of land and forced relocations, and it firmly believed that the Commission should analyse the legal dimensions of those challenges in all relevant fields of international law.

84. To that end, Micronesia intended to submit a written proposal to the Commission for the inclusion of the topic of the legal implications of sea-level rise on

the Commission's long-term programme of work. That proposal would highlight, in the spirit of harmonization, numerous international instruments and other sources of international law relevant to the Commission's potential assessment of the legal implications of sea-level rise, including with respect to the circumstances of people of small island developing States like Micronesia. The Special Rapporteur's reports on the protection of the atmosphere and the Commission's provisional adoption of draft guideline 9 and the commentary thereto had laid a strong foundation for the future consideration of the legal implications of sea-level rise.

85. Micronesia welcomed the Commission's acknowledgement in paragraph (10) of its commentary to draft guideline 9 that "environmental degradation, including air pollution, climate change and ozone layer depletion, 'has the potential to affect the realization of human rights'". It noted the Commission's discussion in the commentary of the challenge of linking protection of the atmosphere with human rights law, since human rights law traditionally involved the obligation of a State to ensure its own citizens' enjoyment of their rights and might not necessarily include the obligation of a State to refrain from acts that prevented the citizens of another State from enjoying their rights. However, as Micronesia had underscored in its statement in the Sixth Committee in 2016, the protection of the atmosphere was an erga omnes obligation, and therefore every State was under an obligation to refrain from acts that polluted or degraded the atmosphere to the detriment of the international community as a whole, including the citizens of other States and their enjoyment of certain human rights, which were undermined by climate change and other consequences of the harm caused to the atmosphere.

86. In the light of the Commission's acknowledgement of the complex interrelationship between the rules relating to the protection of the atmosphere and the rules in many other fields of international law, Micronesia believed that compliance with those rules was vital. Creating and implementing rules in a harmonious manner would be a major challenge for the international community, and disputes would frequently arise. Micronesia therefore looked forward to the Special Rapporteur's fifth report and its discussion of dispute settlement processes and other related matters of compliance and implementation.

87. **Ms. Puerschel** (Germany) said that the topic "Immunity of State officials from foreign criminal jurisdiction" concerned one of the most controversial subjects that the Commission had ever addressed. The principle of individual responsibility for international crimes was a great achievement, but despite all progress made, the fight against impunity was far from won. Germany continued to be a staunch supporter of endeavours to bring perpetrators of international crimes to justice, and it appreciated the Commission's ongoing efforts in that regard.

88. For the Commission's work on the current project to succeed and to be accepted by States, it was essential to strike a balance between the sovereign equality of States and the need for stability in international relations. Germany appreciated that some of the concerns which it had raised during the Committee's discussion of the topic in 2016 had been echoed in the Commission's discussions, but it continued to believe that the Special Rapporteur's fifth report (A/CN.4/701) displayed grave methodological flaws: it failed to make a clear distinction between parts that reflected existing customary international law and parts that sought to develop it; it used State practice selectively and arbitrarily to establish a "clear trend" towards extensive exceptions to immunity; and it did not adequately consider examples of State practice in which investigations or proceedings had been closed because the individual concerned had been deemed to be immune from criminal jurisdiction.

89. Germany was pleased that the commentary to draft article 7 as provisionally adopted by the Commission reflected the vast differences of opinion within the Commission, as underlined by the unusual use of a recorded vote. That point should be made even clearer, and it was also urgently necessary to address in detail the controversial reception of the draft article by States as revealed in their statements in the Sixth Committee and elsewhere.

90. The gravest methodological concern regarding draft article 7 had not been resolved by the Commission. In paragraph (5) of the commentary, the Commission continued to identify a "discernible trend" towards limiting the applicability of immunity from jurisdiction on the basis of what in her delegation's view was disputable State practice; with that, the Commission implied that the draft article in its current form reflected existing norms of customary international law. However, reference was also made in paragraph (7) of the commentary to the Commission's mandate "of promoting the progressive development and codification of international law" as the basis for the draft article. It thus remained unclear which parts of draft article 7 were meant to be proposals for progressive development and which were deemed to codify existing exceptions to immunity under customary international law.

91. Germany reiterated the view, which was shared by a number of Commission members, that draft article 7, whether in its original form as proposed by the Special Rapporteur or in its current form, did not reflect the current state of customary international law, and it agreed with the concerns raised that the Commission should not portray its work as a codification of existing customary international law when there was no sufficient State practice to support that premise. That must be reflected in the final product of the Commission's work. The method that should be employed was to propose a draft treaty and not merely to formulate draft articles to be used directly by national courts and others to identify existing international law.

