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Report of the International Law Commission on the work of its seventy-third session (2022)

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

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I. Introduction

1. At its seventy-seventh session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, held on 16 September 2022, to include in its agenda the item entitled "Report of the International Law Commission on the work of its seventy-third session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 21st to 31st meetings, and at its 36th meeting, held from 25 to 28 October and on 1, 2 and 18 November 2022. The Chair of the International Law Commission at its seventy-third session introduced the report of the Commission on the work of that session (A/77/10) at the 21st meeting, on 25 October, and the Committee considered the report in three clusters, namely: cluster I (chapters I to V and X) at its 21st to 25th meetings, from 25 to 27 October, cluster II (chapters VI and IX) at its 26th to 29th meetings, on 28 October and 1 November, and cluster III (chapters VII and VIII) at its 30th and 31st meetings, on 2 November.

3. At its 36th meeting, on 18 November, the Sixth Committee adopted draft resolution A/C.6/77/L.16 entitled "Report of the International Law Commission on the work of its seventy-third session", as orally revised, without a vote. On the same day, the Committee also adopted without a vote a draft resolution entitled "Protection of the environment in relation to armed conflicts" (A/C.6/77/L.22). After the General Assembly had considered the relevant report of the Sixth Committee (A/77/415), it adopted the draft resolutions, respectively, as resolutions 77/103 and 77/104 at its 47th plenary meeting, on 7 December 2022.

4. The present topical summary has been prepared pursuant to paragraph 40 of resolution 77/103, 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-seventh session of the Assembly.

5. The present topical summary consists of three parts. The first part contains four sections, reflecting the current programme of work of the Commission: succession of States in respect of State responsibility (A/77/10, 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 a summary on the topic of immunity of State officials from foreign criminal jurisdiction (A/77/10, chap. VI), on which the Commission completed its first reading and to which it will revert in 2024. The third part contains summaries on the topics: peremptory norms of general international law (*jus cogens*) (A/77/10, chap. IV); and protection of the environment in relation to armed conflicts (*ibid*., chap. V), on which the Commission completed work on second reading during its seventy-third session.

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

A. Succession of States in respect of State responsibility

1. General comments

6. Delegations generally expressed appreciation for the work of the Commission on the topic. The Special Rapporteur's consolidation of the work so far in the form of draft guidelines was welcomed. Delegations highlighted the complexity of the topic and the potential usefulness of guidance to States. Regret was expressed by some

delegations that the first reading had not been concluded at the seventy-third session. A view was expressed that the outcome of the session appeared rushed.

7. Several delegations welcomed the subsidiary nature of the draft guidelines and emphasized that priority had to be given to agreements between the States concerned. Delegations highlighted the difficulty of codification in a field of law in which State practice was not consistent. The challenge of discerning *opinio juris* was also noted. Several delegations emphasized that the conclusion of agreements between the States concerned had resulted from the circumstances of each case. The difficulty of distinguishing between legal and political aspects of the topic was also underscored.

8. A number of delegations expressed appreciation for the balance between the continuity of rights and obligations and the clean-slate approach pursued by the Special Rapporteur. Some delegations expressed the view that, under existing customary international law, there was no automatic succession of State responsibility. However, the acceptance of automatic succession in other fields of State succession was recalled, and the view was expressed that the clean-slate approach was an exception applied mainly in cases of decolonization. It was suggested that, in situations in which a successor State succeeded automatically to a treaty, it also succeeded automatically to responsibility for the breach of an obligation under that treaty. The importance of the concept of equity was also highlighted and the Commission was encouraged to examine how it had been applied in practice.

9. Support was expressed for the division of the draft guidelines into categories of State succession. The distinction between cases of uniting States and of incorporating all or part of a State into another State was welcomed. Some delegations questioned the value of guidelines limited to encouraging the States concerned to resolve issues by negotiation. Further analysis of the interplay between the provisions concerning the same categories of succession was requested. It was also noted that only some of the draft guidelines referring to the relevant circumstances to be considered provided guidance on what such circumstances might be.

10. Delegations expressed appreciation for the commitment of the Special Rapporteur not to rewrite the general rules of State responsibility, as reflected in the previous work of the Commission, particularly the 2001 articles on responsibility of States for internationally wrongful acts.[1] The need for consistency with the 1978 Vienna Convention on Succession of States in respect of Treaties,[2] the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts[3] and the 1999 articles on nationality of natural persons in relation to the succession of States[4] was also underscored. Caution against unnecessary duplication was encouraged, for example, in relation to provisions addressing a situation in which an internationally wrongful act was perpetrated by a successor State after the date of succession.

2. Specific comments

11. Delegations took note of the provisional adoption by the Commission of **draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis***.

[1] 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.

[2] Concluded at Vienna on 23 August 1978 (United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3).

[3] Done at Vienna on 8 April 1983. Not yet in force. See *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1 March–8 April 1983*, vol. II (United Nations publication, Sales No. E.94.V.6).

[4] General Assembly resolution 55/153 of 12 December 2000, annex.

12. Several delegations welcomed the inclusion of **draft guideline 6** (no effect upon attribution) and considered that it provided useful clarification, even if the proposition was also codified in the 2001 articles on responsibility of States for internationally wrongful acts. It was noted that the provision would not preclude the participation of a successor State in addressing the injurious consequences of a wrongful act.

13. The reformulation of **draft guideline 7 *bis*** (composite acts) was welcomed by some delegations, as was its placement next to draft guideline 7 (acts having a continuing character). Some delegations considered that paragraphs 1 and 2 of draft guideline 7 *bis* reflected customary international law. However, the scarcity and inconsistency of relevant State practice was noted. It was suggested that such situations were adequately covered by the 2001 articles on responsibility of States for internationally wrongful acts. Paragraph 3 was welcomed as a proposal for progressive development. Other delegations doubted the usefulness of the paragraph, as it provided no clear guidance. The Commission was encouraged to determine whether the composite acts contemplated in paragraph 3 were possible under international law.

14. Several delegations welcomed the emphasis on agreement between the States concerned in **draft guidelines 10, 10 *bis* and 11**. The view was expressed that negotiations towards such agreements should focus on the modalities of reparation and its distribution between successor States and that the obligation to make full reparation could not be questioned. The obligation of the States concerned to negotiate in good faith for the purpose of reaching an agreement was emphasized.

15. **Draft guideline 10** (uniting of States) was welcomed by some delegations as a proposal for progressive development. The Commission was encouraged to consider keeping the provision in line with the 2015 resolution of the Institute of International Law.[5]

16. The importance of **draft guideline 10 *bis*** (incorporation of a State into another State), given the lack of a presumption of automatic succession, was underscored. Paragraph 1 was welcomed as a proposal for progressive development. A number of delegations expressed the view that paragraph 2 reflected existing law. Further clarification as to the reasons for the difference of treatment between the two paragraphs was requested, and the Commission was encouraged to consider aligning the provision with the 2015 resolution of the Institute of International Law.

