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Report of the International Law Commission on the work of its seventy-second session (2021)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-sixth session, prepared by the Secretariat

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I. Introduction

1. At its seventy-sixth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, held on 17 September 2021, to include in its agenda the item entitled "Report of the International Law Commission on the work of its seventy-second session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 16th to 25th meetings, and at its 29th meeting, held from 25 to 29 October and on 1 to 3 and 18 November 2021. The Chair of the International Law Commission at its seventy-second session introduced the report of the Commission on the work of that session (A/76/10) at the 16th meeting, on 25 October, and the Committee considered the report in three clusters, namely: cluster I (chapters I to V and X) at its 16th to 19th meetings, from 25 to 28 October, cluster II (chapters VI and IX) at its 19th to 23rd meetings, on 28 and 29 October and on 1 and 2 November, and cluster III (chapters VII and VIII) at its 23rd to 25th meetings, on 2 and 3 November.

3. At its 29th meeting, on 18 November, the Sixth Committee adopted draft resolution A/C.6/76/L.16 entitled "Report of the International Law Commission on the work of its seventy-second session" without a vote. On the same day, the Committee also adopted without a vote a draft resolution entitled "Protection of the atmosphere" (A/C.6/76/L.15) and a draft resolution entitled "Provisional application of treaties" (A/C.6/76/L.13). After the General Assembly had considered the relevant report of the Sixth Committee (A/76/473), it adopted the draft resolutions, respectively, as resolutions 76/111, 76/112 and 76/113 at its 49th plenary meeting, on 9 December 2021.

4. The present topical summary has been prepared pursuant to paragraph 37 of resolution 76/111, in which the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the seventy-sixth session of the Assembly.

5. The present topical summary consists of two parts. The first part contains five sections, reflecting the current programme of work of the Commission: immunity of State officials from foreign criminal jurisdiction (A/76/10, chap. VI); succession of States in respect of State responsibility (*ibid*., chap. VII); general principles of law (*ibid*., chap. VIII); sea-level rise in relation to international law (*ibid*., chap. IX); and other decisions and conclusions of the Commission (*ibid*., chap. X). The second part contains summaries on the topics: Protection of the atmosphere (A/76/10, chap. IV); and Provisional application of treaties (*ibid*., chap. V), on which the Commission completed work on second reading during its seventy-second session.

II. Topics and items on the current programme of work of the Commission

A. Immunity of State officials from foreign criminal jurisdiction

1. General comments

6. Delegations expressed appreciation for the provisional adoption by the Commission on first reading of draft articles 8 *ante*, 8, 9, 10, 11 and 12 and for the completion by the Special Rapporteur of her workplan by the delivery of her eighth report. Appreciation was also expressed for the logical flow of the provisions adopted.

7. Delegations recalled the important role immunity played in facilitating international relations among States. They highlighted the importance of respecting State sovereignty and the rights of officials on the one hand and of preventing impunity for serious crimes on the other. To that end, they stressed the need to find a balance between the various considerations. A number of delegations emphasized the

importance of preventing political abuse of criminal jurisdiction. Several delegations highlighted the relevance of the procedural provisions to promoting a balance between the competing interests and to building confidence between the forum State and the State of the official. States' need for flexibility was also recalled.

8. A number of delegations called upon the Commission to identify more clearly in the commentary instances of codification and proposals for progressive development. With regard to the former, the Commission was encouraged to identify the relevant State practice and *opinio juris*. The view was expressed that the procedural provisions being developed generally did not reflect customary international law. It was recalled that changes to the law would have to be effected by treaty. Some delegations opposed the formulation of new, binding procedural obligations for States.

9. Delegations highlighted the importance of consistency with other legal norms. The Commission was encouraged to consider how the procedural provisions would apply across diverse national legal systems. The value of using general terminology to accommodate diverse legal systems was highlighted. The Commission was also encouraged to ensure consistency with its work on related topics. Concern was expressed regarding the application of certain principles of international law to the draft articles. Several delegations also highlighted the need to ensure that terms, including "criminal jurisdiction" and "criminal proceedings", were used consistently throughout the draft articles.

10. Delegations continued to express divergent views concerning draft article 7 (crimes under international law in respect of which immunity *ratione materiae* shall not apply) and on the issue of whether the procedural safeguards under development by the Commission would be sufficient to allay States' concerns about the provision.

2. Specific comments

11. A number of delegations welcomed **draft article 8 *ante*** (application of Part Four). The relevance of the procedural safeguards to draft article 7 was noted in particular. The Commission was encouraged to resolve any outstanding divergence of views regarding the scope of the procedural safeguards.

12. Support was expressed for **draft article 8** (examination of immunity by the forum State). Some delegations considered that immunity should be examined without delay. Others emphasized that immunity should be examined *in limine litis.* Some delegations stated that examination should occur before measures affecting the official were taken.

13. The view was expressed that the obligations to examine and notify should arise when the forum State became aware that the individual was a foreign State official whose immunity might be affected. It was suggested the phrases "may be affected" and "may affect" might be too broad. The Commission was also encouraged to distinguish between immunity *ratione personae*, which applied when the official was affected by the exercise of criminal jurisdiction by another State, and immunity *ratione materiae*, which was implicated when official acts became the subject matter of criminal proceedings. The Commission was invited to address the realities of the application of coercive measures in the commentary, for example by allowing necessary and proportionate measures to prevent imminent harm. Further clarification of the term "examination" and the phrase "coercive measures that may affect an official" was requested.

14. **Draft article 9** (notification of the State of the official) was also welcomed. It was stated that courtesy required the forum State not only to notify the State of the official, but also to obtain its consent.

15. A number of delegations expressed the concern that notification before action by the forum State could, in practice, hinder the exercise of criminal jurisdiction. Referring to article 42 of the Vienna Convention on Consular Relations, some delegations proposed that notification should be required "promptly" upon

commencement of criminal proceedings or adoption of coercive measures. It was also proposed that the acts that triggered the obligation to notify should be specified in greater detail. It was suggested that the commencement of criminal investigation did not itself require notification. It was noted that the absence of an obligation to notify had not undermined the effectiveness of immunity in practice.

16. Doubt was expressed as to whether the phrase "*inter alia*" sufficiently encompassed the minimum contents of a notification. On the understanding that notification should occur after the examination of immunity, it was proposed that a notification should include the grounds for any non-application of immunity.

17. Some delegations supported using diplomatic channels as the primary means of communication of notification. Differing views were expressed on the relevance of cooperation agreements and mutual legal assistance treaties. It was proposed to delete the last sentence of paragraph 1, and to switch the order of paragraphs 2 and 3 of the provision, given the relationship between paragraphs 1 and 3.

18. The view was expressed that **draft article 10** (invocation of immunity) was consistent with international practice. Nevertheless, several delegations emphasized that invocation was not a precondition to the application of immunity. It was also stated that the invocation of immunity, as well as its timing and the authority responsible for invocation, were within the discretion of the State of the official. It was noted that, in State practice, immunity was not necessarily invoked in writing.

19. Some delegations welcomed **draft article 11** (waiver of immunity). It was stated that the provision corresponded with practice. Concerning the content of a waiver, it was suggested that paragraph 11 of the commentary should be reflected in the text of the draft article. The view was also expressed that the provision should include reference to the consent of the official.

20. Some delegations welcomed paragraph 5, providing that waiver of immunity was irrevocable, and considered that it supported legal certainty. However, a number of delegations noted that, as relevant State practice was limited, they doubted the desirability of the paragraph. The view was expressed that waiver could be revocable, including after a fundamental change of circumstances or where the waiver had been induced by fraud, threat or use of force.

21. The deletion of former paragraph 4 relating to deduction of waivers from international treaties was welcomed. The view was expressed that the non-application of immunity resulting from such treaties was not the result of an implied waiver and that immunity *ratione personae* continued to apply in those circumstances.

22. **Draft article 12** (requests for information) was also welcomed, as it would be of assistance in the process of determining whether immunity applied in a case. The addition of a temporal criterion, by including the word "promptly" in paragraph 4, was proposed. The view was also expressed that the provision was self-evident, established no obligation and could be omitted.

23. Commenting on the eighth report of the Special Rapporteur, a number of delegations welcomed the proposed **draft article 17** (settlement of disputes). Some delegations emphasized that it would complement the other procedural safeguards under consideration. Further clarifications on the purpose of the provision and how it would operate in practice were requested. It was recalled that the aim of setting out rules for dispute settlement should be to provide for a simple, speedy and effective solution and that the rules should provide certainty to the States concerned.

24. A number of delegations stated that the text of the provision would be contingent on the final form of the draft articles. Some delegations expressed the view that a dispute settlement clause would be relevant only to a future treaty. It was pointed out that, unless the draft articles were to become a treaty, any dispute resolution clause would remain non-binding guidance. It was stated that such a provision would be redundant in view of the general obligation of States to resort to peaceful means of dispute settlement.

25. Some delegations supported a binding mechanism, and the reference to the International Court of Justice was welcomed in particular. The procedures to opt out of the jurisdiction of the International Court of Justice in article 15 of the draft articles on prevention and punishment of crimes against humanity and article 27 of the United Nations Convention on Jurisdictional Immunities of States and Their Property were raised as models.