92. The current moment was of pivotal importance for the Commission as a whole and one that could determine the impact and relevance of its future work in areas that went far beyond the current issue. The Commission was one of the most respected and prestigious institutions in the field of international law, but whereas a non-governmental organization could put forward an argument in order to pursue a political goal, the Commission was an organ of the United Nations: it received its mandate from States, and its members were elected by States.

93. The Commission's work was often directly considered by national courts, but also by executive and legislative branches, when determining the state of current international law on a specific issue. When the Commission blurred the line between the two aspects of its mandate, namely codification and progressive development, it called into question the very foundation of its legitimacy. It was the States, and not the Commission, that created international law. Any substantive change of international law would have to be agreed upon by States through a treaty.

94. Her delegation was unable to comment fully on draft article 7 without knowing how it related to the vital issue of procedural safeguards. While it believed that that issue should not have been dealt with separately, it was pleased that the current text of the draft articles contained a footnote indicating that the Commission would consider the procedural provisions at its seventieth session.

95. The exception to immunity for corruption-related crimes included in the Special Rapporteur's version of draft article 7 had been dropped, but only because it had been the prevailing view that in such cases there was not even an official act and thus immunity did not apply. That reasoning showed that the list of crimes to which immunity did not apply in draft article 7 was not exhaustive and would thus not ensure legal certainty. That was exacerbated by the fact that, in paragraph (22) of the commentary to draft article 7, it was stated that "corruption" only covered "grand corruption", which hardly served as a sufficient definition in such a sensitive area of international law. That alone showed how undeveloped the proposal was.

96. The remaining list of crimes in respect of which immunity *ratione materiae* did not apply seemed arbitrary. On the one hand, it omitted the crime of aggression even though it was one of the crimes covered by the Rome Statute. On the other hand, it included the crime of apartheid with a reference to it having been the subject of an international treaty that had established a special legal regime for it, while at the same time it excluded international crimes that might potentially be identified in other multilateral treaties, such as slavery and human trafficking.

97. The implementation of such exceptions would probably raise immense technical difficulties for national courts. Immunity was a procedural matter that must be considered by the courts at the earliest stages of proceedings. In order to assess whether the requirements of draft article 7 were fulfilled, a court would have to have decided beforehand on substantive issues involving the merits of a case. It remained unclear to which standard of proof a court would have to adhere to in the application of the draft article. For that reason as well, draft article 7 needed to be evaluated in the context of the accompanying procedural rules.

98. Thus, in its current form, draft article 7 failed to strike a balance between the need for stability in international relations and the need to prevent and punish the most serious crimes under international law. It was unfortunate that the Special Rapporteur had been unable to present her sixth report, on procedural safeguards, at the Commission's sixty-ninth session. Safeguards against the misuse of exceptions to immunity were a vital matter, and had become even more important in the light of draft article 7 as currently proposed. She hoped that the Commission would carefully consider her delegation's comments at its next session.

99. **Ms. Ju** Yeong Jang (Republic of Korea), referring to the topic of protection of the atmosphere and the draft guidelines provisionally adopted by the Commission, said that her Government supported the insertion of the three new preambular paragraphs, which noted the close interaction between the atmosphere and the oceans, drew attention to the special situation of low-lying coastal areas and small island developing States due to sea-level rise and, in the context of sustainable development, pointed to the need to take into account

the interests of future generations in the long-term conservation of the quality of the atmosphere.

100. Her delegation supported guideline 9 (Interrelationship among relevant rules). It welcomed its reference to specific areas, such as international trade and investment law, the law of the sea and international human rights law, and to the fact that that was not an exhaustive list. It agreed that, as noted in paragraph 1, the principles of harmonization and systemic integration needed to be considered when developing new rules of international law relating to the protection of the atmosphere, and it concurred with the Commission that, as inferred from paragraph (16) of its commentary to the draft guideline, paragraph 3 was consistent with the Sustainable Development Goals.

101. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation believed that the scope of possible limitations and exceptions to such immunity was one of the topic's most important issues, but at its sixty-eighth session the Commission had not had sufficient opportunity to deal with it due to a delay in the translation of the Special Rapporteur's report into the other official languages of the United Nations. Her Government therefore considered it appropriate that the Commission should continue to discuss exceptions to immunity at its sixty-ninth session.

