United Nations A/C.6/73/SR.29

General Assembly
Seventy-third session

Official Records

Distr.: General
10 December 2018

Original: English

Sixth Committee

Summary record of the 29th meeting
Held at Headquarters, New York, on Wednesday, 31 October 2018, at 10 a.m.

Chair: Mr. Biang . . . . . (Gabon)
later: Ms. Ponce (Vice-Chair) . . . . . (Philippines)

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18-18283 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1. **The Chair** invited the Committee to continue its consideration of chapters IX to XI of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Mr. Khng** (Singapore), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Commission's work touched on practical aspects of the international relations of Member States and it thus was of significant interest to his delegation. The establishment of exceptions to immunity *ratione materiae* had been a divisive issue at the Commission's sixty-ninth session and thus required further consideration. It was, however, clear that, at a very minimum, States could agree to the non-applicability of immunity for their officials in given circumstances. The issue of safeguards therefore remained relevant.

3. His delegation underscored the need to focus on safeguards to ensure that exceptions to immunity *ratione materiae* were not applied in a wholly subjective manner. It agreed with members of the Commission who considered that a full discussion of procedural issues was important to ensure that immunities, where applicable, were respected, in order to safeguard the stability of international relations and ensure respect for the sovereign equality of States.

4. **Mr. Arrocha Olabuenaga** (Mexico), referring to the topic "Protection of the environment in relation to armed conflicts", said his delegation was pleased that the objective of the draft principles on the topic contained in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1) was to define treaty-based and customary norms and international practice on the topic and to clarify the interrelationship between the applicable regimes. In future reports, it would be important to clearly define the concepts of "jurisdiction" and "control", since different standards for the international responsibility of States were currently contemplated in case law and literature. That was particularly important in the case of territories occupied by non-State actors who received support from third States. The difference in the criteria adopted by the International Court of Justice and the European Court of Human Rights for the attribution of the conduct of non-State actors was a good example.

5. In draft principle 5 [I-(x)] (Designation of protected zones), reference should be made to international practice under the 1972 World Heritage Convention and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. An additional section should be included on preventive measures to be taken in peacetime. His delegation suggested referring to the customary rule codified in article 36 of Additional Protocol I to the 1949 Geneva Conventions in connection with the legal review of new weapons, with a focus on environmental protection. The designation of protected zones could also be included.

6. On draft principle 10 [II-2] (Application of the law of armed conflict to the natural environment), he said it was necessary to include international practice with regard to damage to the environment and its interrelationship with the concept of military advantage, in order to determine the potential illegality of an attack on the environment. The draft principles as a whole should not be limited to one type of armed conflict, since developments in customary international law had been gradually blurring the distinction between international and non-international armed conflicts.

7. Turning to the topic "Succession of States in respect of State responsibility", he said that the draft articles provisionally adopted by the Commission should be revised to simplify their content and structure and to avoid repetition. Mexico agreed with the Special Rapporteur that the starting point should be the general rule that the successor State was not automatically responsible for obligations arising from internationally wrongful acts committed by the predecessor State, with possible exceptions being identified subsequently.

8. With regard to the draft articles proposed by the Special Rapporteur in his second report (A/CN.4/719), his delegation agreed with a number of Commission members that the word "reparation" in draft article 6, paragraph 2, might limit the scope of the draft article to certain aspects of State responsibility. It would be useful to specify that responsibility for an internationally wrongful act was transferred in the event of succession.

9. On draft articles 7, 8 and 9, concerning cases of succession in which the predecessor State continued to exist, and draft articles 10 and 11, concerning cases in which the predecessor State ceased to exist, his delegation agreed with a number of Commission members that, given the paucity of State practice, most of those draft articles constituted progressive development of international law rather than codification. He therefore suggested that the Commission clarify in the commentaries which articles constituted progressive development, and which reflected codification.

10. In his delegation's view, a decision on the final form of the project could be taken at a later stage.

11. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation agreed that, since immunity was invoked in foreign courts, a review of procedural aspects would provide certainty for both the forum State and the State of the official, prevent claims of politicization in prosecutions and build confidence between the States concerned. It therefore endorsed the suggestion that the next report focus on procedural aspects. The effects of waiver of immunity, and compatibility with the State's obligation to cooperate with an international criminal court or tribunal were relevant issues, as could be seen in recent developments in the International Criminal Court and the agenda of the General Assembly. The Commission's work would make a positive contribution to the debate on those questions.

12. **Ms. Newstead** (United States of America) said that in its 70 years of work, the Commission had addressed a broad range of issues and produced analyses that provided insight for government lawyers, private practitioners, judges and academics. At times, its work had formed the basis for multilateral treaties that had become foundational elements of international law. More recently, the Commission's work had become more varied, with fewer instances of proposals for draft articles that could be adopted in the form of a treaty. For example, most of the projects on the Commission's current programme of work took the form of draft guidelines or draft conclusions. While there could be benefits to those forms, including shorter timeframes for completion, the absence of a clear expression of State consent to codification could cause confusion as to what status the Commission's work should enjoy.

13. The Commission was, of course, not a legislator that established rules of international law. Rather, it's role was to document areas in which States might wish to consider establishing international law. In that respect, it had to ensure that its work was supported by practice and to distinguish between efforts to codify international law and recommendations for progressive development. At the very least, where there was little or no State practice identified in support of a particular principle, the Commission must clearly indicate that it was not purporting to reflect existing law. Unfortunately, there were several examples of projects discussed in the Commission's report of proposals that seemed at variance with that fundamental principle. States also had an important role to play in ensuring that the Commission's work remained responsive to States and reflective of State practice.

14. The United States had supported the Commission's work by contributing to the full range of topics on its agenda, and encouraged other States to engage actively with the Commission. A productive relationship between States and the Commission was vitally important to the relevance and continuing vitality of the Commission's work. In that regard, her delegation was pleased that in 2018 the Commission had held half of its session in New York and hoped that that practice would continue in the future.

15. With regard to the topic "Identification of customary international law", the United States believed that identifying whether a rule had become customary international law required a rigorous analysis to determine whether the strict requirements for formation – a general and consistent practice of States followed by them out of a sense of legal obligation – were met. Such State practice must generally be extensive and virtually uniform, including among States that were particularly involved in the relevant activity. That high threshold was important to all aspects of analysis or identification of customary international law. In that connection, the statement in draft conclusion 8 of the draft conclusions adopted on second reading that practice must be "sufficiently widespread and representative, as well as consistent" should not be misunderstood as suggesting that a different or lower standard applied; that would reflect an inaccurate view of the law.

16. More generally, the draft conclusions and commentaries on the topic should not be read to imply that customary international law was easily formed. Suggesting otherwise might lend credence to the view, held by some, that the exercise of identifying the content of customary international law had become too facile, with experts too ready to extend international law beyond what was supported by the consistent practice of States, thereby possibly imposing outcomes that did not reflect the policy choices of their citizens expressed through their respective State practices.

17. The United States had previously noted a number of areas in which the draft conclusions and the commentaries went beyond the current state of international law, such that the result was best understood as proposals for progressive development. It regretted that there was no clear distinction between proposals for progressive development and material more clearly reflective of existing law in those areas. Failure to distinguish between codification and suggestions for progressive development meant that users of those materials could misunderstand them or afford them greater weight than was merited by the authority on which they were based. For those reasons,

readers of those materials would need to review them carefully, noting what authority and State practice had been identified in support of the proposition addressed.

18. Draft conclusion 4 (Requirement of practice) was an inaccurate reflection of the current state of the law, as it suggested that the practice of entities other than States contributed to the formation of customary international law. In particular, the statement in paragraph 1 that the requirement of a general practice referred "primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law" wrongly implied that entities other than States contributed to the formation of customary international law in the same way as States. The statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggested that international organizations could contribute to the formation of customary international law in the same way as States.

19. The basic requirement that customary international law result from the general and consistent practice of States followed by them out of a sense of legal obligation had long been reflected in the jurisprudence of the International Court of Justice and in the practice of States in their own statements about the elements required to establish the existence of a rule of customary international law. There was no similar support for the claim in draft conclusion 4 that the practice of international organizations – as distinct from the practice of the Member States that constituted those international organizations – could, in some cases, likewise contribute to the formation of customary international law. It was noteworthy in that regard that there was virtually no support provided for that notion in the commentary to the draft conclusion.

20. Accordingly, the claim with regard to a direct role for the practice of international organizations in the formation of customary international law could only be understood as a proposal by the Commission for progressive development. Even when understood as such, the position advanced in draft conclusion 4 with regard to the role of international organizations had numerous flaws. Among other things, it contained no explanation for which international organizations might be relevant when identifying a rule of customary international law, for how the *opinio juris* of an international organization might be identified, or for whether a lack of support from international organizations could defeat the formation of a rule that was otherwise accepted by States. For those and other reasons, the United States could not endorse the Commission's proposals on that issue.

21. The text of the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" in the Commission's report (A/73/10) had changed very little from that on which the United States had provided extensive written comments earlier in 2018. The United States reaffirmed the views expressed therein. It agreed with most of the propositions contained in the draft conclusions, but it had greater difficulty evaluating the accuracy and reliability of the voluminous commentaries thereto. As with any Commission product, the utility of the draft conclusions and commentaries on any particular issue should be understood to be only as great as the authority and State practice identified in support of the proposition addressed.