17. Regarding **draft guideline 11** (dissolution of a State), several delegations emphasized the need for the States concerned to take all relevant factors into account when addressing an injury. It was stated that the circumstances of the dissolution of the predecessor State, including the degree of participation of each successor State in its management, were among such factors. The flexibility of the non-exhaustive list of factors was welcomed. It was noted that the scope of draft guidelines 11 and 14 was similar, and clarification was requested as to the differences of methodology and terminology between the two provisions. The decision to apply the terminology of the Vienna Convention on Succession of States in respect of State Property, Archives and Debates was welcomed.

18. Support was expressed for the separate treatment of the cases of succession covered by **draft guideline 12** (cases of succession of States when the predecessor State continues to exist). Delegations welcomed the emphasis of the provision on the right to invoke the responsibility of the wrongdoing State. The view was expressed that paragraph 1 reflected existing law. Further clarification of the meaning of "particular circumstances" was requested and it was proposed that, if such circumstances related only to the territory or the nationals that became those of the

[5] *Yearbook of Institute of International Law*, Tallinn Session, vol. 76 (2015), p. 711, at p. 715.

successor States, that could be spelled out in the text. It was noted that the provision covered the same situations of succession as draft guideline 9 and coherence between the provisions was encouraged. Further clarification of the scope of the provision and the notion of "successor State" was requested.

19. Further clarification of the scope of **draft guideline 13** (uniting of States) and the notion of "successor State" was requested. It was questioned why the provision recognized automatic succession of rights, when draft guideline 10 did not do so for obligations. Support was voiced for the decision of the Commission not to make explicit reference to an act occurring before the date of succession, as the context of dissolution made the timing clear.

20. Support was expressed for **draft guideline 13 *bis*** (incorporation of a State into another State). However, it was questioned why the provision recognized automatic succession of rights, when draft guideline 10 *bis* did not do so for obligations. Support was expressed for the use of the term "wrongdoing State" to mean the State that was responsible for the internationally wrongful act.

21. **Draft guideline 14** (dissolution of a State) was welcomed. In view of the plurality of successor States, the need to exercise the right to invoke responsibility in line with the particular circumstances was emphasized, and the inclusion of an indicative list thereof was noted. The use of the definition of "dissolution of a State" contained in article 18 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts was welcomed.

22. Support was expressed for the inclusion of **draft guideline 15** (diplomatic protection), but clarification was requested on exceptions to the general requirement of continuous nationality.

23. Concerning **draft guideline 15 *bis*** (cessation and non-repetition), support was expressed for including separate paragraphs to deal with each scenario. Further clarification was requested concerning how the provision might interact with the 2001 articles on responsibility of States for internationally wrongful acts.

24. With respect to **draft guidelines 16 to 19**, as proposed by the Special Rapporteur in his fourth report, support was expressed for the approach taken, following the structure of the 2001 articles on responsibility of States for internationally wrongful acts. Appreciation was expressed for the decision of the Special Rapporteur to include provisions both on reparation and on guarantees of non-repetition. The view was expressed that draft guidelines 16 to 19, as proposed, did not reflect existing law.

25. Note was taken of the revision by the Drafting Committee of **draft articles 1, 2, 5, 7, 8 and 9**, in light of the change of form to draft guidelines. With respect to **draft guideline 1** (scope), delegations welcomed its affirmation that agreements between the States concerned would apply as *lex specialis*. **Draft guideline 5** (cases of succession of States covered by the present draft guidelines) was also recalled, and it was emphasized that the illegal acquisition of territory could not generate the effects of succession between the States concerned. Regarding **draft guideline 7** (acts having a continuing character), it was proposed to distinguish between continuing acts and instantaneous acts with continuing effects. It was recalled that a State could only be responsible for the violation of an international obligation while such an obligation was in force for it.

3. Future work

26. Several delegations expressed support for the continuation of the work of the Commission on the topic. It was noted that the Commission had discussed three options for its future work on the topic: the appointment of a new Special Rapporteur

to continue the work, the establishment of a working group to produce a report on the topic and the discontinuation of work. The Commission was urged to take a transparent and inclusive approach to deciding the future of the topic. It was also encouraged to take a prudent approach, in light of the relative lack of practice, and to consider the utility of the final outcome to States as it continued its work.

27. Some delegations looked forward to the appointment of a new Special Rapporteur and to the completion of the first reading of the topic. Others encouraged the Commission to reconsider the topic and remove it from its programme of work.

4. Final form

28. Delegations took note of the decision of the Commission to change the final form of its work to draft guidelines. Some delegations welcomed the change. The potential relevance of guidelines to the progressive development of international law was highlighted. The replacement of prescriptive wording was also welcomed. Other delegations indicated their flexibility regarding the final form. Some delegations expressed a preference for draft articles.

29. Some delegations also noted the possibility for the Commission to conclude its work on the topic with a report, to be annexed to the annual report of the Commission. In light of the complexity of the topic and the difference of views within the Commission, some delegations preferred such an outcome.

B. General principles of law

1. General comments

30. Delegations generally welcomed the progress made by the Commission on the topic, expressing appreciation for the provisional adoption of draft conclusions 3, 5 and 7 by the Commission at its seventy-third session. While several delegations highlighted the importance of the topic, a view was expressed that the work on the topic was of limited practical relevance since it was not suitable for progressive development nor codification. Overly prescriptive codification or progressive development on the topic was discouraged. Some delegations, however, stated that the work on the topic would be a useful complement to the previous work of the Commission on the sources of international law, emphasizing that a careful and extensive approach was warranted.

31. While several delegations reiterated that the starting point of the work on the topic should be Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, other delegations noted that the jurisprudence of other international courts and arbitral tribunals should also be considered. A number of suggestions were made by delegations on the topic, such as a draft conclusion on the usefulness or significance of other subsidiary means for the determination of general principles of law, which could cover resolutions of United Nations organs or of international expert bodies, an analysis of the practice of international organizations and a deeper study of newly formed principles of international law used by different international courts and tribunals.

32. A number of delegations cautioned against a departure from the principle of State consent when dealing with the topic, emphasizing that the work of the Commission should remain sufficiently anchored in the primary sources of international law and avoid an overreliance on subsidiary means for the determination of the law, such as State pleadings before international courts and tribunals or decisions of international criminal courts. In that sense, the view was expressed that

general principles of law should not automatically render binding effects upon States that have not consented to be bound by relevant instruments.

33. Concerns were expressed regarding the terminology employed by the Special Rapporteur in his reports, including the absence of a unified terminology, and a request was made to clarify the distinction between general principles of law as a source of law and legal principles more generally, between rules and principles, and between general principles of law and fundamental principles of international law. The absence of a clear distinction between "*les principes généraux du droit*" and "*les principes généraux de droit*" in French was regretted. A request to take into account the concept of "universally recognized principles of law" and to further elaborate a definition of general principles of law was also made.

2. Specific comments

34. Some delegations expressed support for the scope of the topic, as defined in **draft conclusion 1** (scope). While some delegations emphasized the nature of general principles of law as a source of international law, doubts were expressed about their nature as a separate source of international law.

35. Regarding **draft conclusion 2** (recognition), some delegations emphasized that recognition was essential for the identification of a general principle of law. It was stated that recognition should be universal and that general principles of law should form the basis of all legal systems. Support was expressed by some delegations for the use of the term "community of nations" instead of "civilized nations", while other terms were also suggested, such as "international community of States" or "international community as a whole", in the light of the Vienna Convention on the Law of Treaties, the jurisprudence of the International Court of Justice and the previous work of the Commission. Merging draft conclusions 2 and 5 was also suggested, as it appeared both provisions addressed the same issue.