26. Other delegations expressed a preference for general, non-binding language. The title "Procedural requirements" was suggested instead of "Settlement of disputes". The Commission was encouraged to reflect the free choice of means of dispute settlement in the commentary. The Commission was also cautioned against taking draft conclusion 21 (procedural requirements) of the draft conclusions on peremptory norms of international law (*jus cogens*) as a precedent because the work on that topic was not yet complete.

27. Some delegations expressed the view that discussion of dispute settlement was premature. It was recalled that the Commission normally avoided including final clauses in its draft articles. The desire for input from States on the complete draft articles before a decision was taken was expressed. The concern was raised that a dispute resolution mechanism might serve to escalate tensions, particularly in disputes involving the application of draft article 7. It was proposed that the question of dispute settlement be left to the discretion of States.

28. Regarding the means of dispute settlement included in the provision, some delegations preferred that the provision not limit the means to which the States concerned might resort. Some delegations called for reference to the means specified in Article 33 of the Charter of the United Nations. It was suggested, however, that it was unnecessary to repeat all the means. The view was also expressed that having a predetermined mechanism could facilitate dispute resolution. Delegations agreed with the Special Rapporteur that the creation of a new body was inadvisable.

29. Several delegations called for the suspension of national proceedings pending dispute resolution; it was suggested that that would prevent aggravation of disputes and preserve the rights of the States concerned. It was proposed that the suspension should take effect earlier, either when immunity was invoked or when attempts to resolve a dispute began. It was also stated that suspension could be considered on a case-by-case basis in the framework of provisional measures or that it could be conditioned on the ascertainment of *prima facie* jurisdiction by the dispute resolution forum. However, concerns were raised regarding the compatibility of such suspension with the independence of domestic courts and regarding the potential effects of requiring the forum State to surrender custody of the official pending dispute resolution. The importance of ensuring that domestic legal systems implemented a suspension was highlighted.

30. Delegations expressed varying views on the advisability of establishing time limits, especially in a provision that did not provide for compulsory dispute settlement. Further clarification of the question was requested.

31. Regarding **draft article 18**, delegations highlighted the fact that domestic and international criminal jurisdictions were distinct spheres, each with their respective rules. Several delegations expressed a need to separate the two regimes, without implying a hierarchy between them. Some wished to preserve recent achievements in international criminal law. Others sought to emphasize that international criminal jurisdiction was outside the scope of the topic. In view of that, a number of delegations expressed their support for the inclusion of a without prejudice clause, as proposed by the Special Rapporteur. Concerning the placement of the provision, several delegations supported its incorporation as paragraph 3 of draft article 1. It was suggested that any reference to immunity before international jurisdiction should be replaced with reference to irrelevance of official capacity, as immunity referred to exception from national jurisdiction.

32. Several delegations doubted the need for the provision and considered that draft article 1 adequately defined the scope of the draft articles. Concern was expressed regarding the reference to "practices". It was proposed that the sentence "the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles" from the commentary should be included in the text of draft article 1, rather than adopting draft article 18. Alternate wording for the provision was also proposed: "The present draft articles take into consideration the application of immunity before international criminal jurisdictions. This immunity must be taken into consideration in the constitutive instruments of said tribunals."

33. Some delegations expressed concern that the Special Rapporteur addressed in her report the immunities of State officials before international criminal tribunals, which were outside the scope of the topic. The view was expressed that the possibility of prosecution before an international tribunal could not affect the immunity of an official before the forums of a foreign State.

34. Doubt was expressed as to whether the provision could apply to States not parties to the Rome Statute of the International Criminal Court. Some delegations emphasized that the establishment of the International Criminal Court did not change the rules of general international law for the States not parties to its Statute. Some delegations expressed disagreement with the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case,[1] and the Commission was encouraged to avoid reference to that judgment in its commentary.

35. Some delegations supported the broadening of the scope of the term "international criminal tribunals", either through use of the term "internationalized criminal tribunals" or by clarification in the commentary. Opposition to such a change was expressed, based on a need for clear demarcation between national and international jurisdictions.

36. A number of delegations agreed with the Special Rapporteur that recommended good practices should not be incorporated in the draft article. Some delegations supported referring to such practices in the commentary.

3. Future work

37. Several delegations encouraged the Commission to complete the first reading of the draft articles in 2022, the final year of the Commission's current term. However, the Commission was also urged not to rush, given the complexity and controversial nature of the topic. A number of delegations regretted that the Drafting Committee was still discussing the issues debated by the Commission two years previously. Trust was expressed that the differences of views would be overcome.

38. Questions that the Commission had left open or not yet considered were recalled. They included the question of inviolability, the outstanding definitions in draft article 2 and the question of *ultra vires* conduct of State officials. The addition of a provision on responsibility for the violation of the immunity of an official was proposed.

39. A number of delegations stated that they were looking forward to an opportunity to comment on the full set of draft articles adopted on first reading. The added value of further analysis of State practice was also noted.

4. Final form

40. Differing views were expressed on whether the draft articles should be intended to lead to a convention. Some delegations emphasized that the draft articles should be adopted by consensus.

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[1] Situation in Darfur, Sudan, In the case of the *Prosecutor v. Omar Hassan Ahmed Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir)*.

B. Succession of States in respect of State responsibility

1. General comments

41. Delegations generally expressed appreciation for the Special Rapporteur and the work of the Commission on the topic, with several delegations commending the progress made. It was noted, however, that a number of draft articles were still pending before the Drafting Committee. While acknowledging that the draft articles could be useful in providing legal guidance, a number of delegations stated that priority had to be given to agreements between the States concerned and emphasized the subsidiary nature of the draft articles.

42. The question was raised as to whether the work of the Commission amounted to codification or progressive development of international law, in the light of the limited relevant State practice on the subject. The view was expressed that the topic might not be ripe for codification of existing customary international law because of the lack of relevant State practice. Nevertheless, some delegations agreed with the Special Rapporteur that there was a need to combine codification with progressive development. Some delegations emphasized that the Commission should state clearly which provisions represented codification and which provisions aimed at progressive development. The Commission was urged to uphold the methodology for the determination of rules of customary international law and encouraged to take a prudent and cautious approach in its work on the topic. While the Special Rapporteur was commended for considering State practice in different categories of State succession, in order to identify emerging rules regulating State succession in matters of State responsibility, some delegations emphasized the importance of taking into account geographically diverse sources of State practice. The utility of the topic given the paucity and inconsistency of State practice was questioned.

43. Delegations reiterated the importance of ensuring consistency in terminology and substance with the previous work of the Commission, in particular its articles on responsibility of States for internationally wrongful acts. Caution was advised against inadvertently misstating the law on State responsibility in the context of the topic.

44. Differing views were expressed concerning the applicable rule and further discussion was called for on the status of the “clean slate” rule and of automatic succession. Several delegations reiterated that neither the clean slate rule nor the automatic succession rule was acceptable as a general rule on the subject due to the diverse, context-specific and sensitive State practice. The view was expressed that there was no consistent practice or *opinio juris* on the subject because each case had its own special political background. It was suggested that the draft articles and their commentaries should be revised to ensure consistency with the approach that no rule of automatic succession to State responsibility existed.

45. It was suggested that, given the complex and composite nature of the topic, the text of the draft articles should be made simpler and more precise. The view was expressed that the draft articles could be improved by avoiding controversial positions or addressing unsettled areas of law that did not need to be addressed in the context of the topic. The Commission was encouraged to consider revising the draft articles to minimize the need to address unrelated issues.

46. With respect to the fourth report of the Special Rapporteur, doubt was expressed regarding the premise that there might be situations where the responsibility, or the rights and obligations arising from responsibility, might be transferred from a predecessor State to a successor State as a matter of *lex lata*. It was considered that a purported rule that responsibility passed from a predecessor State to a successor State would not be a welcome progressive development of the law.

2. Specific comments

47. Regarding **draft articles 7**, **8 and 9**, provisionally adopted by the Commission at its seventy-second session, some delegations considered that they appeared to be aligned with the articles on responsibility of States for internationally wrongful acts.[2]

48. Some delegations expressed support for draft article 7 (acts having a continuing character), but doubt was expressed as to whether the rule for determining if the international responsibility of the successor State extended to the consequences of an act of the predecessor State could be based on the acknowledgement and adoption of the act as its own by the successor State, concepts which had been drawn from article 11 of the articles on responsibility of States for internationally wrongful acts. It was suggested that the focus of the draft article should be, *inter alia*, on the lasting adverse effects of the act committed by the predecessor State or against it and the desired elimination of those effects in accordance with the requirements of fairness and restoration of justice, and on whether the responsibility of the successor State extended to internationally wrongful acts of a continuing character committed by the predecessor State that had commenced prior to the date of succession. Other delegations questioned the added value of the provision and relevance to the topic.

49. Some delegations were of the view that it was not necessary to restate article 10 of the 2001 articles in draft article 8 (attribution of conduct of an insurrectional or other movement) and therefore questioned whether the provision was necessary.

50. While some delegations expressed general support for draft article 9 (cases of succession of States when the predecessor State continues to exist), others opposed the provision as it seemed to them to be vague, imprecise and based on the assumption of a transfer of responsibility between the predecessor State and the successor State. It was suggested that paragraph 2 of the draft article should be redrafted in order to better align it with draft articles 16 to 19, proposed by the Special Rapporteur in his fourth report. It was noted that, while the formulation "may request" restitution or compensation was used in draft articles 16, 17 and 19, draft article 9 employed the formulation "entitled to invoke", the latter formulation being preferrable. Further study of unjust enrichment and similar doctrines was suggested and further elaboration was called for on what constituted the "particular circumstances" in which a successor State might be "relevant for addressing the injury", as indicated in the commentary.