22. Although the statement in draft conclusion 10, paragraph 1, that the subsequent practice of parties to a treaty establishing their agreement with regard to the treaty's interpretation "requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept" was correct in relation to subsequent agreements under article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, it was not correct with respect to subsequent practice under article 31, paragraph 3 (b). Instead, the parties' parallel practices in implementing a treaty, even if not known to each other, might evidence a common understanding or agreement of the parties concerning the treaty's meaning and fall within the scope of article 31, paragraph 3 (b). That was one of the primary differences between a subsequent agreement and subsequent practice: subsequent practice "established" (to use the term in article 31, paragraph 3 (b)) the agreement of the parties; the Vienna Convention did not require the agreement to exist independently.

23. It was explained in the commentary to draft conclusion 12, which dealt with the constituent instruments of international organizations, that the purpose of the assertion that "[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32" of the Vienna Convention was to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it had been created. In other words, it referred not to the practice of the States parties to the international organization, but to the conduct of the international organization itself. As the United States had previously observed, an international organization was not a party

to its own constituent instrument. Consequently, the practice of an international organization "as such" could not constitute subsequent practice of a party to the agreement of the kind contemplated in article 31, paragraph 1, of the Vienna Convention and could not contribute to establishing the agreement of the parties regarding the interpretation of the instrument. The draft conclusion's assertion to the contrary was incorrect.

24. Concerning draft conclusion 13, expert treaty bodies were not parties to treaties, and accordingly their views could not constitute subsequent practice regarding the interpretation of a treaty within the meaning of article 31, paragraph 3 (b). That point was emphasized in the commentary to the draft conclusion, and nothing in the draft conclusion itself should be understood to the contrary. The views of expert treaty bodies might be helpful to States parties to treaties, but ultimately the States decided whether to reflect such views in their interpretation and application of treaties.

25. Concerning the Commission's decision to include the topic "General principles of law" in its current programme of work, her delegation agreed that the nature, scope, function and manner of identification of general principles of international law could benefit from clarification; it was concerned, however, that there might not be enough material on State practice for the Commission to reach any useful conclusions.

26. With respect to the inclusion of the topic "Universal criminal jurisdiction" in the Commission's long-term programme of work, her delegation was concerned about the Commission taking up the topic while it was still under deliberation in the Sixth Committee, including in a working group, and about the parameters of any potential study. It did not consider the topic ripe for active consideration.

27. As to the inclusion of the topic "Sea-level rise in relation to international law" in the Commission's long-term programme of work, her delegation was of the view that its broad nature, as proposed to the Commission, did not meet two of the Commission's criteria for selection of a new topic, namely that the topic "should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification", and that it "should be concrete and feasible for progressive development and codification". In particular, her delegation questioned whether the issues of statehood and protection of persons as specifically related to sea-level rise were at a sufficiently advanced stage of State practice. It also shared the concerns expressed by others regarding the number of topics on the Commission's active agenda. However, if the Commission did move the topic to its current programme of work, her delegation would agree that a study group, as currently proposed, would be the most appropriate mechanism to examine it.

28. The United States recognized that the topic "Peremptory norms of general international law (*jus cogens*)" was of considerable interest and that a better understanding of the nature of *jus cogens* might make it easier to understand its role in international law. However, it continued to have a number of serious concerns with the topic. With regard to the working method adopted for the topic, it was unfortunate that the Commission had neither ensured that States had meaningful and sufficiently frequent opportunities to provide their views to the Commission, nor taken those views into account. On the contrary, there appeared to have been an intentional departure from standard practice, which had delayed referral of the draft conclusions to the Commission's plenary and the preparation of any draft commentaries, thereby making it difficult for States to follow and participate in the Commission's work. That was especially problematic given that the project was not intended to result in a final outcome which would be negotiated and adopted by States. Her delegation urged the Commission to return to the normal working method which allowed it to adopt incremental parts of a topic.

29. Her delegation did not believe that there was sufficient international practice or jurisprudence on important questions, such as how a norm attained *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law. Those questions had already generated contentious debate even within the Commission as well as differing views among States. The Special Rapporteur had acknowledged that the relative lack of State practice presented particular challenges but did not regard that as a limiting principle with respect to several proposed draft conclusions. That was of particular concern where, as in the current case, there had been insufficient engagement with States on the topic to date, thereby preventing them from reacting either favourably or unfavourably to a text adopted by the Commission.

30. The clear divergence of views on the sensitive questions addressed in the Special Rapporteur's third report A/CN.4/714 and A/CN.4/714/Corr.1), a dearth of widespread or consistent State practice and the lack of any mechanism to facilitate a clear expression of State consent to codification all pointed to a need for a cautious approach. Thus, the proposal for the Commission to conclude a first reading of the draft conclusions at its seventy-first session was very premature.

31. More generally, the lack of State practice or jurisprudence on the bulk of the questions addressed in the project had clear implications for the role and function of any draft conclusions ultimately adopted on the topic. Although framed as "draft conclusions", the statements contained in the project were not grounded in legal authority, but rather reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances. That approach neither reflected the current state of the law, nor provided insight into how the law was developing. Rather, it could only be understood as reflecting proposals by the Commission for possible law for consideration by States. It would be for States to assess whether they found the proposals useful, and any weight or influence that the draft conclusions might have would depend on whether they were ultimately accepted by and reflected in State practice. The Commission should consider whether the broader cause of international law, which had depended on a carefully nurtured consensus of legitimacy, would not be better served by greater adherence to traditional analytical principles.

32. Draft conclusion 17, which dealt with the consequences of peremptory norms for binding resolutions of international organizations, fully illustrated her delegation's methodological concerns. The Special Rapporteur cited virtually no evidence of State practice to support the claim that States could disregard their obligations under the Charter of the United Nations to comply with the binding decisions of the Security Council by making a unilateral assertion of a conflict with a norm of *jus cogens*. The draft conclusion might lead to meritless challenges to the binding nature of Security Council resolutions, thereby undermining their implementation and the effective operation of the collective security framework established under the Charter. That was not a theoretical concern, not least because there was no clear consensus on which norms had *jus cogens* status.

33. Her delegation was pleased that two other draft conclusions proposed by the Special Rapporteur about which there were similar analytical concerns – draft conclusions 22 and 23 – would be set aside in the Drafting Committee and replaced with a single "without prejudice" clause. The idea that immunity did not apply to *jus cogens* violations was particularly problematic, given the lack of clarity about which norms had *jus cogens* status. The proposal, if adopted, would allow for immunity to be lifted through the mere allegation of a crime, apparently without any procedural protections. Moreover, the question of whether there were certain crimes for which immunity from national jurisdiction would not apply had already been debated under the topic "Immunity of State officials from foreign criminal jurisdiction". Any discussion of that issue should be confined to that topic.

34. The United States questioned the utility of considering "regional *jus cogens*" and agreed with other delegations that that concept appeared to be at variance with the view that *jus cogens* norms were "accepted and recognized by the international community as a whole".

35. Her delegation had taken note of the draft guidelines on protection of the atmosphere adopted on first reading but, as it had noted on previous occasions, it found many aspects of the topic problematic. It would be submitting relevant comments and observations as requested by the deadline set by the Commission.

36. With regard to the topic "Provisional application of treaties", her delegation took note of the draft guidelines with commentaries thereto, entitled "Guide to Provisional Application of Treaties" adopted by the Commission on first reading. Since the Special Rapporteur intended to continue work on the topic at the Commission's seventy-first session, leading to the possible adoption of model clauses, she wondered whether States would be provided sufficient time to comment on the clauses prior to the second reading. The United States would be particularly interested in the extent to which the draft Guide and commentaries accurately reflected existing State practice.

37. On the topic "Immunity of State officials from foreign criminal jurisdiction", the United States reiterated its general accord with the Commission's approach to immunity *ratione personae*. It agreed that Heads of State, Heads of Government and Ministers for Foreign Affairs were immune from foreign criminal jurisdiction while serving in office. Where the Special Rapporteur in her sixth report (A/CN.4/722) addressed procedural issues with respect to persons enjoying immunity *ratione personae*, the United States generally found that her conclusions did not raise significant concerns. In contrast, as the United States had noted in 2017, the approach that she had taken not only in that report but also in her fifth report (A/CN.4/701) with respect to immunity *ratione materiae* was not reflective of any settled customary international law. It was difficult to make generalizations from State practice, in part due to the paucity of publicly available State practice and *opinio juris* and the complexity inherent in decisions involving prosecutorial discretion.

38. The Commission's categorical pronouncements in terms of immunity *ratione materiae* could not be said to rest upon customary international law. In particular, her delegation did not agree that draft article 7 of the draft

articles provisionally adopted by the Commission at its sixty-ninth session was based on a clear trend in State practice. It also took note of the unusual circumstances associated with the adoption of that particular draft article: by a vote and not by consensus, as was the Commission's usual practice. The United States of course agreed that the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance were serious crimes that should attract punishment, but it did not agree that the Commission was right to adopt the draft article provisionally, given the many serious concerns expressed both within and outside the Commission. The draft article was in conflict with the notion that immunity was procedural in nature, rather than substantive, and that it operated regardless of the gravity of the alleged conduct. It created the false impression that the exceptions were sufficiently established in State practice, such that they formed customary international law; that was not the case.