36. On **draft conclusion 3** (categories of general principles of law), differing views were expressed regarding the existence of a category of general principles of law formed within the international legal system. A number of delegations questioned the existence of such a category, stating that it was not supported by State practice nor by the *travaux préparatoires* of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. Other delegations recalled the ongoing debate in international law on its existence, which should be treated with extreme caution. The importance of State consent and of not overriding it in the creation of rules of international law was underlined. In that connection, further examples of State practice on the existence of general principles of law formed within the international legal system were requested by several delegations, and the elaboration of a clear distinction between the said category and customary international law was called for. Some delegations either supported or were open to the existence of both general principles of law derived from national legal systems and general principles of law formed within the international legal system, and welcomed the inclusion of the latter by the Commission in its work on the topic.

37. 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. A suggestion was made to use the term "transposability" instead of "transposition" in subparagraph (*b*), and a broad understanding of the term "legal systems" was encouraged.

38. Regarding **draft conclusion 5** (determination of the existence of a principle common to the various legal systems of the world), while a view was expressed welcoming its proposed formulation with the commentary thereto, concerns were

raised regarding the overly strict requirements contained therein. It was emphasized that the comparative analysis envisaged in the draft conclusion should be inclusive of economic, social and cultural factors, geographically and linguistically diverse and not limited to recognition by a few States. The use of the term "other relevant materials" in paragraph 3 was questioned due to its uncertainty. A view was expressed that draft conclusions 5 and 8 were inconsistent in their treatment of the role of decisions of national courts in the identification of general principles of law. The Commission was urged to exercise caution when analysing the practice of national courts, which might rely on sources of law other than those applicable under international law. The Commission was encouraged to examine the possible existence of general principles of law of a regional character or that were specific to some type of grouping, and whether such principles would be applicable beyond the region or grouping in question.

39. Concerning **draft conclusion 6** (determination of transposition to the international legal system), support was voiced for its formulation and the notion of compatibility in the determination of transposition of general principles of law to the international legal system, with some delegations commending the balance of rigour and flexibility in the text. The view was expressed that crucial elements of transposition required further analysis. Some delegations requested further elaboration on the notion of compatibility in practical terms and more detailed examples in practice, or noted the differing views expressed in the Commission regarding transposition. It was emphasized that, while a determination of compatibility was necessary for transposition, it was not sufficient, as a conflict analysis with other rules of international law should also constitute a requirement for transposition. It was stated that the criteria for transposition should be universally accepted. Some delegations stressed that recognition should not require a formal act and that the Commission should aim at a text that avoided creating the impression that transposition to the international legal system was either automatic or that it required strict formalities. The Commission was requested to clarify the notion of "implicit recognition" of transposition. A concern was raised that draft conclusion 6 appeared to be inconsistent with Article 38 of the Statute of the International Court of Justice, and that it diminished the role of States in the formation of rules of international law.

40. On **draft conclusion 7** (identification of general principles of law formed within the international legal system), some delegations welcomed its formulation and the inclusion of general principles of law formed within the international legal system in the work on the topic, concurring with the proposed methodology for their identification. However, a number of delegations expressed concerns: some questioned the lack of clear terminology in the text, while others considered the issue of recognition of general principles of law formed within the international legal system to be problematic due to, *inter alia*, insufficient State practice on the matter. In that regard, the divergent views expressed in the Commission were noted. The Commission was requested to provide further examples of State practice to support the existence of general principles of law formed within the international legal system. Additionally, caution, careful consideration and rigorous analysis were called for in respect of draft conclusion 7 by a number of delegations, in particular with respect to the formulation of a methodology for the identification of general principles of law formed within the international legal system and when differentiating them from rules of customary international law, from other sources in general or from principles of international law. Some delegations requested further clarification of the different aspects of the draft conclusion, such as the term "intrinsic", a possible inconsistency between paragraphs 1 and 2, and the use of the word "identification" in the title and the word "determine" in the conclusion itself. A suggestion was made to add a "without prejudice" clause on the existence of general principles of law formed

within the international legal system so that the issue could be addressed in the future if State practice were ever to support it more conclusively, although a view was expressed opposing this suggestion.

41. Regarding **draft conclusions 8** (decisions of courts and tribunals) and **9** (teachings), as provisionally adopted by the Drafting Committee at the seventy-third session, while a view was expressed in support of their formulation, a number of delegations questioned their relevance, as they were considered to be within the scope of another topic already in the programme of work of the Commission. It was also suggested that decisions by national courts should not be considered subsidiary means for the determination of general principles of law. Regarding the terminology used in draft conclusion 9, it was suggested to modify the term "most highly qualified publicists" in order to avoid value judgments.

42. Several delegations welcomed **draft conclusion 10** (functions of general principles of law), as provisionally adopted by the Drafting Committee at the seventy-third session, highlighting its accurate reflection of the functions of general principles of law in international legal practice and its usefulness for practitioners. Some delegations expressed concerns over a potential contradiction between the gap-filling role under draft conclusion 10 and the absence of a hierarchy among sources under draft conclusion 11, and requested clarification of how to reconcile both draft conclusions. Other delegations stressed that general principles of law were not limited to a gap-filling function. The view that general principles of law did not have a monopoly on filling the gaps in the international legal system was also expressed. Doubts were raised about the distinction between essential and non-essential functions of general principles of law, as proposed by the Special Rapporteur in his third report. It was emphasized that the functions contained in paragraph 2 of draft conclusion 10 were not specific to general principles of law and, on that basis, the omission of the said paragraph was suggested. While it was stated that general principles of law lacked normativity and, in that regard, opposition was voiced against general principles of law serving as an independent basis for rights and obligations, the view was also expressed that general principles of law included both "primary" and "secondary" rules.

43. Some delegations requested that the Commission further examine and analyse the functions performed by general principles of law, stressing the relevance of that aspect of the work on the topic. The Commission was encouraged to analyse how the functions under draft conclusion 10, and the relationship with other sources under draft conclusion 11, would apply (*a*) were the Commission to conclude that two different categories of general principles of law existed or (*b*) in case of a general principle of law with identical content to a rule of customary international law having the status of a peremptory norm of general international law (*jus cogens*).

44. With regard to **draft conclusion 11** (relationship between general principles of law and treaties and customary international law), as provisionally adopted by the Drafting Committee at the seventy-third session, while several delegations expressed support for the lack of a hierarchy among sources of international law, others stated that there existed at least an informal hierarchy among those sources, stressing that general principles of law should be considered subsidiary or transitional sources, or have a subsidiary function. In another view, it was suggested that general principles of law constituted a supplementary source of international law, as opposed to a subsidiary or secondary source, and that the relationship between general principles of law and other sources of international law was better understood as a dynamic one. It was also stated that general principles of law appeared to be mostly procedural norms within national legal systems. In that regard, the suggestion was made to add "formal hierarchy" to the text of the draft conclusion. Conversely, the view that references to hierarchy should be omitted in the draft conclusions was expressed.