51. With regard to **draft articles 10** (uniting of States), **10 *bis*** (incorporation of a State into another State) and **11** (dissolution of a State), provisionally adopted by the Drafting Committee at the seventy-second session, concern was expressed about the use of the phrase "shall agree", as it was unclear what the legal obligation or what the legal consequences of a breach would be.

52. Some delegations welcomed the effort to address composite acts in **draft article 7 *bis*** (composite acts), proposed by the Special Rapporteur in his fourth report, and underscored its importance. It was pointed out that the difference between composite acts and continuing acts was not sufficiently clear and clarifications and revisions of the provision were requested. The view was expressed that paragraph 1 was not in line with existing law and that paragraph 2 was not supported by State practice. Further examination of matters relating to shared responsibility when a predecessor State continued to exist, as well as of the application of the obligation of cessation in the case of a composite act or a continuing act that had occurred during the succession process was called for. The work of the Institute of International Law was mentioned as useful guidance on the issue.

53. With respect to **draft articles 16 to 19**, as proposed by the Special Rapporteur in his fourth report, some delegations agreed that the obligation of cessation and

[2] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission 2001, vol. II* (Part Two) and corrigendum, paras. 76–77.

assurances and guarantees of non-repetition, and other forms of reparation, were forms of remedy rather than forms of responsibility and should therefore be treated accordingly. Caution was expressed against merely restating the law on State responsibility for internationally wrongful acts and further clarification was sought on how those rules applied in the case of State succession. While it was suggested that draft articles 16 to 19 should be streamlined so that they would become only two provisions – one concerning cessation and non-repetition and another concerning reparation – support was expressed for having different forms of reparation dealt with in separate draft articles, as each had different requirements and conditions. Some delegations considered that draft articles 16 to 19 did not seem to be necessary and that it would be more useful if the Commission were to focus on the relationship between the different categories of State succession and reparation in general.

54. The view was expressed that the principle of full reparation did not, as a rule, prevent States from concluding settlement agreements, except for situations involving breaches of peremptory norms of general international law (*jus cogens*) or *erga omnes* obligations, where full reparation should be respected, with no exceptions. Conversely, the view was expressed that, since lump-sum agreements were part of State practice and since the draft articles were subsidiary in nature, priority should be given to agreements between the States concerned. It was considered that indicating that in some situations, States "may request" different forms of reparation from a successor State was ambiguous and, given the use of that phrase, likely to be understood as a rule of automatic succession, which had no basis in international law and should not form part of *lex ferenda* either. The view was expressed that a State had the right to decide whether to waive its claims of reparation or present them for a certain amount at a certain point in time and that the waiver of the claim did not mean that the internationally wrongful act had not occurred, since the injured State had the right to decide when and how to present the claim. It was suggested that the Commission examine questions relating to responsibility and reparation by States whose succession processes had not occurred in conformity with international law or the principles of the Charter of the United Nations.

55. While several delegations expressed support for draft article 16 (restitution), it was suggested that paragraph 1 should be further clarified, in particular to explain its apparent inconsistency with article 35 of the articles on responsibility of States for internationally wrongful acts. It was stated that the use of the phrase "may request" in paragraphs 2 and 4 was appropriate, since State practice was uneven and determinations by predecessor or successor States were likely to be driven more by diplomatic and political, rather than legal, considerations. The view was expressed that paragraph 3 was not in accordance with the rules on State responsibility pertaining to reparations. It was suggested that paragraph 4 should also encompass situations of removal of movable, cultural or other State property from the territory that had come under the jurisdiction of the successor State, as well as the scenario whereby the successor State was entitled to restitution if it bore the injurious consequences of the wrongful act.

56. A number of delegations expressed support for draft article 17 (compensation). Further clarification was called for on the basis on which a successor State could request compensation in the event that there were several successor States, and on whether the obligation to make compensation could be transferred, in certain limited circumstances, to the successor State or whether both the predecessor State and the successor State had the obligation to provide compensation. A request was made for the commentaries to provide guidance on methods for determining the amount of compensation owed, as well as on what constituted a "benefit" under paragraph 2. It was suggested that the practice of the African Court on Human and Peoples' Rights in matters of compensation should be examined.

57. With respect to draft article 18 (satisfaction), some delegations voiced support for the provision. Other delegations expressed doubt as to whether the investigation and prosecution of international crimes constituted a form of satisfaction. Further

clarification was sought on the form of satisfaction that would be required under the provision.

58. Some delegations expressed support for the inclusion of draft article 19 (assurances and guarantees of non-repetition). Clarification was sought regarding the meaning and scope of the phrase "if circumstances so require" and on the use of the word "appropriate".

3. Future work

59. Several delegations expressed support for the Special Rapporteur's plans to address, in his forthcoming report, legal problems arising in situations where there were several successor States, both as injured States and as responsible States, as well as matters of shared responsibility. Conversely, it was suggested that the Commission should instead focus on conducting a general review of the topic based on the work completed to date.

60. Some delegations requested the inclusion of other provisions, such as one on the temporal scope of the draft articles, a provision concerning the cessation of a wrongful act of the successor State having a continuing character in relation to a wrongful act of the predecessor State, a provision addressing an internationally wrongful composite act occurring as a result of a series of acts or omissions by the predecessor State before the date of State succession but lasting thereafter through acts or omissions of the successor State, and a provision covering diplomatic protection. The Commission was requested to closely examine in the commentaries the interrelationship between State succession and State responsibility.

4. Final form

61. While several delegations expressed support for the draft articles as the final form for the topic, consistent with the previous work of the Commission on matters of State succession and without prejudice to the question of a future convention, other delegations suggested that alternative outcomes, such as draft guidelines, conclusions, model clauses or an analytical report, were more appropriate. It was also suggested that model clauses and examples of succession agreements between States should be included in the commentaries.

62. A number of delegations suggested that the most suitable option for the outcome of the topic could be decided at a later stage, while others noted that it would be useful to consider the final form in order to ensure that the provisions were appropriately drafted.

C. General principles of law

1. General comments

63. Delegations generally welcomed the work of the Commission and of the Special Rapporteur, highlighting the importance of the topic. It was considered that the work on the topic would be a useful complement to the previous work of the Commission on the sources of international law. A number of delegations emphasized that, due to the complexities of the topic, a careful and extensive approach was warranted. Several delegations reiterated that the starting point of the work of the Commission on the topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, to be examined in the light of State practice and jurisprudence. It was suggested that reference to Article 38, paragraph 1 (c), should be included in the title of the topic.

64. Differing views were expressed on whether general principles of law constituted an autonomous source of international law. Several delegations stated that general principles of law were an autonomous, primary source of international law that usually played a subsidiary role, mainly as a means of interpretation, filling gaps or avoiding situations of *non liquet*. Some delegations stated that general principles of

law constituted a supplementary source. While some delegations considered that establishing a hierarchy between the sources of international law should be avoided, others took the view that general principles of law should be used only where no treaty rule or customary international law applied to a given situation. The view was expressed that, in order to become a source of international law, general principles of law must reflect the principles established in article 2 of the Charter of the United Nations, be recognized by States and be sufficiently general. Some delegations took the position that general principles of law, as a source of international law, had their origin in national legal systems before being transposed to the international legal system. The view was expressed that general principles of law deriving from national legal systems constituted *lex lata*.

65. A number of delegations concurred with the Special Rapporteur that the criteria for identifying general principles of law must be sufficiently strict to prevent them from being used as a shortcut to identifying norms of international law, and at the same time sufficiently flexible to ensure that identification did not become an impossible task. It was suggested that the customary rules and practices and legal systems of indigenous and first peoples could be considered to reflect general principles of law if they were common to many indigenous nations and reflected in some form in the international legal system. Several delegations called for further efforts to differentiate general principles of law, treaty law, customary international law and peremptory norms of general international law (*jus cogens*). The need to clarify the terminology and the definition of general principles of law was emphasized by a number of delegations. The emphasis placed by the Commission on multilingualism when discussing the French and Spanish equivalents of the term "general principles of law" was welcomed.

66. While several delegations commended the Special Rapporteur for the broad survey of relevant State practice, jurisprudence and teachings in his second report, concern was expressed at the reliance in the report on pleadings by States before international courts and tribunals and on decisions of international criminal courts and tribunals.

67. Several delegations voiced support for the potential existence of general principles of law formed within the international legal system, while others raised doubts. A careful and deeper consideration of the question of the existence and nature of general principles of law formed within the international legal system was called for. Some delegations considered that principles formed within the international legal system were distinct from and independent of general principles of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Clarity on which parts of the draft conclusions represented codification of international law and which parts represented progressive development was requested.

2. Specific comments

68. Regarding draft conclusions 1, 2 and 4, provisionally adopted by the Commission at its seventy-second session, some delegations expressed support for the scope of the topic, as defined in **draft conclusion 1** (scope). Several delegations welcomed the fact that the scope of the topic should cover the legal nature, origin, functions and identification of general principles of law, as well as their relationship with other sources of international law. Some delegations welcomed the reference to "source of international law" in the provision itself. With respect to the commentary to the phrase "source of international law", it was suggested that the phrase "in the context of these conclusions" should be inserted to provide further clarity. The lack of reference to "formal sources of international law" in the commentary was also welcomed. While the view was expressed that the commentaries provided a clear explanation of the aim of the draft conclusions, the view was also voiced that it was regrettable that the commentary did not provide enough legal clarification on the distinction between "les principes généraux *du* droit" and "les principes généraux *de* droit" in French.