102. Her delegation noted that the Commission had adopted draft article 7 provisionally by a recorded vote. That was an exception to the usual procedure of adopting draft articles by consensus, and it showed that there had been substantial disagreement on the question of limitations and exceptions to immunity. Her delegation basically agreed with the position taken by the Special Rapporteur and the Commission that there existed neither limitations nor exceptions with regard to immunity *ratione personae*, and it noted the divergence of opinions regarding limitations and exceptions in respect of immunity *ratione materiae*, including on the issue of whether they represented *lex lata* or *lex ferenda*.

103. The Republic of Korea expressed its full support of global efforts to combat impunity, but noted that, in its judgment in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the International Court of Justice had confirmed that the nature and gravity of the crimes in question were substantive matters and did not constitute a bar to immunity, which was a procedural matter. The Commission and the Special Rapporteur should collect and carefully examine relevant practice. The Special Rapporteur's next report, on the procedural aspect of immunity, concerned an issue that was directly related to the application of draft article 7. However, a thorough comparative study on the issue was required, since criminal proceedings varied from one State to another.

104. **Mr. Heumann** (Israel) said with regard to the topic "Protection of the atmosphere" that his delegation recognized the importance of the issues referred to in the three new preambular paragraphs and the commentaries thereto, including marine pollution from land-based sources, greenhouse gas emissions from ships, sea-level rise, and intergenerational equity considerations, and it supported the principle of the harmonization of law. However, it disagreed with the integrative approach proposed by the Special Rapporteur and believed that each subject should be addressed in the context of the appropriate legal regime. Israel objected to the unnecessary linkage of the separate legal regimes and to the creation of a potential overlap, as each legal sphere constituted the *lex specialis* to be applied to the appropriate situation and had different standards and guiding principles.

105. That position was particularly relevant with respect to the idea of an interrelationship between international law relating to the protection of the atmosphere and international human rights law, because of the numerous and significant differences between those two legal regimes. International human rights law was concerned with the individual, and violations were addressed through the prism of the individual, whereas protection of the atmosphere was inherently a general and collective issue. His delegation cautioned against an approach that promoted the overlap of what should be separate and intrinsically different legal regimes.

106. Concerning the Special Rapporteur's intention to address implementation, compliance and dispute settlement in his next report, Israel appreciated the need to promote compliance and adherence to international law and the implementation of rules and norms relating to the protection of the atmosphere and to establish an agreed and just mechanism for dispute settlement through amicable negotiations between the parties concerned. However, it was imperative to avoid duplication of procedures or bodies. Any compliance mechanism to be created and the scope of its capacities must be limited to the subject of protection of the atmosphere and must focus on issues that were not already the subject of, or addressed by, existing related mechanisms. Such a mechanism should be facilitative in nature and should function in a transparent, impartial, non-adversarial and non-punitive manner. Israel expressed concern about the possible politicization of such a professional and politically neutral subject and the potential abuse of compliance mechanisms. It

welcomed any proposal that would serve to safeguard against such potential abuses.

107. Israel reiterated its appreciation for the attention given by the Commission to the important issue of atmospheric pollution, and its overall commitment to the protection of the atmosphere.

108. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, Israel attached great importance to ensuring that the perpetrators of crimes were brought to justice, and it supported international efforts to combat crime and impunity. However, and notwithstanding the mechanisms that existed to advance the aim of bringing criminals to justice, there was universal recognition of the long-standing legal principle of immunity of State officials from foreign criminal jurisdiction. That immunity was procedural and was distinct from the substantive question of the legality of the conduct in question, which in appropriate circumstances could be prosecuted by the State of the official or, when such a State waived immunity, by foreign States. However, the fact that such immunity was procedural did not make it any less essential or fundamental as a legal principle. Indeed, the field of immunity was well established in international law and had been developed to protect the important principles of the independence of States and their sovereign equality, to prevent political abuse, to enable State officials to exercise their functions and to ensure the stability of international relations.

109. Israel was very concerned that the Commission's work on the topic had failed to accurately reflect customary international law on the subject or to adequately acknowledge that fact. Those concerns related both to the draft articles on the topic, which were inconsistent with widely recognized principles in the field, and to the manner in which they had been adopted. In particular, Israel shared the view of many other States regarding the problematic treatment of the issue of immunity *ratione personae* and the exceptions to immunity *ratione materiae* in draft article 7.