Several delegations expressed support for the notion of parallel existence between sources under paragraph 2. With regard to conflict resolution, support was expressed for the reference to generally accepted techniques of interpretation and conflict resolution in international law in the draft conclusion. Additionally, it was stated that, due to the nature of general principles of law, they would rarely be applied on the basis of their speciality.

3. Future work

45. Several delegations expressed their willingness to discuss further the draft conclusions. It was suggested that the discussion on the nature of general principles of law as an independent source of international law and on the methodology to identify them should continue, in particular given the importance of the topic for the international legal community. In that regard, it was emphasized that the consideration of the topic by the Commission should not be done in haste. Some delegations expressed the hope that the first reading on the topic would be concluded in 2023. Support was voiced for the future proposed programme of work by the Special Rapporteur, to suggest changes, in his fourth report, that might be made to the draft conclusions in light of the debate in the Sixth Committee and of any written observations received from States.

4. Final form

46. Several delegations supported the proposed outcome of the work of the Commission, namely draft conclusions accompanied by commentaries. While some delegations supported the inclusion of a non-exhaustive list of general principles of law, others expressed reservations about including such a list, as it would go beyond the scope of the topic.

C. Sea-level rise in relation to international law

1. General comments

47. Delegations generally commended the Study Group for its dedicated work on the topic. They also expressed their appreciation to the Co-Chairs for their work and, in particular, for the second issues paper and its preliminary bibliography on issues related to the subtopics of statehood and the protection of persons affected by sea-level rise.

48. Delegations emphasized once more that sea-level rise was an urgent issue of real and global concern, and one of critical importance. It was noted that sea-level would continue to rise throughout the century thus being an existential threat and causing devastating effects on local communities across the world, in particular on small island developing States.

49. The importance of international cooperation to effectively address the challenge, as well as the need to take into account the rights of vulnerable groups, was emphasized. It was further noted that strengthening the resilience of small island developing States to the effects of climate change was a collective responsibility of the international community. Several delegations expressed support for the principle of common but differentiated responsibilities in relation to sea-level rise.

2. Specific comments

50. On the subtopic of **statehood**, delegations recalled that there had been no record of a situation in which the territory of a State had been completely submerged or rendered uninhabitable. Nonetheless, issues related to statehood were not seen as

being distant theoretical concerns. It was considered that, although only a small number of States were potentially at risk of becoming submerged or uninhabitable, the threat posed to them by sea-level rise was of concern to the international community as a whole.

51. Some delegations considered historical parallels, as drawn in the second issues paper, between land inundation and belligerent occupation unconvincing, as any military occupation of a territory was temporary and reversible in nature, unlike the consequences of sea-level rise. Comparisons with special entities enjoying international legal personality, such as the Holy See and the Sovereign Order of Malta, were also seen as having limited use. Nonetheless, those historical parallels were considered relevant to the extent that they demonstrated the capacity of international law to address prolonged situations in which one or more criteria for statehood were not met.

52. It was noted by some delegations that there was no generally accepted notion of a State. Delegations recalled the existence of widely accepted criteria for statehood. However, it was also observed that, in history, some entities had been recognized as States before they had fulfilled all the necessary criteria. Views were expressed that a distinction should be drawn between the criteria for the establishment of a State and those for its continued existence. It was suggested that the Convention on the Rights and Duties of States (Montevideo Convention) was not relevant to the question of the continuation of statehood and that the lack of one or several of those criteria would not automatically lead to the extinction of a State. Some delegations saw historical examples provided in the issues paper as evidence of the Montevideo criteria being inapplicable after statehood had been initially established. Others observed that a State established by virtue of its population exercising its right to self-determination could only cease to exist through another expression of that right. At the same time, it was argued that a territory was a prerequisite for the existence of a State and that complete loss thereof would lead to its extinction.

53. Delegations took note of the discussion on the presumption of continuity of statehood. Several delegations expressed strong support for the presumption. Views were also expressed in support of the assumption that, once a State was created under international law, it had an inalienable right to take measures to remain a State. At the same time, a concern was raised that the presumption of continuity would effectively lead to the exclusion of the criteria of statehood.

54. The presumption was considered a good starting point for future work on the subtopic. It was, however, also observed that additional study of its practical implications and an examination of relevant State practice were necessary. The Commission was called upon to exercise caution while working on that presumption and avoid modifying existing law.

55. Some delegations viewed favourably the possibility of maintaining some form of international legal personality without a territory and called for further examination of that option. Views were also expressed that the Commission could provide a basis for the dialogue among States on the possible options and modalities for the continuation of statehood, which had been listed in the second issues paper. It was proposed that consideration should be given to the idea of an affected State transferring sovereignty over a portion of its territory to an international mechanism or organization. At the same time, a call was made to exercise caution while considering possible alternatives, as any solutions were conditional on political agreements among States. It was emphasized that those modalities should not entail diminution of any element of the existing international legal personality. According to another view, the Commission should focus on how an affected State could

continue exercising its functions rather than on whether such a State would continue to exist as such.

56. Some delegations also welcomed the intention of the Study Group to examine mitigation and adaptation measures. Delegations shared information on national mitigation efforts. It was also recalled that adoption of such measures could be particularly challenging, for economic and technological reasons, for small island developing States. Consequently, the importance of international cooperation in that area, in particular through technology transfer and the sharing of best practices, was emphasized.

57. The importance of the principle of self-determination was emphasized. At the same time, doubts were expressed about the relevance of the right to self-determination to the issue of statehood in the context of sea-level rise. Some delegations requested clarification of how and where peoples affected by sea-level rise could exercise their right to self-determination.

58. A request was made for the Study Group to note specific historical and legal contexts of the right to self-determination. It was also observed that the principle of permanent sovereignty over natural resources was a basic constituent of the right to self-determination.

59. Further examination of the subtopic was considered necessary. It was observed that the issue of statehood in relation to sea-level rise was sensitive and required a cautious approach from the Commission due to limited State practice in the area. It was noted that observations expressed in the second issues paper were preliminary in nature and aimed to serve as a basis for future discussions without prejudging the conclusions on the subtopic.

60. The need to explore the conditions for the extinction of statehood, as well as its practical consequences, was also emphasized. It was also noted that the construction of artificial islands as a way to preserve statehood required further study. The capacity of a State to uphold its international and domestic obligations in situations of complete loss of territory, for example, in relation to its maritime zones or in the field of human rights, migration and refugee law, was questioned and deemed to require additional examination.

61. A request was made to explore the effects of periodic flooding and freshwater contamination caused by rising sea levels on statehood. Support was also voiced for the proposal to separately address cases in which the territory of a State was completely submerged and in which a State's territory was rendered uninhabitable as a consequence of sea-level rise. Furthermore, the Commission was requested to explore whether and to what extent States affected by sea-level rise could invoke a state of necessity.

62. Delegations commended the efforts to identify legal frameworks potentially applicable to the **protection of persons affected by sea-level rise**. Some delegations argued that the existing legal frameworks were fragmented and general in nature. It was recalled, as an example, that the legal definition of "refugee" as set out in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol did not cover persons affected by climate change. Further study of the applicability of those frameworks in the context of sea-level rise was thus deemed necessary. In particular, requests were made for the Commission to examine the principles of the protection of human dignity, international cooperation and *non-refoulement*. It was also proposed to treat separately issues related to the protection of persons in situ and in displacement.