69. Regarding **draft conclusion 2** (recognition), a number of delegations concurred that recognition was essential for the identification of a general principle of law. It was noted that the commentary was not sufficiently clear on how and under what conditions recognition could be established. A suggestion was made to include specific reference to "a source of international law" in the draft conclusion.

70. Delegations generally agreed that the phrase "civilized nations", contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, was anachronistic and should not be used. It was underscored that caution was required when selecting an alternative phrase to "civilized nations" and, in that connection, it was suggested that written observations could be useful. Support was expressed by several delegations for the alternative phrase "community of nations", as contained in the draft conclusion and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights. The importance of using the terms from the different language versions of the Covenant in the corresponding language versions of the draft conclusion, even though the terms were all somewhat different in the different languages, was highlighted. Delegations suggested a number of alternative phrases, such as "international community of States", "international community", "States", "community of States", "community of States as a whole" and "State practice". Several delegations voiced support for use of the term "nations", while others considered that that term should be avoided. The importance of recognition by States, as evidenced by their practice, was highlighted. It was noted that the phrase "community of nations" should not be confused with the phrase "international community of States as a whole", found in article 53 of the Vienna Convention on the Law of Treaties.

71. Differing views were expressed on whether international organizations might contribute to the formation of a general principle of law. Some delegations stated that the practice of international organizations should be considered for the ascertainment of recognition of general principles, while others encouraged further study of the matter by the Commission. It was suggested that the focus of the provision should be on State practice, and the need to give more weight to it in the draft conclusion and in its commentary was emphasized. Further study of the role of international organizations was also called for and the Commission was urged to take a cautious approach to the matter.

72. Several delegations expressed support for **draft conclusion 4** (identification of general principles of law derived from national legal systems), and the two-step analysis for identification of general principles of law derived from national legal systems. It was noted that, in the title of the provision, the word "identification" was used, while in the chapeau, the word "determine" was used. It was suggested that the same word should be used in both contexts, for consistency and clarity. Several delegations emphasized the need for the identification process to be inclusive and to be conducted diligently, taking into account the regional and linguistic pluralism of the world. The importance of *opinio juris* in the emergence of a general principle of law was stressed.

73. The first step of the analysis in subparagraph (a) was welcomed owing to the broad and inclusive approach reflected in the phrase "the various legal systems of the world". Clarification was sought as to the criteria for meeting the requirement of subparagraph (a). The view was expressed that, in order for a principle to be considered a general principle of law, it should be found in an overwhelming number of legal systems of States belonging to diverse legal traditions. Another view, that "principal legal systems" was the appropriate phrase instead of "the various legal systems", was expressed. The importance of transposition in subparagraph (b) was emphasized. Support was expressed for using the term "transposition" instead of "transposability". It was considered that the meaning of transposition and how it related to recognition was not entirely clear. Concern was expressed that the term "transposition" and the approach taken in the commentary to describe it diminished the role of States. It was suggested that a principle was recognized and transposed into international law through the same means by which States expressed *opino juris*.

The view was expressed that, since general principles of law were recognized in and derived from *foro domestico*, transposition to the international legal system should not be considered necessary for their existence.

74. Regarding **draft conclusion 5** (determination of the existence of a principle common to the various legal systems of the world), as provisionally adopted by the Drafting Committee during the seventy-second session of the Commission, several delegations voiced support for the reference to a wide and representative comparative analysis in paragraph 2. Support was also expressed for the use of the phrase "the various legal systems of the world" instead of "legal families" or "principal legal systems". It was emphasized that the comparative analysis must be inclusive, must take into account the unique characteristics of those selected for it and must be geographically and linguistically diverse. It was considered that analysis of each and every legal system of the world was not required to ensure representativeness. A request was made for the Commission to make it clear in the commentary that a legal principle recognized by only a few States or a group of States could not be deemed a principle common to the principal legal systems of the world. It was noted that in paragraph 2, the term "wide and representative" was used, while in the draft conclusions on the topic "Identification of customary international law" the term "widespread and representative" was used. In that regard, a suggestion was made to ensure consistency of terms across the two sets of draft conclusions or to provide an explanation in the commentary on the use of different terminology. On paragraph 3, clarification was sought on what "other relevant materials" might include. The view was expressed that the materials used for the comparative analysis should be materials that amounted to evidence of State practice. It was stressed that national courts might rely on sources of law different from those applicable under international law and that that should be taken into consideration when analysing decisions of national courts for determining the existence of a general principle of law.

75. With respect to **draft conclusion 3** (categories of general principles of law), as proposed by the Special Rapporteur in his first report, some delegations questioned the existence of the second proposed category, as it appeared it was not supported by State practice or by the *travaux préparatoires* of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. In that connection, extreme caution was called for. In accordance with another view, the two categories of general principles of law were welcomed.

76. Support was voiced for the two requirements in **draft conclusion 6** (ascertainment of transposition to the international legal system), as proposed by the Special Rapporteur in his second report. It was considered, however, that it might be challenging to assess such requirements in specific cases. A careful examination of the draft conclusion was called for and further consideration of the process of transposition was requested. In particular, it was noted that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice did not mention transposition. A suggestion was made to amend subparagraph (a) to read: "compatible with fundamental rules and principles of international law". The view was expressed that there must be compatibility with the fundamental principles of law enshrined in the Charter of the United Nations. In that connection, it was suggested that the phrase "as contained in the Charter of the United Nations" should be added after "fundamental principles of international law". Another view, that subparagraph (a) was redundant, as there was no possibility of general principles of law being incompatible with fundamental principles of international law, was expressed. It was also considered that the notion of compatibility was irrelevant and problematic. Further clarification on the requirement of compatibility between general principles of law and fundamental principles of international law was sought, and further analysis on the nature and scope, as well as examples of State practice on the content of subparagraph (a), were requested.

77. Some delegations supported the inclusion of general principles of law formed within the international legal system as reflected in **draft conclusion 7** (identification of general principles of law formed within the international legal system), proposed

by the Special Rapporteur in his second report, and concurred with the proposed methodology for their identification. Other delegations expressed concerns on the matter. Some delegations were concerned by the lack of objective standards for identification of general principles of law formed within the international legal system. Recognition of general principles of law formed within the international legal system was considered to be problematic by some delegations due to, *inter alia*, insufficient State practice. It was noted that the content of the draft conclusion concerned principles of international law that had already been codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. The Commission was requested to clarify the scope of draft conclusion 7.

78. Caution, careful consideration and rigorous analysis were called for in respect of draft conclusion 7, in particular when differentiating general principles of law formed within the international legal system from rules of customary international law and treaty law. It was observed that subparagraphs (a) and (b) seemed to reflect the requirements of State practice and *opinio juris*, thus constituting rules of customary international law. Some delegations considered subparagraph (a) to be vague and imprecise. Further examination of subparagraph (a) and the requirement of "wide recognition" was requested. A concern was raised that interpretation of subparagraph (a) could allow application of certain treaty provisions to States that were not parties to the treaty in question, thereby circumventing States' consent to be bound. According to some delegations, the possibility for a general principle to be found in General Assembly resolutions was problematic. Some delegations considered the requirement indicated in subparagraph (b) to be vague and unclear, which made it capable of undermining treaties and customary international law, as well as the foundational principle of State sovereignty. The view was expressed that subparagraph (b) was problematic because it could be interpreted in a way that could circumvent the persistent objector rule. The Commission was requested to discuss that requirement further. Some delegations expressed concern that subparagraph (c) and the notion of "the basic features and fundamental requirements of the international legal system" were vague and subjective, and called for further discussion within the Commission.

79. It was noted that confusion could occur in relation to the difference between "fundamental principles of international law", as provided for in draft conclusion 6, and "general principles of law formed within the international legal system", as provided for in draft conclusion 7. Further analysis of those concepts was suggested.

80. Several delegations expressed support for **draft conclusions 8** (decisions of courts and tribunals) **and 9** (teachings), as proposed by the Special Rapporteur in his second report, agreeing with the importance of decisions of courts and tribunals and teachings of the most highly qualified publicists as subsidiary means for the determination of general principles of law. The view was expressed that decisions of national courts were not subsidiary but direct means for determination of general principles of law. In accordance with another view, only final or otherwise definitive decisions of higher courts should be considered in determining whether the judicial system of a State had recognized the existence and content of a general principle of law. It was noted that there seemed to be a discrepancy between draft conclusion 8, paragraph 2, and draft conclusion 5, paragraph 3. While the former considered decisions of national courts to be subsidiary means for determining general principles, the latter included them in the comparative analysis to determine the existence of a principle common to the various legal systems of the world. It was suggested that the phrase "the most highly qualified" should be removed from draft conclusion 9, since it was subjective, or that the draft conclusion should be reformulated to read: "the teachings of publicists from different nations whose work has proven to be consistent and relevant". It was also suggested that resolutions of the United Nations should not be elevated to the level of subsidiary means for the determination of general principles of law. The view was expressed that teachings of scholars could not be relied on for the purpose of determination of a general principle of law.