39. As for the procedural aspects of immunity, which were addressed in the Special Rapporteur's sixth report (A/CN.4/722), the United States noted that since criminal procedures differed from one country to the next, the Commission should exercise caution before attempting to formulate a general rule regarding the timing of such procedures. In the report, the Special Rapporteur asserted that it was "impossible" to find rules of international treaty law or customary international law concerning a number of acts of States that would implicate immunity. Yet, at the same time, she attempted to identify firm rules regarding whether immunity would be implicated by such acts. She also did not cite any international legal support or State practice for the assertion that "the rules on immunity do not apply when detention is a purely executive act carried out in the context of the exercise of criminal jurisdiction by a court in the forum State". In the United States, for example, the executive branch of government was distinct from the judicial branch, and the exercise of criminal jurisdiction by a court would not be considered a "purely executive act". It would therefore be imprudent to draw sweeping conclusions in an area in which there was unclear State practice and a dearth of statements of *opinio juris* and in which there was a diversity of national systems of relevant criminal law.

40. With regard to the determination of immunity, the United States again emphasized the risk involved in making generalizations on the basis of what the Special Rapporteur appeared to recognize as varied State practice. Both with respect to the identity of the State entity tasked with making immunity determinations and the analytical steps that preceded such a determination, State practice was inconsistent and precluded the drawing of conclusions of a universal nature. In that regard, it was asserted in the report that, in the United States, the executive branch was able to make the determination of immunity through a suggestion of immunity that was binding on the courts. It was worth noting that the practice cited in the report was applicable only in civil cases and not in the criminal context, in which determinations regarding immunity could be made by the executive branch as part of the exercise of prosecutorial discretion. Moreover, it was not clear from the report that all States defined "official capacity" in the same manner, and thus, again, it would be preferable to avoid drawing conclusions in an area that did not yet reflect a consistent pattern of State practice. Rather than focus on specific domestic procedures, which might vary significantly according to the criminal law of each State, it might be wise to consider any relevant international standards and the need for a State to apply principles of immunity consistently throughout all its government bodies.

41. With respect to the topic "Protection of the environment in relation to armed conflicts", it was critical that the draft principles on the topic proposed by the Special Rapporteur and the commentaries thereto reflect the fact that international humanitarian law was the *lex specialis* in situations of armed conflict. The extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case-by-case basis. While her delegation welcomed the acknowledgement of that fact by the Special Rapporteur in her report, it also believed that the role of international humanitarian law as *lex specialis* should be more clearly acknowledged in the draft principles and the commentaries thereto.

42. As stated on previous occasions, her delegation remained concerned that the Commission was not the appropriate forum to consider whether certain provisions of international humanitarian law treaties reflected customary international law. Such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*. Her delegation was also concerned that several of the draft principles were phrased in mandatory terms, purporting to dictate what States "shall" or "must" do. Such wording was only appropriate with respect to well-settled rules that constituted *lex lata*. Several of those principles went well beyond existing legal requirements, making binding terms inappropriate: draft principle 8 purported to introduce new substantive legal obligations in respect of peace operations; and draft principle 16 purported to expand the obligations under the Convention on Certain Conventional Weapons to

mark and clear, remove or destroy explosive remnants of war to include "toxic or hazardous" remnants of war. In its commentary, the Commission appeared to recognize that that principle exceeded existing legal requirements, noting that "[d]raft principle 16 aims to strengthen the protection of the environment in a post-conflict situation". It also correctly acknowledged that "[t]he term 'toxic remnants of war' does not have a definition under international law". Her delegation was also concerned that the draft principles applicable in situations of occupation went beyond what was required by the law of occupation.

43. Lastly, her delegation was not confident that the topic "Succession of States in respect of State responsibility" would enjoy broad acceptance or interest from States, in view of the small number of States that had ratified the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The issues raised were complex, and careful consideration by States would be required as the Special Rapporteur continued to develop the draft articles.

44. **Ms. Egmond** (Netherlands), referring to the topic "Protection of the environment in relation to armed conflicts" and the draft principles applicable in situations of occupation proposed by the Special Rapporteur in her first report (A/CN.4/720 and A/CN.4/720/Corr.1), said that her delegation agreed with the Special Rapporteur that the law of occupation should be placed in a fourth section of the draft principles, and it supported the suggestion by members of the Commission to include a separate draft principle stating that Parts One, Two and Three applied *mutatis mutandis* to situations of occupation.

45. On draft principle 19, her Government agreed with the Special Rapporteur that a progressive interpretation of article 43 of the Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land (the Hague Regulations), especially taking into account the French version of the text and the fact that protection of the environment was part of the core functions of a modern State, would include protection of the environment. It was pleased that elements on criminal law of article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) had been included in the version of the draft article provisionally adopted by the Drafting Committee. Her delegation endorsed the inclusion of the reference to health in draft principle 19, paragraph 2. It agreed with members of the Commission who had asked the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food, but cautioned that the scope of the research should remain manageable.

46. On draft principle 20, her delegation agreed with the Special Rapporteur that, in relation to the environment, a modern-day interpretation of "usufruct", as referred to in article 55 of the Hague Regulations, would include the "sustainable use" of resources. There should be a balance between environmental harm caused, for example, by the use of non-renewable resources and the need for society and future generations to be able to use natural resources and ecosystem services. The Netherlands recalled the Commission's observations on intergenerational equity with respect to the use of non-renewable natural resources to ensure a maximization of the long-term benefits of such use. The Drafting Committee's version of the draft principle, contained in document A/73/10, was an improvement, since it indicated that the Occupying Power was permitted to administer and use the natural resources under certain conditions. On draft principle 21, her delegation supported the reference to "due diligence" in the text provisionally adopted by the Drafting Committee.

47. The Netherlands agreed with the Special Rapporteur that, for the time being, the international administration of a territory should not be taken into consideration in the draft principles on occupation. A United Nations mission was not likely to meet the criterion of non-consensual presence and there was very little practice to show that the law of occupation was interpreted to supplement the mandate laid down in Security Council resolutions. With regard to future work, her delegation endorsed the Special Rapporteur's suggestion to consider issues relating specifically to non-international armed conflicts, which represented the majority of modern-day conflicts.

48. On the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the discussions in the Commission and among States in the Sixth Committee had demonstrated that there was no consensus yet on limitations and exceptions to immunity. Distracting from the fundamental questions at hand, the Commission had unfortunately decided to turn to procedural issues on competence and form. While some of those issues, such as voting, deserved attention, they should be discussed in general terms and not in the context of the current topic. Her delegation hoped that a consensus would soon be reached on draft article 7 concerning limitations and exceptions to immunity *ratione materiae*.

49. The Netherlands reiterated its position that it was preferable to refrain from defining crimes or including a list of crimes constituting exceptions or limitations to immunity. A reference to "crimes under international law" would avoid unnecessary debate and allow the topic to proceed. That was also the approach taken by the Netherlands in its domestic International Crimes Act. Her Government also reiterated that it could not be maintained that immunity *ratione materiae* applied to all acts performed by a State official. It was clear that such immunity would not cover international crimes.

50. The Commission should distinguish more clearly between the question of what constituted the exercise of jurisdiction and when immunities must be considered. The issue before the Commission was limited to the exercise of criminal jurisdiction, thus excluding the exercise of other forms of jurisdiction, such as administrative jurisdiction, but including the acts of other law-enforcement agencies, such as public prosecutors and the police. Such bodies might and would be confronted with the question of the applicability of immunity and their analysis as to applicability might well prevent a case from reaching the courts. The acts of all such bodies constituted the exercise of jurisdiction.

51. Under the judicial system of the Netherlands, the courts were required to consider the matter of immunity ex officio, and a foreign State was not required to submit a statement claiming immunity for it to apply. However, the Netherlands recognized that a foreign court was not obliged to "blindly accept" a claim of immunity by a foreign official and could indeed consider such a claim invalid. Ultimately, a claim to immunity that was in good faith should be considered seriously and given due weight. Similarly, however, criminal proceedings initiated against a foreign State official in good faith should not be obstructed and labelled as being politically motivated without justification.

52. Her delegation appreciated the Special Rapporteur's emphasis on the distinction between immunity and inviolability, which too often was overlooked. It supported the position that persons enjoying immunity *ratione materiae* did not enjoy inviolability. Immunity applied to the acts of an official in his or her official capacity and the question of whether such acts might be subjected to criminal jurisdiction. Immunity did not apply to the person as such. The Netherlands would continue to object to any foreign summons to appear for persons enjoying immunity *ratione personae*. It had, for example, objected to a foreign summons to appear directed at its Head of State, even though said summons was not in the exercise of criminal jurisdiction. It considered that the inviolability and immunity of its Head of State precluded him from having to respond to a summons to appear, in particular when the summons was accompanied by a threat to have him held in contempt of court for failure to appear. The Netherlands would not object, in principle, to a non-binding invitation to testify addressed to the Head of State, but it would be very unlikely to grant such a request.

53. With respect to requests to produce documents and precautionary measures in relation, for instance, to passports, the question was whether the objects requested (documents, passports) were State-owned property with a public, non-commercial purpose. That was clearly the case with passports, which were normally not owned by an individual but by the issuing State. That question was mentioned by the Special Rapporteur but deserved more attention. The Special Rapporteur asserted in her report that it was impossible to find either special rules or State practice applicable to such measures.