63. Some delegations observed that one of the cornerstone principles related to protection of persons was the principle of international cooperation. According to

several delegations, the principle presupposed a duty for developed States to assist developing ones, subject to their consent, in accordance with their human rights obligations, and to cooperate in international environmental matters, hence building resilience to disasters. The need for the Commission to further examine the applicability and scope of the principle of international cooperation was emphasized, including the duties of non-affected States to cooperate.

64. The need to assess the relevance of previous work carried out by the Commission was emphasized, including the draft articles on protection of persons in the event of disasters. However, some delegations disagreed with the applicability of the draft articles, which were developed in the context of events for which there was no State responsibility, to the subtopic, as sea-level rise was caused by anthropogenic climatic factors, while disasters were natural phenomena not caused by any State.

65. It was suggested that any future obligations related to the protection of persons affected by sea-level rise should be based on, *inter alia*, the principle of common but differentiated responsibilities, the national capacity of the non-affected States and relevant human rights and humanitarian principles. It was also observed that the status of persons affected by sea-level rise was closely linked to the issues of statehood. In that regard, a proposal was made for the Commission to explore questions related to statelessness.

66. Several delegations referred to regional and national legal frameworks and practice related to protection of persons affected by sea-level rise.

67. It was noted that the subtopics on statehood and protection of persons should be considered in light of the observations expressed with respect to the first issues paper, which was focused on the **law of the sea**. It was recalled that questions related to the status of maritime features, shifting baselines and displacement of maritime zones were of importance for the sovereign and economic rights of States.

68. A view was expressed that the principle that “the land dominates the sea” formed a foundation for the attribution of maritime zones. Therefore, it was noted that sea-level rise would inevitably lead to changes to shorelines and maritime delimitations. At the same time, any such changes were to be made on the basis of the principles of fairness and equity. Land reclamation and coastal fortification were recalled as potential ways to mitigate the consequences of sea-level rise, but it was stressed that States should not obtain sovereign rights over maritime zones on the basis of artificially created territories.

69. Some delegations noted that baselines and maritime zones once established should not be subject to reconsideration and change. Otherwise, such changes could generate serious legal uncertainty and also negatively affect the economies of small island developing States. It was noted that the principle of fundamental change of circumstances was not applicable to existing maritime delimitations. It was observed that the United Nations Convention on the Law of the Sea did not impose an obligation on States to review and update all duly published charts and coordinates. The Pacific Islands Forum Leaders’ 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise and the 2021 Alliance of Small Island States Leaders’ Declaration were also recalled.

70. Several delegations underlined the fundamental role of the United Nations Convention on the Law of the Sea. At the same time, views were expressed that the Commission should base its work on all relevant international instruments and avoid attributing the central role to only the Convention. It was further observed that the Convention was not designed to address the impacts of climate change-related sea-level rise and the challenges related thereto. Accordingly, a view was expressed that some changes to the existing legal framework were necessary. On the other hand,

several delegations emphasized the importance of preserving the integrity of the Convention.

3. Future work

71. Some delegations noted the plan to consolidate the results of the work on the legal aspects of sea-level rise in the next quinquennium. Others requested the Commission to carefully formulate its future plan of work on the topic, as well as provide clarification on the status of past and future issues papers.

72. Some delegations emphasized that all the subtopics under consideration remained relevant and called upon the Commission not to dismiss areas in which State practice was insufficient. Other delegations considered it necessary for the Commission to focus on certain more urgent questions, in particular those related to the law of the sea and the protection of persons.

73. A request was made for the Commission to examine the effects of sea-level rise on States' human rights obligations, as well as on obligations related to migration induced by sea-level rise. Support was voiced for the Commission to address the issue of compensation for the damage caused by sea-level rise.

74. It was considered that the unprecedented nature of sea-level rise called for progressive development of international law, at least by analogy with existing rules. According to another view, the Commission did not have a mandate to propose changes to existing international law.

75. Several delegations requested that the Commission should, in its future work, make a clear distinction between codification of existing legal rules and their progressive development.

76. A call was made for the Commission to take into account the comments and practice of States, regardless of their size or level of development, and of relevant international organizations. A view was also expressed that the Commission should pay attention to regional practice and, in particular, the practice of coastal States. At the same time, some delegations emphasized that the Commission should exercise caution while considering emerging regional State practices regarding sea-level rise.

77. It was proposed that the relevant rules and principles of international environmental law be taken into account, including the right to a clean, healthy and sustainable environment; human rights and humanitarian law; and the law of the sea. The need to take into consideration the decisions of the Security Council was emphasized. The increase in international climate change-related litigation, including requests for advisory opinions by the International Court of Justice and other judicial courts and mechanisms, was also noted as an important source of inspiration for further analysis on the topic.

78. The Commission was also encouraged to cooperate with other expert bodies dealing with sea-level rise and its effects. The need for the Study Group to maintain regular contacts with the scientific community was emphasized.

4. Final form

79. It was suggested that the Commission should elaborate on the planned outcome of the work on the topic, including on the possibility of converting it into a traditional topic, with a designated special rapporteur or rapporteurs and with public debates in a plenary format.

80. It was noted that different outcomes could potentially be appropriate, depending on the subtopic in question. The identification of practical options for vulnerable States affected by sea-level rise was suggested as a possible outcome for matters

related to statehood. As regards matters related to protection of persons, some support was voiced for drafting an instrument on the protection of populations in territories affected by sea-level rise. According to another view, both subtopics could be best addressed through a report, while matters related to the law of the sea required more tangible proposals for future legal development and reform.

D. Other decisions and conclusions of the Commission

1. Future work of the Commission

81. Delegations generally welcomed the inclusion of the topics "Settlement of international disputes to which international organizations are parties", "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law" in the Commission's programme of work. The importance of taking into account the practice of States, as well as the views of relevant actors in the international community, from different legal systems and regions of the world when working on the new topics was stressed. It was suggested that, for all three new topics, the Commission should avoid producing draft principles or draft conclusions.

82. Regarding the topic "Settlement of international disputes to which international organizations are parties", the inclusion of private law disputes within the scope of the topic was welcomed, as such disputes had practical importance and often had implications for host countries. It was suggested that it would be useful if the Commission could next undertake the codification of the rules of jurisdictional immunities of international organizations as a logical extension of its work on the topic and the topic "The responsibility of international organizations".

83. With regard to the topic "Prevention and repression of piracy and armed robbery at sea", it was stated that the analysis by the Commission of the practice of States under the United Nations Convention on the Law of the Sea, as well as clarification of areas of uncertainty thereunder, would support ongoing international cooperation. The view was expressed that the current international framework was insufficient to curb piracy and, therefore, a number of related issues needed to be clarified, such as the definition of piracy, the importance of regulating criminal jurisdiction, and the application of universal jurisdiction to the crime of piracy. According to another view, piracy at sea was already covered extensively by the existing legal framework and there was no need for further guidance or clarification of the issue, which was not the case with armed robbery at sea. The Commission should thus focus on the latter.