110. On the issue of persons enjoying immunity *ratione personae* during their term of office, the draft articles only specified the "troika", but according to customary international law, the group of high-ranking officials who enjoyed such immunity was not limited to those three persons. That position had been reflected in the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and in decisions of national courts and had also been expressed by a number of Commission members and many Member States in Sixth Committee meetings. As noted by a number of Commission members, international relations had evolved in a way that high-ranking State officials other than the "troika" had become increasingly involved in international forums and made frequent trips outside their national territory. Thus, if immunity *ratione personae* was attached to certain high-ranking State officials because of the nature and the necessity of their functions for the maintenance of international relations and international order, it followed that such immunity should not be limited to the "troika", but should also be granted to other high-ranking State officials, including, for example, Ministers of Defence and Ministers of International Trade. The non-exhaustive nature of the list of persons who enjoyed immunity *ratione personae* was evident in the use of the words "such as" in the above-mentioned judgment of the Court, where it was also recognized that the rationale for immunity was associated with the function that the State official fulfilled and not only the title of his or her office.

111. Concerning draft article 7, Israel shared the view that there were no established norms of international law regarding limitations or exceptions to immunity of State officials from foreign criminal jurisdiction, nor was there a trend towards the development of such norms. In fact, the inclusion of exceptions would have the effect of greatly diminishing and even nullifying the immunity of State officials, as such immunity would be violated as a matter of practice by the very process of examining the applicability of exceptions. That, in turn, would also create an opening for abuse for political purposes, something which the doctrine of immunity was intended to prevent. The fact that draft article 7 had been adopted by the Commission by a vote rather than by consensus, in contrast to long-standing practice, itself reflected the problematic nature of the provision and its failure to reflect accurately the state of the law.

112. Accordingly, his delegation was of the view that the draft articles should not include any limitations or exceptions to immunity from foreign criminal jurisdiction and that draft article 7 should be deleted. However, should the Commission proceed with a discussion of exceptions — an effort which Israel did not encourage and which in any event would be an attempt to propose *lex ferenda* only — then it must be done in conjunction with a discussion of safeguards. Such safeguards could include the principle of subsidiarity, according to which criminal jurisdiction should be asserted by States with close and genuine jurisdictional links that were willing and able to genuinely apply such jurisdiction, in order to facilitate effective prosecution and promote the interest of justice; consultations with the sending State; the need for decisions on such matters to be taken by the most senior

legal officials; and measures to ensure that foreign criminal jurisdiction was not exploited for political reasons.

113. The draft articles did not reflect the current state of the law, and in fact undermined well-established, well-accepted and well-founded legal principles that continued to be applicable to, and necessary for, contemporary international relations. If the Commission wished to propose the progressive development of the law in a certain direction, then it should be made clear that that was the purpose of the exercise, and States would react accordingly. If it was seeking to give expression to the law as it was, and in his delegation's view as it should remain, then it had missed the mark. In either case, a closer engagement with Member States on the topic was necessary for the Commission's contribution to be more effective and better received.

114. **Ms. Ahamad** (Malaysia) said that her delegation noted with regard to the topic "Protection of the atmosphere" that the three new preambular paragraphs addressed the interrelationship between the protection of the atmosphere and other branches of law, and that the fourth preambular paragraph acknowledged the close interaction between the atmosphere and the oceans. It was worth noting that the United Nations Convention on the Law of the Sea dealt with atmosphere-related issues only if they were within the territorial airspace and affected the marine environment. It did not address the atmosphere itself or circumstances in which oceans might affect the atmosphere. The interrelationship between the oceans and the atmosphere covered by the Convention was therefore limited and unilateral, and further efforts by the international community were required to overcome the gaps in the relevant international law. In that connection, Malaysia was of the view that the inclusion of the new fourth preambular paragraph was necessary to coordinate the laws on protection of atmosphere and the oceans.

115. Malaysia supported the new sixth preambular paragraph, which drew attention to the special situation of low-lying coastal areas and small island developing States and concerned one of the most profound effects of global warming and atmospheric degradation, namely sea-level rise.

116. With regard to the new draft guideline 9, which touched on the interrelationship between international law relating to the protection of the atmosphere and other branches of international law, such as trade and investment law, the law of the sea and human rights law, that list should not be regarded as exhaustive, since there might be other fields of law that were equally relevant. Any proposal to expand the linkages between protection of the atmosphere and other branches of international law should be considered on its merits and on a case-by-case basis. Overall, the Commission should work to ensure that the draft guidelines provided clear guiding principles and approaches so that States could take appropriate steps to protect the atmosphere.