54. The Netherlands considered, at least with respect to State-owned property, that there were special rules concerning immunity that might be deemed relevant for the purpose of the topic. As codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, State-owned property with a governmental, non-commercial purpose enjoyed immunity from jurisdiction and pre- and post-judgment enforcement measures, while the same did not apply to State-owned property with a commercial, non-governmental purpose. Similarly, conventions covering the immunity of State officials, such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions, contained special rules on the immunity of objects constituting the property of State officials. With regard to the suggestion of some members of the Commission to clarify the relationship between immunity and State responsibility, her Government stressed that immunity should not lead to impunity and that the State of the official should cooperate in the administration of justice and assume responsibility for the internationally wrongful acts of its organs.

55. **Mr. Bručić-Matic** (Croatia) said that the topic "Succession of States in respect of State responsibility" was of the utmost importance for his country, which had suffered a brutal aggression and massive destruction in a large part of its territory in 1990 during and after the dissolution of the predecessor State. The second report of the Special Rapporteur (A/CN.4/719) and the draft articles proposed by the Special Rapporteur would make

a valuable contribution to the clarification of that important topic.

56. Concerning draft article 11 (Dissolution of State), as rightly noted by the Special Rapporteur, both territorial link and evolution of an organ of the predecessor State into the organ of one of the successor States should be regarded as key elements when determining the holder of obligations arising from internationally wrongful acts. Both those factors should be explicitly included in the draft article. The International Court of Justice seemed to have recognized the element of devolution as part of its jurisdictional construct in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. In establishing its jurisdiction, the Court had essentially indicated that the Genocide Convention did not apply to Serbia retroactively, but – although at the relevant time Serbia had not been a party to the Convention – on the basis of the supposed violation thereof, the attributability of such violation to the Socialist Federal Republic of Yugoslavia, which had been a party to the Convention, and the responsibility for the violation that the Federal Republic of Yugoslavia had "inherited" from the Socialist Federal Republic of Yugoslavia due to the devolution of the organs of the latter into the organs of the former, which responsibility Serbia took over from the Federal Republic of Yugoslavia, Serbia was potentially responsible for the violation of the Genocide Convention.

57. By accepting jurisdiction in that case, the Court had opened the possibility for succession of State responsibility on the basis of the devolution of organs, but had never addressed the issue because it had answered the first question of its jurisdictional construct in the negative, namely whether the events referred to by Croatia had actually occurred and whether they had been in violation of the Genocide Convention. As shown from the above-mentioned case, when analysing different forms of succession of States in respect of State responsibility, attention needed to be given to instances in which a part or parts of a predecessor State that became a successor State could bear responsibility for internationally wrongful acts, not only towards third States, but also towards other successor States that had emerged from the predecessor State.

58. Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur, he said that draft conclusion 10, paragraph 1, and draft conclusion 11, paragraph 1, in essence addressed the same issue in the same manner and could therefore be merged. His delegation reiterated its support for the proposed illustrative list of *jus cogens* norms and hoped that the Special Rapporteur's next report would contain a proposal on how to proceed with the question.

59. Croatia was particularly pleased with the Commission's decision to include the topic "Universal criminal jurisdiction" in its long-term programme of work. It had commented on that important issue on a number of occasions but wished to highlight in particular the point that universal jurisdiction was a jurisdictional basis of last resort, to be exercised only when the competent State, based on the territoriality principle, the active personality principle and the passive personality principle, was unable or unwilling to act. At the same time, it had also cautioned against misinterpreting the concept of universal jurisdiction by changing its spatial (from universal to regional) and temporal (from a posteriori to a priori) framework, which would lead to flagrant violations of State sovereignty.

60. His delegation hoped that the Commission's work on the topic would result in guidelines or conclusions of practical utility to States.

61. **Mr. Jiménez Piernas** (Spain), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles provisionally adopted by the Commission, said that, regarding the debate around draft article 7, Spain supported the establishment of a system of limitations and exceptions to immunity *ratione materiae*. Even though the draft article mainly represented progressive development of international law, foreign State officials whose term of office had come to an end should not be entitled to invoke immunity *ratione materiae* in cases of the most serious crimes of international law, such as those enumerated in draft article 7, namely the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance. All those crimes were duly recognized as such in various international instruments, and some of them amounted to *jus cogens* norms. Thus, the Commission, in its work on the codification and progressive development of international law, should adopt a text that included a provision on the scope of draft article 7, in order to promote the fight against impunity for such crimes under international law.

62. On the procedural aspects of the question, a court should start considering immunity from jurisdiction without delay at the start of a criminal procedure and before any binding measures were taken against the official that might hinder the exercise of his or her functions; in any event, it should be considered before any judgement or decision on the merits of the case was

rendered, and without prejudice to the court's ability to conduct an investigation, provided it limited itself to fact-finding and did not impose any coercive measures.

63. Immunity from foreign criminal jurisdiction must be recognized for the three categories of acts referred to in the Special Rapporteur's sixth report (A/CN.4/722), understood in a broad sense as belonging to the concept of exercise of jurisdiction by the authorities of the forum State: detention, appearance as a witness, and precautionary measures. Concerning detention, foreign Heads of State, Heads of Government and Ministers for Foreign Affairs while in office enjoyed inviolability under international law. They were also exempt from having to appear as witnesses in judicial proceedings before the courts of the forum State. In that respect, local courts must also apply the rule of immunity from jurisdiction and refuse the adoption of precautionary measures linked to their persons or property. In other scenarios, in particular with respect to other foreign officials for whom the claim of inviolability was not clearly established, it was nevertheless important to ensure that their functions were not affected, in particular when immunity *ratione materiae* was at stake.

64. When dealing with procedural issues, the use of existing mechanisms of judicial cooperation and mutual legal assistance should also be explored, as they might help in striking the proper balance between respecting the principle of sovereignty and fighting impunity. In a State governed by the rule of law like Spain, the application of international rules on immunity of foreign officials from criminal jurisdiction was a matter for the national courts, with due regard for the separation of powers. The legal and procedural guarantees established in the Spanish legal system must be respected, especially those concerning the protection of the human rights of all citizens involved in judicial proceedings before the national courts.

65. Spain reiterated its support for the completion of the work on immunity of State officials from foreign criminal jurisdiction and the adoption of a text that would ensure the normative character of the proposals on the topic, the final goal of which was to ensure a higher degree of legal certainty. That goal was within the Commission's reach.

66. **Ms. O'Sullivan** (Ireland), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that it was her delegation's understanding that, as the Special Rapporteur had not proposed any draft articles in her sixth report, the debate that had taken place within the Commission at its seventieth session had been preliminary in nature and that it would continue at the seventy-first session. Against that backdrop, her delegation's comments on some of the preliminary conclusions of the Special Rapporteur were on the proviso that a more complete analysis of those particular aspects of immunity would be possible in 2019.

67. Having said that, her delegation supported consideration of the dual components of the procedural aspects of immunity, such as timing, waiver and safeguards, including in the context of draft article 7, as provisionally adopted by the Commission. It would be useful to analyse the safeguards protecting due process and other guarantees under international human rights law, and also safeguards aimed at protecting the stability of international relations and avoiding political and abusive prosecutions. As stated on previous occasions, her delegation would welcome guidance from the Commission on those aspects of the draft articles that constituted codification of existing international law and those that reflected progressive development.

68 Her delegation agreed with the view that procedural provisions and safeguards were relevant to the draft articles as a whole. The Commission could offer valuable guidance on the question of timing. It was generally accepted that determinations in relation to the immunity of State officials from foreign criminal jurisdiction should be considered in *limine litis*. However, it would be helpful if the Special Rapporteur and the Commission could consider that issue in more detail.

69. The Special Rapporteur had identified detention, appearance as a witness and precautionary or preliminary measures as acts of the forum State to which immunity could apply. Her delegation noted the consideration by the Special Rapporteur and the Commission of the impact of inviolability on immunity and in particular the distinctions discussed in that regard in relation to immunity *ratione personae* and immunity *ratione materiae*. The discussion in plenary of the difference between criminal investigations in general and the criminal investigation of a particular case for the purposes of immunity was interesting. Those areas could benefit from further elaboration in the Special Rapporteur's next report.

70. Ireland noted the plan of future work suggested by the Special Rapporteur and supported by Commission members, the aim being to complete the first reading of the draft articles during the seventy-first session. However, States would not have had an opportunity to comment on all the draft articles before the planned first reading of the entire set of draft articles in 2019. Bearing in mind the importance of immunity in international

relations, adequate time must be allocated for the topic to be considered in full.

71. *Ms. Ponce (Philippines), Vice-Chair, took the Chair.*

72. **Mr. Adamov** (Belarus), commenting on the topic "Protection of the environment in relation to armed conflicts", said that there was a need to eliminate inconsistencies between the draft principles and existing international law, in particular international humanitarian law, both in terms of the terminology used and in terms of the basic approach taken. His delegation endorsed the approach whereby the main aspects of international humanitarian law were clarified and developed in the light of the interests of protection of the environment. The main focus of the document should be on protection of the environment in relation to armed conflicts, and not on the impact of armed conflict on the legal regulation of environmental protection. An in-depth study of the principles of international environmental law would be counterproductive.