84. Several delegations stated that the topic "Subsidiary means for the determination of rules of international law" would be an important addition to the Commission's work on the sources of international law. It was emphasized that the topic should focus on the subsidiary means listed in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. A close review of the drafting history of that subparagraph was encouraged, in particular to clarify the current and intended role of subsidiary means in the determination of rules of international law.

85. While a number of delegations welcomed the inclusion in the Commission's long-term programme of work of the topic "Non-legally binding international agreements", the view was expressed that the topic should not be included in the Commission's programme of work. Several delegations highlighted that the topic had practical significance for States. The Commission was encouraged to take into account the practice of States from various regions. It was suggested that the work on the topic could take the form of draft guidelines and model provisions. Suggestions were made to change the title of the topic in English by replacing the word "agreements" with a word such as "arrangements" or "instruments", as the use of the

word “agreement” should be limited to legally binding texts. Another view was that the title of the topic in French should be changed to “*Actes concertés non conventionnels*”. The Commission was urged to exercise caution when dealing with the topic, which was more appropriately examined on the basis of State practice.

86. The topics “Extraterritorial jurisdiction”, “The fair and equitable treatment standard in international investment law” and “Universal criminal jurisdiction” were proposed by some delegations for inclusion in the Commission’s programme of work.

87. Suggestions were made for the Commission to consider topics related to the Vienna Convention on the Law of Treaties, legal issues arising in connection with the coronavirus disease (COVID-19) pandemic and nationality.

2. Programme and working methods of the Commission

88. A number of delegations commended the Commission for its accomplishments during the seventy-third session, despite the fact that the session had once again been held in a hybrid format due to the COVID-19 pandemic. The webcasting of plenary meetings and the resulting increased accessibility of the Commission’s work were welcomed. Support was expressed for the establishment of a working group on methods of work of the Commission, an issue considered to be of great importance to States.

89. Some delegations reiterated their request for the Commission to provide more clarity on the taxonomy of the outcomes of its work, particularly with regard to the usage of “guidelines”, “principles”, “conclusions” and “articles”. It was suggested that the Commission could clarify the criteria it applied when deciding on the type of outcome to enhance transparency and efficiency. In that connection, the Commission was requested to shed light on whether the outcomes of its work, including draft conclusions and guidelines, were of a prescriptive or descriptive nature, to define their scope and, more generally, to determine their status in international law.

90. The Commission was once more encouraged to clearly distinguish in the outcomes of its work between provisions reflecting the codification of existing international law and those reflecting progressive development. It was emphasized that, whether engaging in codification or progressive development of international law, the Commission should take into account State practice and *opinio juris*.

91. Some delegations reiterated their call for the Commission to continue to take the views and concerns of States into account, while highlighting the fact that the Commission was an independent body. The Commission was urged to explore mechanisms that might enable States to review the Commission’s outputs in a more systematized manner that favoured predictability and allowed more efficient use of resources, knowledge and expertise.

92. 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. To that end, the recommendation of the Commission to hold the first part of a session in New York during the next quinquennium was welcomed.

93. A number of delegations noted the Commission’s budgetary constraints and the impact that they had on its work. The importance of the attendance of all members of the Commission at its meetings, as well as of its Secretariat, was highlighted. Several delegations noted 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 some delegations, while it was noted that the new membership would include a larger number of women than before.

The Commission was encouraged to improve gender parity in the Bureau, in the Drafting Committee and among the Special Rapporteurs.

94. Further comments were made by delegations on the working methods of the Commission in the context of the revitalization of the work of the General Assembly (A/C.6/77/SR.35) and during the consideration by the General Assembly of Sixth Committee reports (A/77/PV.47).

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

Immunity of State officials from foreign criminal jurisdiction

1. General comments

95. Delegations generally welcomed the completion on first reading of 18 draft articles with commentaries thereto and expressed gratitude to the Special Rapporteur on the topic. While expressing general support for the continued work of the Commission on the topic, delegations observed that several articles required further analysis on second reading. The need to strike a balance between the principles of sovereign equality and accountability, while maintaining international peace and security, was emphasized by delegations.

96. It was recalled that immunity should not exempt its beneficiaries from all criminal responsibility and that it was not granted for personal benefit but to protect the rights and interests of the State. The possibility that the State of the official might exercise its jurisdiction in some situations was also noted. Delegations remarked that, when the prerequisites of circumstances precluding wrongfulness were fulfilled, States could invoke them in relation to obligations concerning the immunity of foreign officials.

97. Several delegations reiterated their request that the commentaries to the draft articles clearly indicate to what extent the draft articles constituted an exercise of codification (reflecting *lex lata*) or progressive development of international law (reflecting *lex ferenda*). A number of delegations called upon the Commission to continue its efforts to identify the relevant State practice and *opinio juris* in support of the draft articles. Several delegations expressed doubts as to whether draft articles 7 and 14 reflected customary international law. Some delegations maintained that the Commission should not propose "new law" but strictly reflect existing customary international law. Other delegations insisted on the importance of engaging in progressive development to combat impunity for serious crimes.

98. Several specific drafting proposals were made in relation to the draft articles. Delegations urged the Commission to proceed cautiously with a view to reaching a consensual outcome, particularly if it were to propose recommendations for progressive development of international law. The importance of avoiding potential conflicts of obligations was emphasized by delegations. The Commission was requested, *inter alia*, to clarify that the forum State's obligations in the draft articles did not preclude the taking of necessary and proportionate measures to prevent harm in response to an imminent and unlawful use of force. The Commission was also requested to clarify the responsibilities and civil liabilities that would be incurred by a State for any wrongful acts committed as a result of the official's conduct in the context of immunities *ratione materiae*.

2. Specific comments

99. While delegations appreciated the inclusion of a "without prejudice" clause in paragraph 2 of **draft article 1** (scope of the present draft articles), doubts were

expressed in relation to paragraph 3, particularly concerning the expression "under international agreements". The reference to agreements "as between the parties to those agreements" was considered redundant. Some delegations questioned to what extent the phrase "international criminal courts and tribunals" encompassed hybrid or internationalized criminal courts and tribunals. The Commission was encouraged to widen the scope of paragraph 3 and not limit it to criminal courts and tribunals established by international agreement.

100. With respect to **draft article 2** (definitions), the Commission was invited to identify the terms whose definitions would be included in the provision. It was suggested that the State in the term "State of the official" should not necessarily be identical to the State of nationality of the official. Some delegations sought clarification of the scope of the definition of "act performed in an official capacity". A number of delegations favoured a return to the previous terminology, "exercising elements of governmental authority", established in the context of the work of the Commission on responsibility of States for internationally wrongful acts. Doubts were expressed regarding the commentary related to the applicability of immunities to acts *ultra vires*. The Commission was requested to reconsider the application of immunity *ratione materiae* to *ultra vires* actions of officials.

101. **Draft articles 3** (persons enjoying immunity *ratione personae*) and **4** (scope of immunity *ratione personae)* were considered by some delegations to reflect customary international law. Yet some delegations noted that the category of State officials who enjoyed immunity *ratione personae* was, in fact, broader and went beyond the "troika" to encompass other high-level officials. The Commission was requested to clearly state that such a narrow scope did not reflect customary international law and to provide further analysis regarding draft article 4, paragraph 2.