117. On the topic of immunity of State officials from foreign criminal jurisdiction, she noted that in the statement made by her delegation at the seventy-first session of the General Assembly with regard to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, it had agreed with the point made in the Special Rapporteur's fifth report (A/CN.4/701) that there were discrepancies in the characterization of a particular act as a limitation, especially in the case of international crimes in each State.

118. Malaysia reiterated its position that the Commission should deal cautiously with the formulation of draft article 7. Based on the fifth report, the scope and parameters of crimes that caused harm to persons, when such crimes were committed in the territory of the forum State, were still unclear, since they had yet to be defined and had not attained the status of customary law. Moreover, the application of immunity *ratione materiae* and immunity *ratione personae* in draft article 7, paragraphs 1and 2, needed to be clearly addressed.

119. For the above-mentioned reasons, draft article 7, paragraph 1, should be given further consideration, since existing State practice varied with regard to the definition and characterization of the offences, in particular torture and enforced disappearance. Malaysia therefore continued to have reservations about including those offences as exceptions to immunity. The obligation to cooperate with an international court or tribunal referred to in draft article 7, paragraph 3 (ii), as proposed by the Special Rapporteur, should also be examined more closely.

120. Her delegation noted that the Commission would consider procedural provisions and safeguards at its seventieth session. It looked forward to the relevant commentaries providing for a better understanding of the purpose and intention of the draft articles.

121. **Ms. Nguyen** Giang Thuy (Viet Nam) said that her delegation welcomed the Commission's work on the topic of protection of the atmosphere, which was a subject of pressing concern for States and the international community as a whole. Viet Nam was of the view that the term "atmosphere" in the draft guidelines needed to be more clearly defined so as to distinguish it from other territorial domains. In

particular, it sought clarification on whether its scope included the areas above sea areas. A guideline needed to be elaborated to deal with overlap in the scope of application of the rules on the protection of the atmosphere and the existing rules on the protection of the environment in general.

122. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", her delegation noted that such immunity originated in customary international law. Therefore, the codification of rules on the question must proceed cautiously, with due regard for the principles of sovereign equality, non-interference in the domestic affairs of States, and the need to maintain international peace and security. It was important to strike a balance between the benefits of granting immunity to State officials and the need to address impunity. The draft articles on the topic must provide for those principles and reflect the codification of established norms. In that connection, her delegation believed that the exceptions to immunity from criminal jurisdiction warranted further debate.

123. Viet Nam agreed with the rules set out under draft article 7, paragraph 1, since they reflected existing legal principles enshrined in various international treaties dealing with international criminal responsibility. Corruption should not be considered as an exception to the immunity of State officials, since it reflected the conduct of an individual serving a personal agenda for personal gains. Moreover, such a rule was not well established in customary international law. Further consideration also needed to be given to the "territorial tort exception", since it related to civil rather than jurisdictional aspects.

124. **Mr. Simonoff** (United States of America) said that his delegation was more concerned than ever about the direction that the Commission appeared to be taking with respect to the topic of protection of the atmosphere. The United States did not believe that it was useful for the Commission to address the topic. Various long-standing instruments already provided general guidance to States in their development, refinement and implementation of treaty regimes, including very specific guidance tailored to discrete problems relating to atmospheric protection. His delegation continued to be concerned that any exercise aimed at extracting broad legal rules from specific environmental agreements would not be feasible and might potentially undermine carefully negotiated differences among regimes. The United States continued to believe that such an exercise, and the topic more generally, would most likely complicate, not facilitate, ongoing and future negotiations and might thus inhibit State progress in the environmental area.

125. Those concerns had been somewhat allayed by the Commission's 2013 understanding, which his delegation had hoped might prevent the work from straying into areas where it could do affirmative harm. However, all four reports of the Special Rapporteur had taken an expansive view of the topic. Especially worrying was the purported identification of "obligations" or "requirements", in contravention of the 2013 understanding that work on the topic would not impose new legal rules or principles on current treaty regimes. During its sixty-ninth session, the Commission had strayed even further from that understanding by provisionally adopting a guideline that purported to inject consideration of the atmosphere not only into the interpretation and application of treaties, but more broadly into the development of any new rule of international law. If the Special Rapporteur's proposed long-term plan of work on the topic was followed, the work would continue to stray outside the scope of the 2013 understanding and into unproductive and even counterproductive areas. His delegation therefore called upon the Commission to suspend or discontinue its work on the topic.