3. Future work

81. A number of delegations looked forward to the third report of the Special Rapporteur, focusing on the functions of general principles of law and their relationship with other sources of international law. It was stated that the Commission might face difficulties addressing those matters without considering the processes through which general principles of law emerged, changed or ceased to exist. The need to address the relationship between general principles of law and peremptory norms of general international law (*jus cogens*), as well as general principles of law and customary international law, was emphasized.

82. Support was expressed for the Special Rapporteur's proposal to provide a broadly representative bibliography of the main studies relating to general principles of law, and the view was expressed that the Commission should not produce a list of general principles of law. Some delegations suggested that draft conclusions on the usefulness or significance of other subsidiary means for the determination of general principles of law should be included. The Commission was cautioned not to delve into matters that would be addressed under the topic "Subsidiary means for the determination of rules of international law". The Commission was requested to consider the possibility of the existence of general principles of law of a regional character, as well as to include in its report definitions of the terms "general international law", "general principles of international law" and "fundamental principles of international law".

4. Final form

83. Several delegations voiced support for draft conclusions accompanied by commentaries as the final form for the topic.

D. Sea-level rise in relation to international law

1. General comments

84. Delegations commended the Commission for its dedicated work on the topic, which they welcomed, and expressed general support for the Commission's continued engagement, including in the light of its important role in encouraging the progressive development and codification of international law. The Commission's work on the subject was regarded as topical and urgent. At the same time, it was emphasized that it was important not to forego the comprehensiveness of the analysis for the sake of urgency. The Commission's readiness to address concerns voiced by States on the topic was met with appreciation. The Commission was requested to pay particular attention to the views of small island developing States and affected States. Member States' comments and contributions were also welcomed and encouraged. In particular, it was suggested that States should provide the Commission with examples of practice related to baselines and navigational charts.

85. Several delegations also welcomed the report of the Commission on the topic. The need to examine in further detail the complex issues involved, on which there was a diversity of views, was noted.

86. The view was expressed that the sources of law indicated in paragraph 294 of the report should be in line with Article 38 of the Statute of the International Court of Justice. A concern was expressed as to the possibility of including geographical charts in the list of sources of law. Concern was likewise voiced regarding the relevance of the 1958 Geneva Conventions on the Law of the Sea, which had been negotiated when some States affected by sea-level rise were under colonial administration.

87. Delegations emphasized that sea-level rise was an issue of real and global concern, and one of critical importance. Several delegations noted that the effects of sea-level rise had multiple legal implications that extended beyond the law of the sea, and included matters of statehood, rights of affected persons and rights and

obligations of States affected by the primary or secondary effects of the sea-level rise. Some delegations considered that challenges posed by the phenomenon extended to all spheres of life, including legal, social and economic spheres. It was also maintained that States would be likely to experience the direct or indirect consequences of sea-level rise in the near future.

88. In general, delegations stressed that sea-level rise created serious or even existential risks for small island and low-lying States, especially those whose livelihoods depended to a great extent on maritime zones, including those established under the United Nations Convention on the Law of the Sea. The adverse effects of sea-level rise on the achievement of the Sustainable Development Goals were also noted.

89. Another view that was expressed was that sea-level rise was considered to have more immediate relevance to matters of the law of the sea than to issues of loss of statehood due to loss or reduction of territory, as those issues were unlikely to occur in the near future. Several delegations also emphasized that the issue of sea-level rise was inherently linked to global climate change and welcomed the Commission's intention to proceed on that premise. In that regard, States were called upon to focus on containing climate change, including through international cooperation. Several delegations referred to the most recent scientific findings of the Intergovernmental Panel on Climate Change and recalled that the Panel's most recent report had confirmed the existence of anthropogenic climate changes, which, among other things, had led to widespread, rapid and increasing sea-level rise.

90. Delegations stressed the importance of international cooperation in addressing the effects of sea-level rise. The need to provide assistance to developing States, including through knowledge-sharing, capacity-building and financial support, as well as to develop adaptation measures, was emphasized. The need to build resilience within communities affected by sea-level rise was also stressed. Some delegations highlighted the importance of discussing the legal and practical implications of sea-level rise and of developing joint scientific, technical and technological responses. It was also noted that the ability of States to address climate change-related sea-level rise had been adversely affected by the global coronavirus disease (COVID-19) pandemic.

91. Delegations expressed their appreciation to the Co-Chairs for their work and, in particular, for the first issues paper and its preliminary bibliography on issues relating to the law of the sea, and to the Study Group for its contribution. Some delegations noted the existence of diverse views among the Study Group members on certain legal issues.

92. Some delegations found the first issues paper to represent an important and in-depth contribution on the potential legal implications of sea-level rise. At the same time, the preliminary character of the work of the Study Group and its mandate to perform a mapping exercise of relevant legal issues were recalled.

93. The Study Group was invited to ensure the transparency of its discussions, particularly in relation to the Sixth Committee, to the extent that its working format permitted it to do so. The Study Group was encouraged to fully consider and reflect the views of States in the course of its work and to take a cautious approach towards the multiple complex legal issues before it, while at the same time retaining a clear distinction between *lex lata* and *lex ferenda*. The possibility of including some progressive development elements was not excluded.

94. Delegations also welcomed the Study Group's initiative to consider the practice of African States regarding maritime delimitation and encouraged the examination of the practice of State from other regions.

95. With regard to the scope of the Study Group's work, it was noted that the Group had not examined certain potential solutions to the issue of loss of maritime zones to the full extent. The fact that the Study Group had addressed the issues of the status of islands and reefs and of whether low-tide elevations could be claimed as a territory

was of concern to a delegation. It was further noted that, due to their unprecedented character, some issues examined by the Study Group would be best considered further by States.

96. Some delegations supported the conclusion, expressed in the issues paper, that the rules on the fundamental change of circumstances (*rebus sic stantibus*) could not be applied to maritime delimitations established by agreements or tribunal decisions.

97. Delegations recalled the work of the International Law Association including, *inter alia*, the reports of the Committee on International Law and Sea Level Rise and the Committee on Baselines under the International Law of the Sea. It was suggested that the Study Group should take into account the findings contained therein, in particular those adopted at the seventy-eighth Conference of the International Law Association. The Study Group was also called upon to engage in consultations with the International Law Association to avoid duplication and fragmentation of work. At the same time, concern was raised about the usefulness of discussions within the Commission on matters that had already been examined by the International Law Association or the Institute of International Law.

2. Specific comments

(a) *United Nations Convention on the Law of the Sea*

98. Delegations emphasized the fundamental importance of the United Nations Convention on the Law of the Sea, and the concomitant need to preserve its integrity. The Study Group's assertion that its mandate was not to propose amendments to that Convention was welcomed. At the same time, the view was expressed that the United Nations Convention on the Law of the Sea had not been intended to address issues arising out of climate change-related sea-level rise. It was also stressed that it was premature to reach a determination on the legal implications of sea-level rise in the context of that Convention.

99. It was underlined that the United Nations Convention on the Law of the Sea should be interpreted in good faith and applied in a manner that respected the rights and obligations enshrined therein, including the rights and entitlements flowing from maritime zones. The view was expressed that customary international law rules developed outside the context of climate change should not be used to interpret the Convention and that instead, recent State practice should be considered. Some delegations suggested that the Commission and the Study Group should take into account other applicable rules of general international law, in particular the principle of *uti possidetis juris*. Examination of international jurisprudence on maritime issues was also welcomed.

100. Furthermore, it was maintained that the interpretation of the provisions of the United Nations Convention on the Law of the Sea should be guided by principles of international stability and the peaceful coexistence of States, as well as by equity. In line with that approach, it was suggested that the Commission should be guided in its work on matters concerning maritime delimitations by the principles of stability, security, certainty and predictability, which were viewed as also being key principles of the Convention. It was also suggested that such principles, and in particular the principle of legal stability, would require the preservation of baselines, maritime delimitations and entitlements.

(b) *Baselines and maritime delimitations*

101. The discussions and range of views on the nature of baselines, that is, whether fixed or ambulatory, as reflected in the Commission's report, were noted. It was emphasized that there was a lacuna in the existing legal regime concerning the nature of baselines in the context of climate change-related sea-level rise.

102. A number of delegations expressed support for the acceptance of permanent baselines and maritime zones irrespective of the possible implications of sea-level rise. It was stressed that States should not be obliged to update their maritime

coordinates or charts once they had been duly determined and deposited with the Secretary-General of the United Nations. Delegations noted that a body of State practice in support of the fixed baselines approach was under development, as some States had adopted legislative and political measures to preserve their baselines and maritime zones. The view was expressed that such practice could result in the emergence of a new customary international law rule or be regarded as subsequent treaty practice for the purposes of the interpretation of the United Nations Convention on the Law of the Sea. Some delegations appreciated the view expressed in the issues paper that the Convention did not exclude an approach based on the preservation of baselines and outer limits of maritime zones in the face of sea-level rise. It was also maintained that maritime boundary delimitation treaties and the decisions of international courts or tribunals should not be easily reopened. The concern was also raised that adoption of the ambulatory baselines approach could lead to an encroachment on sovereignty and jurisdictional rights of coastal and island States, while fixed baselines would contribute to greater predictability of maritime boundaries.