102. Some delegations also suggested that **draft articles 5** (persons enjoying immunity *ratione materiae*) and **6** (scope of immunity *ratione materiae*) reflected customary international law. It was suggested, however, that the expression "State officials acting as such" was too broad and should not include activities that were qualified as unlawful in the forum State or that exceeded the competencies of the officials in the forum State. Some delegations stated that they would prefer a more restrictive definition. It was suggested that only the actions undertaken in the forum State in conformity with international law should be covered by immunity.

103. Several delegations voiced concerns about the adoption of **draft article 7** (crimes under international law in respect of which immunity *ratione materiae* shall not apply). While a number of delegations expressed support for the draft article, other delegations requested that the Commission further review the list of crimes or replace the listed crimes with the expression "the most serious crimes as stipulated in international law". Some delegations supported the deletion of the draft article. A number of delegations expressed doubt concerning the reasons provided for the exclusion of the crime of aggression. It was suggested that the Commission should establish a working group to examine further the possibility of including the crime on the list. Delegations expressed diverging views in relation to the list of treaties enumerated in the annex to the draft articles. A number of delegations emphasized that the debate about the status of the exceptions to immunity under customary international law remained contested.

104. The guarantees presented in **Part Four** (procedural provisions and safeguards) were generally welcomed. It was suggested that the procedural safeguards should take into account the differences between immunity *ratione personae* and *ratione materiae*. A number of concerns were expressed in relation to the impact of draft articles 14, 15 and 16 on domestic law, and the relationship between Part Four of the draft articles and general international law.

105. While general support was expressed for **draft articles 8** (application of Part Four), **9** (examination of immunity by the forum State) and **10** (notification to the State of the official), delegations questioned whether it was necessary to differentiate between examination and determination of immunity. A number of delegations suggested broadening the scope of draft article 9, paragraph 1, to include any act that implied the exercise of criminal jurisdiction by the forum State. Some delegations asked the Commission to reconsider the possibility for the forum State to take coercive measures against a representative of a foreign State. It was emphasized that there should always be an obligation to notify the State of the official when an official claimed immunity. Some delegations suggested, however, that notification should only be required if the measures might affect the immunity of a State official.

106. Several delegations expressed support for **draft article 11** (invocation of immunity). While a number of delegations noted that the invocation of immunity should not be considered as a precondition for the application of immunity, delegations sought clarity on the consequences of failing to invoke immunity and the temporal scope of a reasonable time. It was proposed that invocation should be made as early as possible.

107**. Draft article 12** (waiver of immunity) was appreciated by some delegations. However, it was suggested that the provision was generally not supported by State practice. It was also suggested that paragraph 1 meant that the forum State had a right to seek a waiver of immunity. The deletion of paragraph 5, on the irrevocability of a waiver of immunity, was also suggested.

108. Regarding **draft article 13** (requests for information), it was pointed out that the question of sources of information merited further consideration, as well as the inclusion of temporal elements in the draft provision.

109. Delegations raised a number of questions regarding the commentary to **draft article 14** (determination of immunity). Different views were expressed in relation to the time during which the question of immunity should be considered. Some delegations insisted that proceedings should be stayed until immunity was determined. Other delegations observed that foreign State officials enjoying immunity *ratione materiae* might be subject to the criminal jurisdiction of forum States until a determination of immunity had been made. It was pointed out that a determination of immunity by the competent authorities of a forum State, which were not necessarily part of the judiciary, could possibly be subject to judicial review. A number of delegations expressed concerns regarding the examples of permissible coercive measures enumerated by the Commission. It was pointed out that the representatives of the State of the official should have the right to be present during the judicial proceedings of the forum State when a case had a connection to the State of the official.

110. Delegations observed the relationship between **draft article 15** (transfer of criminal proceedings) and applicable treaties on judicial cooperation or extradition and principles of international law. Some delegations suggested that the forum State should have an obligation to transfer the proceedings to the State of the official. It was highlighted that a transfer should only occur if the State of the official was willing and able to prosecute the official. Delegations would appreciate further clarification of paragraph 4. Some delegations wondered whether the examples of the measures contained in the commentary to draft article 14, paragraph 4 (*b*), were also valid in the event of transfer contemplated in draft article 15, paragraph 3.

111. Delegations expressed opposing views regarding the inclusion of **draft article 17** (consultations).

112. Some delegations commended the adoption of **draft article 18** (settlement of disputes). Other delegations expressed a preference for non-binding language. Several delegations maintained that draft article 18 would only be relevant to a future treaty. Regarding the means of dispute settlement, some delegations highlighted that a dispute could be resolved by the International Court of Justice only if all the States concerned had expressly consented to have their dispute submitted to the Court. It was pointed out that a simple reference to Article 33 of the Charter of the United Nations would suffice.

113. The Commission was encouraged to clarify in the text that disputes could only arise after immunities had been definitively determined by the competent judicial authority. The Commission was also asked to address the suspensive effects of an international dispute. Several delegations requested that the Commission set a specific time limit for the States concerned to resolve their dispute.

3. Future work

114. The Commission was urged not to rush the second reading of the draft articles, but to carefully study the comments of Governments and work towards reconciling diverging views. Delegations noted that the draft articles would greatly benefit from an in-depth examination of the judgments of the International Court of Justice and State practice on the topic. Delegations looked forward to the appointment of a Special Rapporteur.

4. Final form

115. Delegations noted that the Commission had not yet taken a position on the final form of its outcome on the topic. Differing views were expressed on whether the Commission should continue its work in the form of draft articles.

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

A. Peremptory norms of general international law (*jus cogens*)

1. General comments

116. Delegations generally welcomed the adoption, on second reading, of the draft conclusions, including the annex, on the topic and the commentaries thereto. Several delegations commended the outcome as a valuable practical guide for identifying peremptory norms and their legal effects. The draft conclusions clarified the relationship between peremptory norms and other norms of customary law and general principles of law.

117. Some delegations observed that the draft conclusions followed closely existing international law, in particular the Vienna Convention on the Law of Treaties, the articles on responsibility of States for internationally wrongful acts and the guide to practice on reservations to treaties.

118. Other delegations expressed the view that the draft conclusions did not reflect existing law in all aspects. It was further noted that the draft conclusions did not deal with cases in which one peremptory norm conflicted with another, nor in which a peremptory norm changed over time.

119. Some delegations noted that the use of the term “shall” in some of the draft conclusions would have been more appropriate for draft articles than conclusions. Some delegations also expressed the view that most of the texts were based on

academic writings and judicial decisions and it would have been useful to have more extensive references to the practice of States.

120. Some delegations agreed with the form of the topic being draft conclusions, in which the Commission surveyed the existing law, but also expressed the view that conclusions were not the appropriate form for progressive development and that they would be better described as "recommendations".

121. It was said that only a few changes had occurred since the first reading. The addition of "identification and legal consequences of" in the title was welcomed as clearer and more appropriate.

122. The point was made that the issue of modifying a peremptory norm remained problematic and unclear. Some delegations stated that, given the nature and the importance of the topic, it would have been desirable for the Commission to have continued its consideration of the matter.