73. The Commission should also review the scope of the draft principles, which should not cover non-international armed conflicts. A State's laws, including its environmental laws, continued to be in force when such a conflict occurred, even in areas temporarily not under the State's control. The inability of a State to enforce its laws might serve as grounds for it to be exempted from responsibility, as confirmed in recent rulings of the European Court of Human Rights, but not for other participants in the conflict to be recognized as subjects of international law. The scope of the draft principles should be clearly limited to international armed conflicts.

74. Referring to the draft principles set out in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), he said that, with regard to draft principle 4, paragraph 1, it was not clear what was meant by "other" measures. In his delegation's view, legislative, administrative and judicial measures constituted an exhaustive list.

75. Draft principle 18, paragraph 2, required additional work. It was obvious that the concepts of national defence and security was applicable solely to States. However, international organizations bore responsibility for the protection of the interests of their member States; for example, they were not permitted to convey confidential information to third parties. The main aim of the document was protection of the environment in situations of armed conflict. There was a need to assess the extent to which the regulation of access to information met that aim.

76. Turning to the draft principles provisionally adopted by the Drafting Committee, his delegation proposed taking into account in draft principle 19 the possibility that the law and, in the broader sense, the "rules" of the occupying State might be more progressive in nature than those of the occupied territory and thus might be more conducive to the well-being of the population in the territory. The obligation to respect the law of the occupied territory could be qualified by those considerations. Furthermore, the draft principle was not comprehensive in scope: it did not cover the airspace of the occupied territory. The expression "environmental considerations" in paragraph 1 needed to be clarified. Paragraph 2 should be deleted, as it was merely a particular example of the principle set out in paragraph 1.

77. With regard to the applicability of the draft principles to United Nations peacekeeping missions, the best option would be to use the text when elaborating the mandates of such missions, the rules for the use of force by personnel and model status of forces agreements. His delegation was not convinced that the concept of "Occupying Power" was applicable in that context.

78. His delegation agreed with the Special Rapporteur that the applicability of the draft principles should not be linked to the lawfulness of the armed conflict itself. Any other interpretation would lead to the absurd conclusion that a State that had unlawfully started an armed conflict was released from its obligations with regard to the victims of the aggression. The Commission should also not focus excessively on an analysis of the human rights that could be affected as a result of the destruction of the environment, given the broad range of such rights. If the Commission decided to enumerate them, their sources should be listed in the commentary.

79. Concerning draft principle 20, his delegation supported the principle of sustainable use, but the temporary nature of occupation, and thus the assumption that the actions of the Occupying Power were not irreversible, should also be reflected. As there were currently no mechanisms for assessing environmental damage caused during an armed conflict or for considering complaints, the Commission should provide, at least in general terms, for damage compensation mechanisms. A working definition of the words "significant damage" in draft principle 21 as proposed by the Special Rapporteur in her first report was also needed.

80. Turning to the topic "Succession of States in respect of State responsibility", his delegation noted that there was little relevant State practice and that it was

highly specific to the historical context. Each case of succession was unique and was part of a broader political and legal process. That complicated the Commission's work on identifying general rules and trends. It was important to be cautious in formulating a presumption of succession when the predecessor State had ceased to exist. A number of factors must be taken into account, including the circumstances under which the predecessor State had ceased to exist and the degree of participation of each of the successor States in the administration of the predecessor State, and thus in the commission of internationally wrongful acts. It seemed unlikely that a uniform rule could be elaborated.

81. His delegation agreed with the view expressed during the debate in the Commission that limiting the scope of the draft articles on the topic to "lawful" succession might create an unfair advantage for successor States. Moreover, lawful succession might be accompanied by international legal documents establishing an agreement between the parties. In such a situation, the draft articles would not be applicable.

82. With regard to the need to ensure compatibility with the articles on responsibility of States for internationally wrongful acts, his delegation believed that, from the standpoint of State responsibility, the main issue was whether or not the predecessor State had ceased to exist. Given that territorial changes, including secession of part of a territory, did not ipso facto preclude wrongfulness within the meaning of the articles on State responsibility, there were grounds, in his delegation's view, for a presumption that there was no succession of responsibility in that case. In other words, if the predecessor State continued to exist, responsibility continued to be attributed to it, unless there was good reason to assume the opposite. The question of the extent to which such situations fell within the scope of other provisions of the articles on State responsibility – for example, on force majeure, distress and necessity – required further study.

83. His delegation was not convinced by the approach underlying draft articles 7 and 9. It seemed that, pursuant to the articles on State responsibility, the actions of any organ, even one with considerable autonomy, were attributable to the State itself. His delegation endorsed the wording of draft article 11, paragraph 1, which it took to mean that, in the absence of an agreement in any form, there was no succession in respect of responsibility. His delegation considered that the concept of "national liberation movement" was covered by the concept of "insurrectional or other movement", bearing in mind in particular the use of the latter term in the articles on State responsibility.

84. His delegation agreed with the proposal to change the title of the topic to "State responsibility problems in cases of succession of States". With regard to a broadening of the scope of the draft articles to include the interests of other parties injured by an internationally wrongful act of a State, his delegation considered that, since the draft articles concerned international responsibility, the relevant injured parties were subjects of international law. The inclusion of a "diagonal" element in the draft articles – succession with regard to the claims of foreign natural and legal persons – would expand the scope of the topic considerably.

85. On the topic "Immunity of State officials from foreign criminal jurisdiction", he said that, as a number of delegations had pointed out, such immunity was a rule of customary international law. It stemmed from generally recognized principles of international law, namely the sovereign equality of States and the non-use or threat of force.

86. His delegation had consistently noted the absence of a rule of customary international law establishing an exception to immunity of State officials. For his delegation, "values" did not in themselves have an impact on established norms of international law: only after a "value" was recognized by the international community as universally binding and was formulated as a norm of either treaty law or customary international law could consideration be given to the relationship between that norm and other norms already established. That assumption was supported in the Special Rapporteur's sixth report (A/CN.4/722).

87. A number of delegations had previously asserted that there was a trend that would justify draft article 7 as a progressive development proposal, but they had not demonstrated the existence of consistent State practice perceived as *opinio juris*. On the other hand, a significant number of States maintained that international practice did not demonstrate the existence of a custom or even of a trend establishing limitations or exceptions to immunity.

88. A comprehensive analysis of State practice with regard to possible exceptions to immunity should include consideration not only of situations demonstrating the existence of a trend towards limitation but also of situations that contradicted the existence of such a trend. Each example should reflect not only the position of the forum State but also the position of the State of the official against whom proceedings had been instituted in a foreign court.

89. The fact that the Commission had resorted to a vote in order to provisionally adopt the draft article

reflected the lack of consensus among members on that sensitive issue and made it difficult for States to take a position on it in the Sixth Committee. That was an argument in favour of the view that there was no customary rule of international law on the issue. Thus, in his delegation's view, the only acceptable way of regulating immunity of State officials from foreign criminal jurisdiction was through the conclusion of an international treaty. Even if some States were to agree in such an instrument on waivers of immunity, robust safeguards would be needed to prevent politically motivated proceedings and the abuse of jurisdiction.

90. Consequently, work on the issue of waivers of immunity should be done in tandem with the establishment of specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protected both States and individuals. Particular attention must be given not so much to protecting the human rights and procedural safeguards to which officials, just like any other accused persons, were entitled, as to preventing abuse by the State claiming jurisdiction.

91. His delegation maintained its position with regard to the need for further work on the list of crimes under international law in respect of which immunity *ratione materiae* did not apply. Reference was made in the Special Rapporteur's report to the different opinions of States concerning which crimes should be included in the list. A number of delegations had rightly pointed out that no criterion existed to justify the inclusion of any particular crime.

92. In the Special Rapporteur's report, it was rightly concluded that immunity was not equivalent to impunity. By analogy with the norms of international and national law concerning diplomatic missions, consular posts and special missions, the question of the criminal responsibility of officials should, first and foremost, be brought before the courts of the State of the official. Furthermore, the presumption that the State of the official had jurisdiction should be recognized in the draft articles as a basic principle.

93. His delegation looked forward to considering the Special Rapporteur's conclusions, in her seventh report, on cooperation and international legal assistance between the forum State and the State of the official; on questions related to guarantees of a fair trial; and on cooperation between States and international criminal courts and its possible impact on immunity from foreign criminal jurisdiction. Like a number of Commission members, his delegation was sceptical about the appropriateness of examining the role of the International Criminal Court. The Rome Statute was a self-contained instrument, of relevance solely to the States parties to it, and had little impact on general norms of international law in the area under consideration.

94. **Ms. Yvard** (Thailand), commenting on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the issue of limitations and exceptions to immunity was highly sensitive, hence the need for a fine balance between all possible aspects concerning both the forum State and the State of the foreign official, including the stability of friendly international relations, the principle of the sovereign equality of States, due process guarantees and the fight against impunity for the commission of serious crimes.

95. With regard to draft article 7 as provisionally adopted by the Commission at its sixty-ninth session, Thailand supported the conclusion that a clear distinction between immunity *ratione materiae* and immunity *ratione personae* needed to be made when deciding whether immunity would apply, which in her delegation's view should take place at the initial stage of judicial proceedings; that limitations and exceptions to immunity applied only to immunity *ratione materiae*; and that work on the topic should be based on *lex lata*, State practice and customary international law. Further discussion on procedural aspects, including on procedural safeguards, would help ensure a fair and effective application of draft article 7. She hoped that the views expressed by States in the Sixth Committee would be taken into consideration in the Special Rapporteur's next report.