103. Conversely, some delegations expressed support for ambulatory baselines. It was argued that declaring any principle of permanency of baselines, established and deposited in accordance with international law, should refer solely to sea-level rise induced by climate change and not to other circumstances. As such, the need to distinguish between sea-level rise and reclamation activities was mentioned. It was further stressed that any reclamation or coastal fortification measures should not create new rights for States. It was also maintained that sea-level rise and the disappearance of territories could eventually lead to changes in baselines and consequently, the outer limits of maritime zones. It was stressed that existing rules of international law, as reflected in the United Nations Convention on the Law of the Sea, defined baselines as being generally ambulatory. It was also observed that there was no relevant rule of customary international law due to the lack of State practice and accompanying *opinio juris*. It was further noted that some States regularly updated their charts in order to reflect physical changes in the maritime domain.

104. Support was also voiced for an intermediate approach that would accommodate both permanent and ambulatory baseline options with the aim of preserving the rights and entitlements flowing from maritime zones. Several delegations referred to the Pacific Islands Forum Leaders' 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise as evidence of emerging State practice. A call was made to States to support that Declaration. The Alliance of Small Island States Leaders' Declaration 2021 was also referred to by several delegations.[3]

3. Future work

105. Several delegations expressed their commitment to fully supporting the topic and closely following and engaging in the debate. The need to further examine the issues concerning the law of the sea, including by considering the comments and practice of States, was stressed. The suggestion to invite scientific and technical experts was also welcomed, due to the considerable legal, scientific and technical interplay in the subtopic. The Commission was requested to consider relevant legal instruments from a wide range of disciplines of international law. Furthermore, some delegations stressed the need for the Commission to be guided by its prior work. It was also emphasized that the work of the Commission and the Study Group should not undermine the existing balance achieved by maritime boundary agreements.

106. Some delegations supported the choice of subtopics to be examined by the Study Group, as well as areas for further in-depth analysis in relation to issues concerning the law of the sea, as identified in paragraph 294 of the Commission's report. Others

[3] Some delegations also recalled the discussions that had taken place during the twenty-first meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, held in 2021, and the Arria-formula meeting of the Security Council held in 2021 on sea-level rise and its implications for international peace and security.

stressed the need to urgently address the implications of sea-level rise for questions of statehood and migration. Delegations expressed their appreciation for the upcoming second issues paper, which was to deal with issues relating to statehood and the protection of affected persons. The need to examine the scope and contents of the principle of cooperation in the context of the protection of affected persons was emphasized. A deeper analysis of the applicability of article 62 of the Vienna Convention on the Law of Treaties to the phenomenon of sea-level rise was requested. It was also indicated that a closer examination of the effects of sea-level rise on international agreements, such as licences for economic activities in exclusive economic zones, was required. A suggestion was made to clarify existing *non-refoulement* obligations of States with respect to "climate refugees".

107. With regard to the effects of sea-level rise on statehood, some delegations indicated that there was a presumption that a State, once established, would continue to be a State, particularly if it had a defined territory and population, among other factors. The suggestion was made that any discussion on the issue should be guided by the principle of self-determination and the presumption of State persistence. The view was expressed that control over territory was not always a necessary criterion for the continued existence of a State. It was also suggested that the criteria provided by the Convention on Rights and Duties of States to determine the creation of a State could not be equally applicable to the question of a State's extinction. It was further observed that small island States should be able to retain their statehood even in the event of complete inundation.

108. The Commission was asked to further consider existing State practice and *opinio juris*. In particular, it was recommended that it proceed carefully, including in its upcoming studies, owing to the scarcity of such practice and *opinio juris*. It was suggested that particular attention should be given to the practice of coastal States. Furthermore, the Commission was requested to continue taking into account the perspectives of small island developing States.

4. Final form

109. With respect to the outcome of the Commission's work, it was indicated that the work of the Commission could contribute to the development of practical recommendations for States. The question was raised as to whether the Commission intended to propose changes to the existing legal framework. It was maintained that the development of draft articles by a Special Rapporteur could be an appropriate course of action. Other delegations found the preparation of guidelines or draft articles, with a view to establishing a global framework convention on legal consequences of sea-level rise, to be premature. The need to refrain from proposing modifications to the United Nations Convention on the Law of the Sea was reiterated. Furthermore, the view was expressed that the legal response to climate change-related sea-level rise should not further disadvantage the most affected States.

110. Given the preliminary character of the work of the Study Group, it was mentioned that any possible recommendations could be considered by the Commission only at a later stage, when both issues papers had been considered and all additional studies on the relevant sources of law had been conducted.

111. With respect to the bibliography, it was suggested that the Commission should ensure inclusivity and full representativeness of all regions. The view was also expressed that the bibliography should be continuously updated.

E. Other decisions and conclusions of the Commission

1. Future work of the Commission

112. The view was once more expressed that there were too many topics on the programme of work of the Commission for realistic analysis by the Commission and States, given their existing capacities. In that regard, it was noted that the Commission

should reduce the pace of its work in order to provide States with an opportunity to analyse its output more carefully. It was suggested that a more streamlined programme of work would facilitate in-depth discussions between States and the Commission, and the view was expressed that, in order to ensure meaningful input from States, the Commission might wish to pay greater attention to reservations expressed regarding the desirability of taking up certain topics. Moreover, it was considered that the Commission should focus on the conclusion of topics included in the programme of work and that it should exercise restraint and exert rigorous scrutiny with regard to the inclusion of new topics in the programme of work. In that connection, the non-inclusion of any additional topics in its programme of work at the seventy-second session was welcomed. The Commission was requested to provide an explanation as to why certain topics were given preference to be moved to its current programme of work, while others were kept in its long-term programme of work.

113. Several delegations called upon the Commission to include the topic "Universal criminal jurisdiction" in its programme of work. The view was expressed that work on the topic by the Commission would inform the deliberations in the Sixth Committee on the item "The scope and application of the principle of universal jurisdiction".

114. Also proposed for inclusion in the programme of work of the Commission were the topics "The settlement of disputes to which international organizations are parties", "Extraterritorial jurisdiction" and "Prevention and repression of piracy and armed robbery at sea". Some delegations highlighted the fact that the topic "The settlement of disputes to which international organizations are parties" raised several important questions relating to the scope and privileges and immunities of international organizations.

115. A number of delegations welcomed the inclusion in the Commission's long-term programme of work of the topic "Subsidiary means for the determination of rules of international law". The fact was highlighted that work on the topic would be in line with the work of the Commission on sources of international law and could help to remedy certain consequences of the fragmentation of international law. The usefulness for States of having detailed guidance on how subsidiary means for determining rules of international law should be applied was mentioned. The Commission was also encouraged to limit its study on the topic to the identification and application of judicial decisions and the teachings of the most highly qualified publicists, in accordance with Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, and its interplay with paragraphs 1 (a), (b) and (c). It was stated that the work of the Commission on the topic would contribute to the progressive development of international law. It was considered that the limited use of subsidiary means for the determination of rules of international law would render the topic of academic value. It would also be challenging to garner interest and input from Member States. The view was expressed that, while there was merit in including the topic in the long-term programme of work, priority should be given to other topics. It was stated that the topic did not constitute a pressing or practically relevant issue.

116. Several delegations expressed doubt about the inclusion of the topic. The Commission was urged to take a rigorous, prudent, inclusive and balanced approach to its work and to take into account the limitations applicable to subsidiary means, in particular those set out in Article 59 of the Statute of the International Court of Justice.

117. Suggestions were made for the Commission to consider topics related to security, climate change and humanitarian crises in the context of the Sustainable Development Goals. It was also suggested that the Commission should work on topics related to environmental law, the Vienna Convention on the Law of Treaties, arbitrary detention in State-to-State relations, and legal issues arising in connection with the COVID-19 pandemic.

2. Programme and working methods of the Commission

118. Delegations welcomed the fact that the Commission had been able to adapt its working methods and hold its seventy-second session in a hybrid format due to the circumstances of the COVID-19 pandemic, despite the challenges outlined in the report of the Commission. It was hoped that lessons could be learned from the experience of holding the session in a hybrid format to further improve the working methods of the Commission. The webcasting of plenary meetings and the resulting increased accessibility of the Commission's work were emphasized. Support was expressed for constituting the Planning Group to examine the programme, procedures and working methods of the Commission.

119. Several delegations reiterated their call for the Commission to take a balanced approach in terms of the practical interest of Member States, as well as in the selection of Special Rapporteurs, when making decisions about the addition of new topics in its programme of work, so as to enhance the legitimacy of its work. Several delegations expressed the view that the selection of topics for consideration by the Commission should be based on the urgent needs of the international community and the views of Member States.

120. The Commission was called upon to provide more clarity on the taxonomy of its products, particularly with regard to the usage of "guidelines" and "principles". It was suggested that the Commission could clarify the criteria it applied when deciding on the type of outcome. Where the Commission decided to develop non-binding guidelines or conclusions for a particular topic, the Commission was encouraged to make it clear in its reports why that decision had been made, in order to facilitate the understanding of States. A concern was expressed about the tendency of some national and international courts to refer to the outputs of the Commission as though they reflected rules of customary international law, even though not all its outputs were ultimately used as the basis for international conventions.

121. It was suggested that the Commission should clearly distinguish in its work products between provisions reflecting the codification of existing international law and those reflecting progressive development. The Commission was urged to exercise more rigour when concluding that a rule had attained the status of customary international law, in particular when there was insufficient State practice and *opinio juris*.

122. Some delegations highlighted the importance of encouraging the linguistic diversity of the sources of the products of the Commission. It was stressed that the Commission should optimize its working methods to ensure that its products reflected the diversity of the world and different legal traditions. The importance of the work of the Commission being consensus-based was underlined.