126. **Mr. Hutama Putra** (Indonesia) said that his delegation attached great importance to the topic "Protection of the atmosphere". It was pleased to note the growing attention that the Commission had given to environmental issues. It supported the statement delivered by the Marshall Islands on behalf of the Pacific small island developing States (see A/C.6/72/SR.22), and in particular the point that the Commission should not restrict itself to traditional topics, but should also consider topics that reflected pressing concerns of the international community as a whole, such as the protection of atmosphere, and should include a new topic on the legal implication of sea-level rise.

127. Indonesia was aware that the topic posed a difficult legal issue, with a number of legal instruments in place. However, those legal instruments were piecemeal, and not all of them had been endorsed by States. His delegation was concerned that a number of important issues in the field of environmental law had been excluded from the Commission's deliberations, such as the polluter-pays principle and the principle of common but differentiated responsibilities.

128. The Commission was in an ideal position to advise States, evaluate existing legal instruments and close the legal gaps between them. Therefore, it should be given the space and flexibility needed to work on the topic: the scope of work should not be restricted. With its expertise, independence and objectivity, the Commission could explore and improve the

environmental legal regime in a comprehensive and holistic manner, for the benefit of all. His delegation believed that the preambular paragraphs of the draft guidelines on the protection of the atmosphere should include a reference to the common heritage of humankind. That powerful, symbolic principle should guide the Commission in its future work and deliberations.

129. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", his Government's position was that there should be no impunity for grave international crimes. His delegation appreciated that the Commission had been working cautiously on that sensitive and contentious topic, seeking to strike a balance between the fight against impunity for grave international crimes and the need to foster inter-State relations based on the principle of sovereign equality. It was important to bear in mind that the prosecution of officials of one country by the courts of another country would potentially raise problems in relation to the principle of sovereign equality.

130. The complexity of the issue was reflected in the fact that draft article 7 had been provisionally adopted by a vote. The differing views on limitations and exceptions to immunity meant that the draft article needed to be revisited. There were only a few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. In Indonesia, there had never been a case relating to limitations and exceptions, except in civil proceedings. Given the topic's sensitive and complex nature, Indonesia called for a more extensive study and analysis of the draft articles.

131. **Ms. Gaye** (Senegal) said with regard to the topic "Protection of the atmosphere" that her delegation agreed that international law relating to the atmosphere and international trade and investment law, the law of the sea and international human rights law were interrelated. A clarification of that interrelationship would help address the risk of a fragmentation of international law. International law relating to the protection of the atmosphere was part and parcel of general international law, and in its further deliberations on the subject, the Commission must therefore base itself on and refer as much as possible to the doctrine and case law on general international law. That was a challenge that the Commission would have to meet in dealing with all new topics in the future.

132. A prior harmonization of conventions on the protection of the atmosphere would ensure that existing rules and new norms did not overlap; that would help avoid conflicts. Her delegation acknowledged the existence of significant links between those norms, as established by the Special Rapporteur in his fourth report (A/CN.4/705 and A/CN.4/705/Corr.1), in which he cited conclusion (4) of the work of the Study Group on fragmentation of international law, which stressed the principle of harmonization, of which the concept of a concurrent application was a perfect illustration. That showed the interrelationship that existed between international law on the protection of the atmosphere and other branches of international law.

133. It was essential to take into account the concept of mutual supportiveness in view of the complexity and diversity of the relationship between bilateral investment treaties and protection of the atmosphere. As stipulated in article 3 of the United Nations Framework Convention on Climate Change, multilateral agreements on the environment also covered protection of the atmosphere, while the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case illustrated perfectly the interrelationship between international law on environmental protection and the law of the sea.

134. Senegal therefore agreed with the Special Rapporteur that the application of rules of international law in a supplementary manner would help to avoid conflicts, conflicts, and it took note of draft guideline 9, concerning the guiding principles of concurrent application. In addressing the topic, the Commission should give special attention to developing countries, due to their vulnerability to climate change. Senegal urged the Commission to continue to strengthen its cooperation with the General Assembly when deciding on future topics to be considered for the development and codification of international law.

The meeting rose at 6 p.m.