96. **Ms. Mudallali** (Lebanon), addressing the topic "Protection of the environment in relation to armed conflicts" and the draft principles provisionally adopted by the Drafting Committee, said that it was important to bring greater legal clarity to and fill the legal gaps concerning that critical issue. With regard to draft principle 19, paragraph 2, and draft principle 20, which both featured the phrase "population of the occupied territory", her delegation suggested replacing that phrase with "protected population of the occupied territory" or "protected persons of the occupied territory", to ensure consistency with article 4 of the Fourth Geneva Convention, in which protected persons were defined as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

97. On draft principle 4, set out in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), her delegation agreed with the

Commission about the importance of disseminating the law of armed conflict to armed forces and, to the extent possible, also to the civilian population, as that contributed to States' respect for international law provisions pertaining to the protection of the environment. The obligation to conduct a "weapons review" found in article 36 of Additional Protocol I to the 1949 Geneva Conventions was also of utmost importance.

98. Her delegation welcomed the Special Rapporteur's intention to address questions relating to responsibility and liability for environmental harm in relation to armed conflicts in her next report, where she could also consider the question of reparation, and especially restitution, where possible, in cases of internationally wrongful acts which caused damage to the environment, in conformity with article 31 of the articles on State responsibility. The draft principles pertaining to that question could be covered in a separate part (Part Five), although they could also be placed either in Part One (General principles) or in Part Three (Principles applicable after an armed conflict).

99. **Mr. Rittener** (Switzerland), referring to the topic "Protection of the environment in relation to armed conflicts" said that international humanitarian law provided the primary basis which should be adequately reflected in the elaboration of new specific protection regimes. The protection of the environment during armed conflicts should be made more explicit and developed to fill the gaps relating to environmental protection without changing existing international humanitarian law.

100. Referring to the draft principles proposed by the Special Rapporteur in her first report (A/CN.4/720 and A/CN.4/720/Corr.1), specifically the draft principles governing post-conflict situations and in particular the principle relating to remnants of war, he said that it would be useful if the rights and obligations of both the former parties to the conflict and other actors were further clarified. Some obligations, for instance those regarding the clearance, removal or destruction of remnants of war, might also apply to States in general, especially if they were affected, without necessarily having been parties to the conflict itself.

101. Possible linkages and overlaps between the various parts of the draft principles should be further clarified, notably between the principles applicable to armed conflicts and situations of occupation and those applicable after an armed conflict. The principles relating to remedial activities, for example, might be relevant not only after an armed conflict but also as soon as active hostilities ceased.

102. Switzerland endorsed the proposal to further address questions relating to environmental protection in non-international armed conflicts, in particular if the obligations and practices of non-State armed groups were also taken into account. It would welcome further consideration by the Special Rapporteur of the relevance of human rights from the point of view of environmental protection and the question of whether it would be useful to draft a general provision relating to the human rights obligations of all actors. Switzerland also endorsed the Commission's intention to reconsider whether the term "environment" or "natural environment" was preferable. In some instances, "natural environment" might be unnecessarily restrictive.

103. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that Switzerland reiterated the importance of the procedural aspects of immunity. As his delegation had pointed out in 2017, a number of methodological questions, such as the existence of immunity, invocation of immunity, waiver of immunity, and timing, required further clarification. Respect for the immunity of State officials, if and when applicable, was key to avoiding an unnecessary strain on international relations and to maintaining the sovereign equality of States. It would be useful for the Commission to comment on those issues.

104. It was his delegation's understanding that in her seventh report the Special Rapporteur would be considering procedural safeguards related to both the State of the official and the foreign official concerned. In that effort, it would be of utmost importance to strike a delicate balance between respecting the functional and representative character of State officials and safeguarding the fight against impunity for the commission of serious crimes under international law.

105. Draft article 7 as provisionally adopted by the Commission at its sixty-ninth session, stated that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction did not apply in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance. In his delegation's view, it was of paramount importance for an article on exceptions to functional immunity of State officials from foreign criminal jurisdiction either to be solidly based on State practice and *opinio juris* or to be labelled as progressive development of the law. Since the Commission's draft articles enjoyed great practical authority and were often interpreted as statements of the law by domestic courts, it was important to have a clearer indication from the Commission as to whether the draft article reflected existing customary international law or progressive

development. The Commission should either provide stronger evidence that the draft article represented customary international law or indicate clearly to what extent it fell within the area of progressive development.

106. **Ms. Streșină** (Romania) said, with regard to the topic "Succession of States in respect of State responsibility", that the paucity and diversity of State practice in the area was not conducive to codification or progressive development. Her delegation reiterated its reluctance to support the development of new law on the topic, given its the limited practical relevance. It could, however, endorse a set of model clauses to be used by States in agreements on succession.

107. With regard to the topic "Protection of the environment in relation to armed conflicts", Romania agreed with the general opinion that international humanitarian law was the *lex specialis* in that area. However, considering the topic from the perspective of international environment law would allow States to more easily identify legal gaps in situations of armed conflict. In that connection, it was worth recalling that, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had concluded that international humanitarian law did not operate to the exclusion of all other rules and principles of law during armed conflict.

108. Her delegation welcomed the Special Rapporteur's intention to address in her next report questions relating to protection of the environment in non-international armed conflicts. The responsibilities of non-State actors should also be considered. Given that the question of responsibility and liability was also a key issue in environmental protection, it would be useful to elaborate on the relevance of the precautionary and "polluter pays" principles with regard to the topic, given that armed conflicts had the potential to cause transboundary harm to the environment. Thus, not only the occupied State, but also other affected States and the international community at large shared an interest in clarifying the question of responsibility.

109. On the topic "Immunity of State officials from foreign criminal jurisdiction", she said that, given the contentious debate that had taken place at the 2017 session on limitations and exceptions to immunity and draft article 7, as provisionally adopted by the Commission, the inclusion of a summary of those discussions in the sixth report of the Special Rapporteur (A/CN.4/722) had been a good way of framing the examination of the procedural aspects of immunity. Her delegation reiterated its view that clarifying the procedural implications of immunity and establishing procedural safeguards for the State of the official could help dispel concerns regarding politicization and abuse in the exercise of jurisdiction, including with reference to a fair and effective implementation of draft article 7.

110. Although the immunity of State officials was anchored in the principle of sovereign equality of States, in applying that principle, it was important to bear in mind the development of substantive norms of international criminal law and international human rights law, in particular the ongoing efforts to prevent impunity for serious crimes under international law. Rules concerning the immunity of State officials should not be seen to be in conflict with norms of *jus cogens*. The former merely embodied a procedural mechanism meant to ensure stability in international relations. Nor should the rules absolve anyone of responsibility for serious violations or affect the objective of combating impunity for the most serious crimes. From that perspective, it would be useful to examine the feasibility of a mechanism for communication between the forum State and the State of the official to facilitate investigation and prosecution by the foreign State.

111. Her delegation welcomed the attention given in the report to maintaining a methodological distinction between immunity *ratione personae* and immunity *ratione materiae* in addressing procedural provisions. On the timing of the consideration of immunity, Romania subscribed to the approach followed by the Special Rapporteur and the Commission with regard to the need to resolve the question at an early stage in the process, before binding measures were taken against the State official. Insofar as the investigation phase was concerned, her delegation supported the Commission's intention to study further the applicability of those rules in the light of national law and practice.

112. The analysis of the three categories of acts affected by immunity and identified by the Special Rapporteur was very useful. The coercive nature of those acts and the consequent impediment to the exercise of functions by an official were adequate indicators in identifying a balanced course of action. The Commission should continue to look into that subject and consider the question of inviolability in that context. Her delegation agreed with the Special Rapporteur that it was up to the courts of the forum State to determine the existence of immunity, while acknowledging the important role played by the executive branch.

113. Lastly, while emerging practice had demonstrated the impact of the obligation to cooperate with an international criminal court on the immunity of State officials, that issue should be seen in a broader context, in conjunction with international judicial cooperation and assistance mechanisms and international arrest

warrants registered with the International Criminal Police Organization (INTERPOL). However, such an analysis should remain within the agreed scope of immunity of State officials from criminal jurisdiction, while bearing in mind that the draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law. Given the dearth of State practice, the Special Rapporteur and the Commission should proceed cautiously in order to achieve the proper balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to ensure that the immunity of its officials was respected.

114. **Mr. Musayev** (Azerbaijan), commenting on the topic "Protection of the environment in relation to armed conflicts", said that provisions dealing with occupation were essentially laid down in three instruments: the Hague Regulations, which were considered as reflecting customary international law; the Fourth Geneva Convention; and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts. On the whole, his delegation endorsed the consideration of the interplay between the law of armed conflicts and other branches of international law, in particular international human rights law and international environmental law. However, it noted that, as stated in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), the "Commission does not intend, nor is it in a position, to modify the law of armed conflict".