123. A number of delegations called upon the Commission to continue its efforts to enhance the interaction between the Commission and the Sixth Committee. That included the need for more guidance from the General Assembly on strategic and policy priorities and the possible preparation by the Commission of questions requiring simple and direct answers when requesting information on State practice. Some delegations reiterated their call for the Commission to continue to take the concerns of States into account, with some delegations commending the Commission for taking greater account of the views of States. More transparency on and explanation of the reasons why the Commission decided not to take up certain comments and observations from States was called for.

124. Support was voiced for the Commission to meet more frequently in New York to strengthen its relationship with the Sixth Committee, while acknowledging that the seat of the Commission was Geneva. The Commission was encouraged to maintain dialogue and cooperation with other international and regional bodies.

125. Several delegations noted the Commission's budgetary constraints and the impact they had on the quality of its work. The importance of the attendance at its meetings of all members of the Commission, as well as of its Secretariat, was

highlighted. It was also stressed that Special Rapporteurs should be given the assistance required for the preparation of their reports. In that connection, several delegations expressed openness to the establishment of a trust fund to support Special Rapporteurs, while emphasizing that adequate resources for the Commission to fulfil its mandate should be provided from the regular budget of the Organization. The lack of gender parity in the Commission membership was stressed by several delegations.

126. Delegations also expressed support for the Geneva Seminar on International Law, and some of them expressed the hope that the Seminar would take place in 2022.

III. Topics on which the Commission completed work on second reading at its seventy-second session

A. Protection of the atmosphere

1. General comments

127. Delegations generally welcomed the completion of work of the Commission on the topic, highlighted its importance and commended the Special Rapporteur for his efforts. Some delegations also welcomed the serious engagement by the Commission with the comments and observations submitted to it directly by States and those received from international organizations, as well as the statements made in the Sixth Committee.

128. Delegations generally expressed their support for the invitation of the Commission to take note of the guidelines and the commentaries thereto, and to ensure their widest possible dissemination. Some delegations noted that the guidelines were useful and balanced.

129. Some delegations expressed appreciation for the acknowledgement in the guidelines that the atmosphere was of essential importance for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems.

130. A number of delegations expressed the view that the guidelines built on a strong body of customary international law and on international conventions, as well as the relevant principles of the Rio Declaration on Environment and Development. It was noted that the guidelines would contribute significantly to the process of codifying generally accepted principles, and that they constituted a potentially useful addition to the international law on the protection of the atmosphere. The view was expressed that the guidelines were a good example of in-depth analysis of key principles of international law that would apply to often complex and cross-cutting issues, including due diligence, the obligation to cooperate and peaceful settlement of disputes, while also addressing the fragmentation of international law.

131. However, some delegations expressed their concern that the guidelines had the potential to inhibit progress in international environmental law by creating confusion about its content, including through statements suggesting new international legal obligations. It was recalled that the guidelines were not meant to contain binding international obligations. In that regard, it was also recalled that the work on the topic was to be in line with the 2013 understanding regarding the scope of the Commission's work on the topic. It was also noted that it was important to ensure that the interpretation and implementation of the guidelines did not inadvertently conflict with ongoing legal and policy development in other international bodies. The view was expressed that it was necessary to maintain coherence between the guidelines and other environmental treaties related to the subject and to take into account the views contained in the reports of the Intergovernmental Panel on Climate Change.

132. A number of delegations welcomed the integrated approach adopted by the Commission in the guidelines, which addressed the air pollution and climate change issues as "one atmosphere". Some delegations also welcomed the careful and balanced drafting of the guidelines, which clarified and facilitated the correct

implementation of States' obligations to protect the atmosphere from pollution and degradation. The view was expressed that the guidelines were not sufficiently specific to provide States with any guidance other than that they could already find in existing instruments dealing with matters of air pollution, climate change, degradation of various components of the atmosphere or the protection of the environment in general.

133. Regret was expressed that the guidelines excluded from their scope of application the question of transfer of funds and technology, including intellectual property rights, to developing countries. It was also noted that the significance of the Commission's work could be undermined by the exclusion of topics that were of a normative nature and that encompassed the questions of common but differentiated responsibilities, the liability of States and their nationals, the precautionary principle and the transfer of funds and technology, including intellectual property rights, to developing countries.

2. Specific comments

134. A number of delegations expressed support for the recognition in the **preamble** that the atmosphere was a natural resource, noting with appreciation that the focus of the guidelines was on the protection of the atmosphere as a natural resource, rather than on one or more types of pollution.

135. Some delegations welcomed the use of the expression "common concern of humankind" in the preamble in lieu of "pressing concern of the international community as a whole", as it reflected better the subject matter of the guidelines and was found in other international instruments. However, some delegations recalled that the inclusion of that phrase in the preamble did not create rights and obligations and that, in particular, it did not entail *erga omnes* obligations.

136. Support was expressed for the recognition in the preamble of the special situation and needs of developing countries, and of the special situation of low-lying coastal areas and small island developing States due to sea-level rise. The view was expressed that equitable utilization could not be realized without affording due consideration to the benefit of the international community as a whole, especially developing countries and the most vulnerable groups.

137. With regard to **guideline 1** (use of terms), support was expressed for the addition of "energy" in the definition of the term "atmospheric pollution". One delegation was of the view that the definition of atmospheric pollution should not focus on its effect, but instead on the identification of the causes of pollution.

138. While some delegations expressed support for the approach taken in **guideline 2** (scope), other delegations regretted the decision to exclude the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle. The view was expressed that such exclusion could not be a basis to question the well-established status and implication of those principles for the obligations of States under international law. Some delegations highlighted the importance of the principle of "do no harm" and of the precautionary principle in the context of the guidelines. The importance of ensuring consistency in the reference to the principles outlined in guideline 2 and the 1992 Rio Declaration, including the precautionary approach, was noted. Regarding **guideline 3** (obligation to protect the atmosphere), the view was expressed that the emphasis on the importance of exercising due diligence in taking appropriate measures to prevent, reduce or control atmospheric pollution and atmospheric degradation was helpful. A number of delegations welcomed the statement in the commentary to guideline 3 to the effect that States could discharge their obligations to protect the atmosphere "acting jointly". While it was acknowledged that there were different views as to whether the obligation to protect the atmosphere was an *erga omnes* obligation, a number of delegations reiterated their position that that obligation was indeed an obligation *erga omnes*.

139. Some delegations also welcomed the recognition in **guideline 4** (environmental impact assessment) that States had the obligation to ensure that an impact assessment was undertaken of proposed activities under their jurisdiction or control that were likely to have a significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

140. Regarding **guideline 5** (sustainable utilization of the atmosphere), some delegations welcomed the approach adopted by the Commission. In particular, the point was made that the formulation of the guideline recognized the concept of sustainable development. The view was expressed that it would have been preferable to include a reference to social development, since it was one of the pillars of sustainable development. According to another view, the emphasis should have been placed on the long-term reduction of the negative impact of the energy sector on the environment and on the promotion of policies and programmes aimed at increasing the use of environmentally sound and economically profitable energy systems.

141. A number of delegations expressed support for **guideline 7** (intentional large-scale modification of the atmosphere), noting particularly the use of the expression "prudence and caution". While some delegations supported the objective of the guideline, they expressed the belief that the "precautionary approach", as used in the Commission's draft articles on the law of transboundary aquifers, would have been a more relevant point of reference. The view was expressed that the expression "intentional large-scale modification" was not sufficiently clear and therefore that the guideline should have explained what activities constituted large-scale modification and what the impact was of the distinction made by referring to the element of intentionality.

142. A number of delegations expressed their support for **guideline 8** (international cooperation), highlighting the fact that international cooperation was at the core of the protection of the atmosphere from pollution and degradation. Support was expressed for the addition of the word "technical" in paragraph 2 of the guideline. Some delegations welcomed the reference to cooperation with international organizations in the commentary to guideline 8. Support was also expressed for the reference in the commentary to the principles of sovereign equality and good faith guiding international cooperation.

143. Regarding **guideline 9** (interrelationship among relevant rules), some delegations welcomed the approach of the Commission in clarifying the interrelationship between relevant rules in different areas of international law. However, the view was expressed that an in-depth study was required to find the relevant and common factors between the protection of the atmosphere and other relevant fields of international law. The view was also expressed that interpretation or application in harmony with other existing rules of international law could not expand international legal obligations beyond the content originally accepted by States. According to another view, guideline 9 was aimed at harmonizing the international obligations of States and preventing the fragmentation of international law in the field of atmospheric protection. It was also noted that, when interpreting and applying the rules of international law, regional or special rules should not violate universal, general legal regimes and should not create obligations for third parties without their consent. It was noted that, since some States were not parties to the Vienna Convention on the Law of Treaties, it would be appropriate not to include reference to that Convention in guideline 9.

144. Some delegations welcomed the recognition of the need to give special consideration to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, including indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

145. Support was expressed for the formulation of **guideline 10** (implementation), in particular as it was framed in terms of due diligence, leaving discretion to the State

as to the means adopted to implement international legal obligations related to the protection of the atmosphere.

146. Regarding **guideline 11** (compliance) and **guideline 12** (dispute settlement), the view was expressed that legal frameworks relating to the protection of the atmosphere already existed and included appropriate mechanisms for addressing compliance and dispute settlement.