115. Situations of occupation varied in nature and duration, and in addressing the protection of the environment and property rights in an occupied territory, the specific characteristics of the occupation should be taken into consideration, particularly when such occupation was a result of the unlawful use of force condemned by the Security Council and the General Assembly. International law specified that territory could not be acquired by the use of force. The prohibition of the use of force contrary to the Charter of the United Nations was a peremptory norm of international law, recognized as such by the international community of States as a whole. Therefore, while the underlying rationale of the relevant provisions of the law of occupation was to ensure the survival and welfare of the civilian population under occupation, the rights and interests of people expelled from an occupied territory and seeking to return to their homes and properties in that territory could not be disregarded. No rights could be exercised in violation of the rights of others. That was particularly relevant with regard to property rights and the protection of the environment and natural resources of the occupied territory.

116. The occupying State must not exploit the resources or other assets of the occupied territory for the benefit of its territory and population, nor should it further the interests of the local surrogate operating in the occupied territory under the effective political, military and economic control of the occupier. Similarly, the exploitation of natural resources to cover the expenses of the occupation, particularly where such occupation was the result of the unlawful use of force, was not permitted. States must be able to exercise full sovereignty over their wealth, natural resources and economic activities, and the principle of permanent sovereignty over natural resources continued to apply in situations of military occupation.

117. His delegation did not agree with the view expressed in the Special Rapporteur's report that "the notion of 'safeguarding the capital' would, in light of the general development of international law related to natural resources, have to be equated with 'sustainable use of natural resources'". Such a view could be misinterpreted by the occupiers as a pretext to secure or enhance their territorial claims and thus prolong the occupation. In some situations of military occupation, there was a clear link between the exploitation and pillaging of natural resources and other wealth in the occupied territories and the unconstructive position of occupying States in conflict settlement processes. Draft principle 20 required additional clarification to avoid such misinterpretation and abuse.

118. Limitations imposed on an occupant by international law were derived from the temporary nature of occupation. Occupation did not confer sovereignty over the occupied territory upon the occupier, and the legal status of the territory in question remained unaffected by the occupation. International law prohibited actions based solely on the military strength of the occupying State and not on a sovereign decision by the occupied State. The occupant lacked the authority to make permanent changes to the occupied territory. In accordance with international humanitarian law, the local legal system must remain in place during occupation. Article 43 of the Hague Regulations created a powerful presumption against change with regard to the occupant's relationship with the occupied territory and population, in particular concerning the maintenance of the existing legal system, while permitting the occupant to "restore and ensure" public order and safety. While the balance between the two was not always clear, especially with regard to extended occupations, an occupant did not have a free hand to

alter the legal and social structure in the territory in question, and any form of "creeping annexation" was forbidden.

119. The presumption in favour of the maintenance of the existing legal order was particularly high and was supplemented by provisions in article 64 of the Fourth Geneva Convention. However, that must be interpreted restrictively, and the difference between preserving local laws and crafting "provisions" which were "essential" was clear and significant. That meant not only that the legal system as such was unaffected, apart from the new measures which were not characterized as laws as such, but that the test for the legitimacy of those imposed measures was that they be "essential" for the purposes enumerated.

120. The Fourth Geneva Convention provided for the continued existence of rights and duties irrespective of the will of the occupying State. An occupant could not evade responsibility for its illegal acts of invasion and military occupation or for subsequent developments by setting up or otherwise providing for the continuing existence of puppet regimes composed of persons from the occupied territory. Given the need to strengthen the legal constituents of protection of the environment, his delegation supported future work by the Commission on questions relating to responsibility and liability for international harm in relation to armed conflicts, in particular in situations of military occupation.

121. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation noted that Member States and the Commission itself were divided about the question of limitations and exceptions to immunity. It reiterated its view that more should be done at the international level to ensure that those responsible for serious crimes, including State officials, were brought to justice. The establishment of the truth with respect to gross violations of international humanitarian and human rights law committed during armed conflicts, the provision of adequate and effective reparations to victims and the need for institutional actions to prevent a recurrence of such violations were prerequisites for sustainable peace and long-term stability.

122. His delegation was not fully confident that the Commission's work on the topic was an appropriate way of addressing the issue. It opened the way to misinterpretations and politically motivated actions, in violation of the principle of the sovereign equality of States and ran counter to the interests of stability of international relations. Draft article 7 provisionally adopted by the Commission, in particular some of the crimes listed therein, lacked sufficient support in State practice and did not reflect customary international law.

123. In her first report on the topic "Protection of the environment in relation to armed conflicts", the Special Rapporteur pointed to the judgment of the European Court of Human Rights in *Chiragov and Others v. Armenia* and to Security Council resolutions 822 (1993) and 853 (1993) as examples of instruments in which certain situations had been characterized as situations of military occupation. However, she should also have added Security Council resolutions 874 (1993) and 884 (1993) and General Assembly resolutions 60/285 and 62/243, which dealt with the same subject.

124. A reference to those sources would also be relevant in connection with the analysis contained in the second report of the Special Rapporteur for the topic of succession of States in respect of State responsibility (A/CN.4/719).

125. **Mr. Musikhin** (Russian Federation) said that his delegation had on several occasions expressed doubts about the appropriateness of further work on the topic "Protection of the environment in relation to armed conflicts", which had already been under consideration by the Commission for more than five years. In his delegation's view, the question had been sufficiently addressed in international humanitarian law and did not require the elaboration of, for example, a new international convention. The norms of international law in force in situations of armed conflict must be absolutely clear. Priority must be given first and foremost to the safety of the civilian population.

126. Initially, the idea had been not to consolidate the norms of international law relating to protection of the environment but to examine their application exclusively in times of armed conflict. Later, "preventive measures" and "principles applicable after an armed conflict", which related, respectively, to the time before and after the conflict, had been added to the draft principles. Since those periods were considered to be peacetime, the general norms relating to the protection of the environment should be fully applicable. Thus, it was counterproductive to attempt to develop a set of comprehensive rules in relation to environmental protection for all time periods, namely before, during and after an armed conflict.

127. The draft principles set out in the Special Rapporteur's first report on the topic (A/CN.4/720 and A/CN.4/720/Corr.1) contained wording of a general nature, for example concerning the designation of "areas of major environmental and cultural importance" as "protected zones". The designation of such areas in the absence of war should not be a subject for consideration.

In the context of an armed conflict, it was well known that, under international humanitarian law, demilitarized zones, hospital and safety zones and also non-defended localities were regarded as protected zones. During the preparation of Additional Protocol I to the Geneva Conventions, the idea of extending that status to other types of sites had not received the necessary support. That point needed to be borne in mind; otherwise, the draft principles would contradict existing international humanitarian law. Furthermore, the report contained an analysis of the interplay between human rights law and international humanitarian law. That approach should not lead to any change in the interpretation of existing norms of international humanitarian law.

128. In his delegation's view, it was inappropriate to refer, in the context of draft principles 5 [I-x] and 13 [II-5], to the application, by analogy, of the international legal regime for the protection of cultural heritage to issues relating to the protection of the environment in armed conflict. Moreover, those draft principles contained the term "protected zone". That concept did not exist in modern international humanitarian law. For instance, the Fourth Geneva Convention and its Additional Protocol I envisaged three types of "safety zones": hospital zones, neutralized zones and demilitarized zones. The introduction of the concept of "protected zone" was an unwarranted expansion of the concept of "safety zone". Draft principle 6 (Protection of the environment of indigenous peoples) was not directly related to the topic.

129. It was not clear what was meant by the reference in draft article 4, paragraph 2, to further measures to be undertaken by States to enhance the protection of the environment in relation to armed conflicts. In draft principle 9 [II-1], paragraph 3, it was necessary to specify what the parts of the natural environment were and to clarify how the use of one of those parts for military activities affected the status of the natural environment as a whole. It was not clear in draft principle 11 [II-3] what was meant by the words "environmental considerations". As his delegation understood it, there was no such notion in the existing treaty-based system of international humanitarian law. The meaning and extent of such considerations should be specified.

130. As a whole, the draft principles contained a number of provisions that required more detailed consideration and elaboration, especially those that excessively expanded the scope of the topic. In his delegation's view, language that was not used in current international humanitarian law should be avoided in the draft principles. Issues of complementarity with other branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors, and overall application of the draft principles to armed conflicts of a non-international character, required a thorough analysis.

131. His delegation's opinion regarding the merits of further work on the topic "Succession of States in respect of State responsibility" had not changed. The Commission had not been able to make significant progress. Draft articles 5 (Cases of succession of States covered by the present draft articles) and 6 (No effect upon attribution), as provisionally adopted by the Drafting Committee, did not in themselves raise questions, but they were of only secondary importance. The problem that had not been resolved in a satisfactory manner was the overall approach to the topic.

132. During the Commission's seventieth session, the Special Rapporteur had decided to radically change his approach: the general rule of non-succession in respect of responsibility, with possible exceptions, had been replaced by a general rule of automatic succession. It was noteworthy, however, that that fundamental change of approach seemed to be based on the same few examples of State practice and court decisions. It was debatable whether those examples could be considered evidence of an established rule of State succession in respect of responsibility and hence whether they could be used as the basis for any draft articles. His delegation also doubted that it was methodologically correct to depart from the Vienna Convention on Succession of States in respect of Treaties of 1978 and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983.