147. The view was also expressed that guidelines 10 and 11 should be read together with guideline 8 on the obligation to cooperate as, in most cases, implementation of and compliance with that obligation depended on scientific and technical knowledge that was exclusively owned by developed countries. Therefore, it was suggested that frameworks for cooperation should be strengthened rather than elaborating further on States' responsibility.

B. Provisional application of treaties

1. General comments

148. Delegations generally welcomed the adoption, on second reading, of the Guide to Provisional Application of Treaties, containing a set of draft guidelines, with commentaries, and examples of provisions on the provisional application of treaties in the annex. Some delegations stated that the Guide would provide a valuable and practical tool for States and international organizations in their treaty-making practice and would allow for the development of consistent practice and greater legal certainty. With reference to the general commentary, several delegations reiterated the importance of the voluntary and flexible nature of provisional application. It was also recalled that the provisional application of a treaty was an exception and meant to facilitate but not replace the entry into force of a treaty. It was also emphasized that the mechanism of provisional application should not be abused.

149. The Commission was commended for embarking on extensive studies of the practice of States and international organizations regarding both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, on various topics, in particular the provisional application of treaties. It was noted that the Guide struck a good balance between the preservation of the acquis of the Vienna Conventions on the Law of Treaties and the need to clarify a number of legal issues arising out of the growing practice of provisional application of treaties. However, it was also noted that statements in some areas that were neither necessary nor supported by State practice risked undermining the purpose of the Guide. A call was made for further discussion of legal aspects related to provisional application of treaties. Several delegations described their practice with regard to the provisional application of treaties. It was also considered important to further discuss and clarify the interaction of international and domestic law, as well as other legal aspects of the provisional application of treaties.

150. Some delegations welcomed the fact that the Guide did not purport to be comprehensive, as suggested by the without-prejudice draft guideline 7 regarding reservations, and that it had to be read and applied alongside the broader corpus of residual rules of the law of treaties, which did not necessarily include all the rules on the law of treaties. It was noted that the Commission should have specified which rules of international law, other than article 25 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, reflected the law applicable to the matter, in relation to each corresponding draft guideline contained in the Guide.

151. Some delegations noted the non-binding nature of the Guide. Several delegations generally welcomed the recommendation of the Commission to the General Assembly. A number of delegations highlighted the recommendation to request the Secretary-General to prepare a volume of the *United Nations Legislative Series* on provisional application of treaties, encouraging States and international

organizations to provide further information on their practice. Several delegations welcomed the inclusion of examples of provisions on the provisional application of treaties in the annex, including the extent to which regional diversity was reflected. While some delegations would have preferred the adoption of model clauses, others welcomed the fact that the Commission did not include such clauses.

2. Specific comments

152. Some delegations welcomed the fact that the scope *ratione personae* of the Guide, as prescribed in **draft guideline 1** (scope), had been extended to include not only States but also international organizations, which was also reflected in the commentaries and in the examples included in the annex to the Guide. Further clarification regarding the relationship between "provisional application" and "provisional entry into force" was sought. Some delegations highlighted the purpose of the Guide, as set out in **draft guideline 2** (purpose) and in the general commentary.

153. While support was expressed for **draft guideline 3** (general rule), it was noted that the phrase "in some other manner it has been so agreed" should have been further clarified. The reference to article 24 of the 1969 Vienna Convention in the commentaries to draft guidelines 3 and 5 was highlighted, as the issue of provisional application arose from the moment that the treaty was adopted. While the omission of "negotiating States or organizations" from the formulation of article 25 of the Vienna Convention was commended in view of contemporary practice, it was also stated that provisional application would ordinarily be agreed on by the negotiating parties.

154. Several delegations expressed support for the final formulation of **draft guideline 4** (form of agreement), in particular the emphasis on the requirement of consent to provisional application between the States and international organizations concerned. It was observed that consent should be transparent in the means of or arrangements for agreeing on provisional application. Some delegations commended the non-exhaustive and flexible nature of the draft guideline. Concern was expressed that an agreement on provisional application by "any other means or arrangements" would undermine parliamentary approval procedures required in some legal orders. It was also noted that it would have been appropriate to address the role of the depositary of multilateral treaties in relation to such other means or arrangements.

155. Some delegations welcomed the fact that draft guideline 4 allowed for the possibility that provisional application could be agreed through an act of an international organization adopted in accordance with its rules or by a declaration which was accepted by a State or by other international organizations concerned. Other delegations pointed out that an act by an international organization should not be given the same weight as agreements between two or more States.

156. While several delegations observed that the commentaries provided that a declaration must be expressly accepted, the view was expressed that such acceptance could also take place implicitly. Some delegations pointed out that the commentaries explained that the term "declaration" was not meant to refer to the regime concerning unilateral acts of States. It was noted with regret that the commentaries did not provide further clarifications regarding such declarations. Another view that was expressed was that such declarations were not supported by sufficient State practice.

157. In relation to **draft guideline 5** (commencement), it was noted that the commentary acknowledged the relevance of article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions regarding provisions of a treaty that might become relevant before its entry into force. It was observed that the current wording of the draft guideline did not clearly indicate whether commencement of provisional application could be initiated by a State unilaterally on a specified date "as notified".

158. Several delegations agreed with the clarifications provided regarding the legal effect of provisional application in **draft guideline 6** (legal effect**)**. It was also observed that the wording did not appropriately specify the need for domestic approval of provisional application. Some delegations noted that whether or not

provisional application created legally binding obligations depended on the intention of the parties, and that provisional application only had limited legal effect for the duration that the consent had been given. It was also highlighted that the provisionally applied treaty must be applied in good faith.

159. A number of delegations took note of the without-prejudice clause regarding reservations contained in **draft guideline 7** (reservations). While some delegations noted that the Commission could not provide more clarification regarding the legal effect of reservations due to the lack of practice, others observed that the draft guideline might provide some guidance. It was emphasized that the draft guideline had to be interpreted in line with the Guide to Practice on Reservations to Treaties.[4] It was also considered important that the draft guideline acknowledged that States and international organizations retained the right to submit a reservation concerning the provisional application of the treaties they had signed; and to oppose the provisional application of a treaty by means of a unilateral declaration by another State or international organization. Other delegations doubted whether it was possible to formulate reservations outside the modalities provided for in articles 2, paragraph 1 (d), and 19 of the 1969 Vienna Convention.

160. Support was expressed for **draft guideline 8** (responsibility for breach). The importance of the Guide was highlighted, as the violation of a provisionally applied treaty could lead to international responsibility of States and international organizations. In view of the distinction between the legal obligation deriving from the agreement to apply the treaty provisionally and the legal obligations deriving from the provisionally applied treaty under draft guideline 6, it was noted that draft guideline 8 should have clarified the double tier of potential responsibility for a breach. While it was noted that draft guideline 8 was fully consistent with other guidelines, it was also noted that the definition of a responsibility regime would undermine the willingness of States to resort to provisional application. It was also observed that draft guideline 8 was valid only within the framework of article 18 of the 1969 Vienna Convention.

161. In relation to **draft guideline 9** (termination), some delegations observed with satisfaction the clarifications provided regarding the termination of provisional application, especially the addition of legal grounds for termination of provisional application other than those anticipated in article 25, paragraph 2, of the Vienna Convention. It was noted that such other grounds should be specified in advance of provisional application, in line with article 25, paragraph 2, of the 1969 Vienna Convention. While there was support for the decision not to include a notice period for termination, it was emphasized that treaties that had been applied provisionally for a long time should be terminated only with a reasonable termination period, to ensure legal certainty. Regarding paragraph 2 of the draft guideline, it was noted that a question might arise as to whether the notifying State could determine unilaterally when the provisional application terminated. It was observed that new paragraph 4 regarding the rights, obligations or legal situations created through provisional application prior to its termination contributed significantly to strengthening the legal certainty and stability of legal relations.

162. The view was expressed that the phrase “pending its entry into force”, in the general rule contained in draft guideline 3, was problematic because it was uncertain whether a treaty would enter into force or not. The Commission was requested to provide a more careful examination of the termination of provisional application, also to clarify the relationship between draft guidelines 8 and 9, particularly in cases of unlawful termination of provisional application. It was pointed out that the Commission should have further clarified the interaction between the provisional application under article 25 and the so-called interim obligation under article 18 of

[4] General Assembly resolution 68/111 of 16 December 2013, annex. See also *Yearbook of the International Law Commission*, 2011, vol. II (Part Three).

the 1969 Vienna Convention. The substantial difference between the article 18 regime and the article 25 regime in the 1969 Vienna Convention was emphasized.

163. **Draft guidelines 10** (internal law of States, rules of international organizations and observance of provisionally applied treaties) and **11** (provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties) were considered appropriate, since their content reflected the provisions of articles 27 and 46 of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties, respectively. In relation to draft guideline 10, it was noted that the provision might be applicable to international organizations, but it raised complex questions with regard to the exercise of full powers by State representatives.

164. In relation to **draft guideline 12** (agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), it was observed that the draft guidelines constituted an important safeguard, providing for a good balance between respect for domestic arrangements and provisional application of treaties. It was emphasized that States and international organizations should ensure that the provisional application of a treaty was compatible with their internal laws and rules. It was also observed that the provision left open the question of whether the agreement to limit the provisional application of a treaty according to the internal law of a State required the consent of all States parties or only those States applying the treaty provisionally.