133. Instead of using as his starting point the Commission's previous work on issues relating to succession of States, the Special Rapporteur had based his research primarily on a report of the Institute of International Law, a resolution adopted on the basis of that report and the works of Patrick Dumberry. Furthermore, his delegation was not certain that it was methodologically sound to structure the draft articles on the basis of whether or not the predecessor State continued to exist. It would have been better to structure them by category of succession, as had been done, for example, in the 1983 Vienna Convention. Taking into account the examples of State practice examined by the Special Rapporteur, and in the light of part IV (State debts) of the 1983 Vienna Convention, it would be more appropriate to indicate that the main way of settling issues of responsibility in connection with succession was by agreement. In that context, draft article 1, paragraph 2, which had been presented to the

Commission by the Chair of the Drafting Committee but had not been included in the report of the Commission, was a step in the right direction. In that provision, the Commission made it clear that the draft articles were of a subsidiary nature, since they would apply only if no other solution was agreed upon.

134. His delegation also had doubts regarding the Special Rapporteur's approach to the attribution of responsibility in cases of succession. As his delegation understood it, the Special Rapporteur had proposed that, if the predecessor State continued to exist, responsibility should not pass to the successor States, except in particular cases, whereas if the predecessor State ceased to exist, then certain obligations deriving from succession in respect of responsibility, such as the payment of monetary compensation, should pass to the successor States. As justification, the Special Rapporteur argued that, if the predecessor State ceased to exist, it would be unfair to the injured State to retain the rule of non-succession. In his delegation's view, the interests of fairness might not be served by an approach whereby the successor States did not bear any responsibility for breaches committed by the predecessor State yet received part of its property, assets and territory. However, such an approach could be applied to newly independent States.

135. Issues concerning the direct responsibility of a predecessor State that continued to exist should not be the subject of research, since they were covered by the rules of general State responsibility rather than the rules of succession. Such cases were not contemplated in the 1978 and 1983 Vienna Conventions. Thus, there was no need to include draft article 6. His delegation reiterated its opinion that the concept of continuation should not be examined under the topic. It also proposed that the Commission consider changing the final form of its work on the topic to an analytical report.

136. On the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation noted that the procedural aspects of the topic had not been comprehensively examined. It looked forward to further discussions of the Special Rapporteur's sixth report (A/CN.4/722) during the seventy-first session of the Commission and the presentation by the Special Rapporteur of her seventh report, in which she was to complete the examination of procedural issues. It also looked forward to proposals for draft articles that reflected the issues examined in the sixth report.

137. His delegation shared the Special Rapporteur's wish to find answers to a number of fundamental procedural questions, including when immunity from foreign criminal jurisdiction began to apply; what types of acts of the forum State were affected by immunity from foreign criminal jurisdiction; who determined the applicability of immunity, and what effect that determination had; whether or not it was necessary to invoke immunity, and who could do so; how and by whom the waiver of immunity could be effected; and what effects the waiver of immunity had on the exercise of jurisdiction.

138. Since immunity was procedural in nature, the procedural aspects of its application were of vital importance. The Commission could formulate valuable guidance in that area on the basis of existing case law and practice. The elaboration of procedural rules for the invocation of immunity could dispel some of the concerns of States about the rule set out in draft article 7 on the existence of exceptions to immunity, which was inconsistent with international practice. Unfortunately, the report did not cover all the procedural issues, nor did it contain an analysis of the relationship between the procedural and substantive aspects of the topic. All in all, it was doubtful whether a set of procedural guarantees could offset the conceptual and substantive content of the draft article.

139. There was no urgency for the Commission to complete the first reading of the draft articles during the seventy-first session. His delegation primarily looked forward to reviewing the full set of draft articles on the procedural aspects of the topic to be provided in the Special Rapporteur's seventh report. Once the procedural issues had been discussed, the Commission could review the content of the draft article from a different angle to iron out the differences of opinion within the Commission and among the members of the Sixth Committee. His delegation reiterated its view that the exceptions listed in the draft article, which had been adopted in the Commission by a vote instead of by consensus, were not supported by the practice of national or international courts or the laws of States.

140. The desire to eradicate impunity for serious international crimes was a noble objective but it should not serve as an instrument for manipulating the rules of customary international law. The introduction of exceptions to the immunity of State officials from foreign criminal jurisdiction might be used by a State to apply political pressure on another State under the pretext of fighting impunity; that would only increase tensions in inter-State relations.

141. His delegation did not support the consideration of questions relating to international criminal jurisdiction under the topic of immunity of State officials from foreign criminal jurisdiction. Firstly, the wording of draft article 1 as provisionally adopted by the

Commission – "[t]he present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State" – excluded the examination of international criminal jurisdiction. Secondly, international criminal courts operated on the basis of a special legal regime, whether it was a treaty, such as the Rome Statute of the International Criminal Court, or a Security Council resolution. The invocation of immunity in those cases was based on special international legal instruments. Therefore, his delegation did not see any scope for codification or progressive development of international law in that area.

142. **Mr. Cuellar Torres** (Colombia), referring to the topic "Protection of the environment in relation to armed conflicts", said that the environmental effects generated before and during a conflict could pose a serious threat to human beings and ecosystems. The environmental harm caused by an armed conflict had long-term, potentially irreparable consequences, and it might well undermine effective reconstruction of societies and destroy large expanses of wilderness and ecosystems. That was why in principle 24 of the 1992 Rio Declaration on Environment and Development it was stressed that warfare was inherently destructive of sustainable development and that States must therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development.

143. To date, laws to prevent, reduce and repair damage to the environment caused by armed conflict had not been effective. International humanitarian law therefore needed to be integrated into other branches of international law, such as environmental law, human rights law, treaty law and even the law of the sea, with a view to protecting the environment as an integral part of society. In that connection, his delegation agreed with the Special Rapporteur that environmental concerns had permeated most areas of international law, as demonstrated by the advisory opinion of the Inter-American Court of Human Rights concerning State obligations in relation to the environment and the right to life and personal integrity. In that opinion, the Court had emphasized the interdependence and indivisibility of human rights, the environment and sustainable development. Although the opinion did not concern the protection of the environment in relation to armed conflicts, it still applied in that context because the obligation to protect human rights and the environment did not cease during armed conflict.

144. The topic was particularly important for Colombia, where armed conflict had damaged large parts of the environment and had adversely affected the health of the population, manifested in many ways, including illegal mining, deforestation, planting of anti-personnel mines, existence of remnants of war, destruction of wells and oil spills. For that reason, the peace agreement with the Fuerzas Armadas Revolucionarias de Colombia (FARC) included a provision that the mandate of the Truth, Coexistence and Non-Recurrence Commission was to elucidate and promote the recognition of the human and social impact of the conflict on society, including its impact on environmental rights. The agreement had also established that persons who admitted their acts could propose a plan for reparation and restoration activities, which expressly included environmental protection programmes in nature reserves, environmental recovery programmes in areas affected by illicit crops and anti-personnel mines, and programmes to provide access to drinking water and build sanitation systems.

145. **Mr. Lippwe** (Micronesia), speaking on the topic "Protection of the environment in relation to armed conflicts" and the draft principles set out in the first report of the Special Rapporteur (A/CN.4/720 and A/CN.4/720/Corr.1), said that his delegation strongly supported the notion expressed in the commentary to draft principle 6 that there was a "special relationship between indigenous peoples and their environment", a relationship rooted in centuries of close interaction between the peoples and their natural environment. Terrestrial and maritime areas and resources were of great importance for indigenous peoples, being closely linked to their cultural practices, sociopolitical rankings, traditional identities and basic sustenance. International law, including major international instruments, State practice and jurisprudence, was replete with examples of recognition of the rights of indigenous peoples, including the right to enjoy their natural environments for long-standing purposes that were unique to them and central to their identities. Armed conflict, especially when waged by foreign powers, typically disrupted the connections between indigenous peoples and their natural environments, threatening their identities as peoples. Micronesia echoed the call in draft principle 6, paragraph 2, for States to undertake effective consultations and to cooperate with indigenous peoples about how best to remedy the harm inflicted by armed conflict on the territories they inhabited.

146. There was a growing understanding in international law that attention must be given to the needs and interests of not just indigenous peoples but also of so-called local communities, a group recognized in the Convention on Biological Diversity and its Nagoya Protocol, and also in the Paris Agreement on climate change. In the view of Micronesia, there was an

important distinction between indigenous peoples and local communities, in the sense that an indigenous people typically descended from a population that had inhabited a country at the time of the country's conquest or colonization by a foreign entity; was currently subservient to or at a remove from the dominant population in the country; and retained socioeconomic, cultural and political institutions that dated to pre-conquest and pre-colonization eras. A local community, on the other hand, was typically a population with long-standing historical, cultural and political roots in a country and was not subservient to or at a remove from any other population in the country. Such local communities exhibited many of the same connections to the natural environment as indigenous peoples, but the local communities had the benefit of being integral components of States, whereas indigenous peoples were not necessarily integrated in the same manner. Micronesia urged the Commission to consider whether the content of draft principle 6 could be applied to such local communities.

147. Micronesia endorsed the Drafting Committee's revision of the Special Rapporteur's original draft principle 19 to reflect the relationship between the protection of the natural environment and the enjoyment of certain human rights. Human rights to shelter, sustenance, health, religious practices, cultural activities and political engagement and other core aspects of humanity were dependent on healthy, thriving, intact natural environments. An explicit link between the protection of the natural environment and the enjoyment of core human rights should be established in draft principle 19 or some other draft principle. His delegation looked forward to an expanded discussion of that issue in the commentary to draft principle 19.

The meeting rose at 1.10 p.m.