2. Specific comments

123. On **draft conclusion 2** (nature of peremptory norms of general international law (*jus cogens*)), some delegations welcomed the reference to the protection of fundamental values of the international community as a whole, which was perceived as a wider concept than that of the fundamental values of the international community of States as a whole. Other delegations also welcomed the clarification that the elements in draft conclusion 2 did not constitute additional criteria for the identification of peremptory norms. Still other delegations were of the view that the reference to the "fundamental values of the international community" created ambiguity and a risk of misinterpretation. It was also noted that the universality of peremptory norms meant that they bound States and international organizations.

124. Some delegations welcomed the confirmation in **draft conclusion 3** (definition of a peremptory norm of general international law (*jus cogens*)) that peremptory norms were universally applicable and therefore did not apply on a regional or bilateral basis. It was observed that it was not clear if the expression "the international community" in draft conclusion 2 and the expression "international community of States as a whole" in draft conclusion 3 had different meanings.

125. Delegations supported the fact that **draft conclusion 5** (bases for peremptory norms of general international law (*jus cogens*)) made clear that customary international law was the most common source of peremptory norms. Gratitude was expressed for the Commission's explanation concerning the change from "sources" to "bases" in the title of draft conclusion 5.

126. Some delegations noted that all sources should be considered collectively and generally in identifying peremptory norms. Others were of the view that only customary international law formed the basis for peremptory norms and, accordingly, that there should have been more references to State practice to substantiate the view that treaty provisions and general principles of law could likewise serve as the basis of a peremptory norm. It was stated that, since treaties were binding only on the parties thereto, they could not serve as the basis for the existence of peremptory norms (binding on all States). The fact that the commentary recognized that treaties and general principles could serve as the basis for peremptory norms to a limited extent was welcomed. Some delegations were of the view that a general principle of law could not serve as a basis for peremptory norms.

127. Several delegations emphasized the importance of the requirement of acceptance and recognition in identifying peremptory norms, as stated in **draft conclusion 6** (acceptance and recognition).

128. Regarding **draft conclusion 7** (international community of States as a whole), some delegations welcomed the fact that the requirement of acceptance and recognition did not require unanimity, but "acceptance and recognition by a very large and representative majority of States". Several delegations welcomed the reference to acceptance and recognition across regions, legal systems and cultures. Other delegations considered that the terms "a very large majority" and "representative" introduced further uncertainty regarding the nature or degree of acceptance of a norm.

129. Several delegations noted that the term "acceptance and recognition by a very large and representative majority of States" in draft conclusion 7 was inconsistent with the definition provided in draft conclusion 3, in which a peremptory norm was defined as one "accepted and recognized by the international community of States as a whole", based on article 53 of the Vienna Convention on the Law of Treaties. Other delegations expressed the view that, to be identified as having a peremptory character, a norm must be expressly recognized by all regional groups and by all the main legal systems and cultures of the world and that silence could not be interpreted as acceptance or recognition of such a status. Several other delegations thought that the threshold should not only be "a very large majority" but virtually universal acceptance and recognition, in line with article 53 of the Vienna Convention on the Law of Treaties. It was also noted that the reference to "other actors" in the commentary should be subject to careful consideration when assessing the acceptance by States.

130. Regarding **draft conclusion 8** (evidence of acceptance and recognition), the view was expressed that public statements made on behalf of States must have been delivered by organs or agents in their official capacity. The reference to various forms of evidence was also welcomed. It was stated that the views of non-State actors might contribute to the assessment of the acceptance and recognition of peremptory norms, but it was the acceptance and recognition by States that mattered as evidence of the emergence of such norms. Some delegations disagreed with the reference to resolutions adopted by international organizations as being examples of acceptance and recognition and recalled that, in the Commission's conclusions on the identification of customary international law, the relevant evidence was the conduct of States in connection with such resolutions, since support for a resolution could be for political reasons. It was noted that the commentary should have clarified which international organizations or intergovernmental conferences were being referred to and determined their scope, and whether any and all decisions of an international organization could meet the standard of evidence required.

131. On **draft conclusion 9** (subsidiary means for the determination of the peremptory character of norms of general international law), it was stated that there was a broader than necessary interpretation of the expert bodies and publicists whose work and teachings could serve to determine the peremptory character of norms of general international law. It was also stated that the resolutions of expert bodies or the outputs of international organizations should not be regarded as evidence of acceptance and recognition unless they were authoritative or a reflection of consensus.

132. Regarding **draft conclusion 11** (separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)), it was noted that the wording of paragraph 1, stating that a treaty that, at the time of its conclusion, conflicted with a peremptory norm was void in whole, was helpful. It was stated that the term "unjust" in paragraph 2 (*c*), referring to "continued performance of the remainder of the treaty would not be unjust", was vague and it would have been preferable to refer to performance not against the common interest of the parties.

133. Concerning **draft conclusion 14** (rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), some

delegations expressed support for the inapplicability of the persistent objector rule. Others observed that the reference to the inapplicability of the persistent objector rule was contrary to the standard of acceptance and recognition requiring a very large majority of States, but not unanimity, in draft conclusion 7, for a norm to be considered as having a peremptory nature. It was stated that the existence of a conflict presupposed the existence of conflicting rules. If one of them did not exist, there could be no such conflict.

134. Another view was expressed that it was not clear if there was sufficient State practice to support the proposition in paragraph 3 of draft conclusion 14, namely that the persistent objector rule did not apply to peremptory norms. It was also mentioned that, since a rule of customary international law would not be opposable to a State that maintained a persistent objection, it was difficult to indicate that the persistent objector rule did not apply to peremptory norms.

135. Regarding **draft conclusion 16** (obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)), some delegations welcomed the indication that peremptory norms were superior to the binding resolutions and decisions of international organizations, and stressed that such an argument should not be used as a pretext to avoid complying with such decisions that were otherwise binding. Some delegations would have preferred an explicit reference to the Security Council in draft conclusion 16, but welcomed the explicit references in the commentary. It was also stated that a possible conflict between Security Council resolutions and peremptory norms was possible and could not be equated with a conflict between such a norm and the Charter of the United Nations itself.

136. Other delegations disagreed with the assertion that a Security Council resolution could be rendered void owing to a conflict with a peremptory norm, in light of Articles 25 and 103 of the Charter of the United Nations. It was emphasized that the Security Council was at the core of the collective security system of the United Nations and that it was inconceivable that its resolutions would conflict with a peremptory norm. Some delegations noted that the draft conclusion created the risk of being invoked as grounds for unilaterally disregarding binding decisions of the Security Council and could jeopardize the effectiveness of the Security Council's actions when acting under Chapter VII of the Charter of the United Nations. Other delegations were of the view that there was insufficient State practice to support the conclusion that a State could refuse to comply with a Security Council resolution based on the assertion that it breached a peremptory norm.

137. Regarding **draft conclusion 17** (peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)), it was stated that States had a duty to cooperate to bring acts of aggression to an end. It was added that the cooperation required to put an end to such violations should take place though multilateral institutions, focusing on non-coercive dispute settlement and without affecting the rights of the population in the responsible States.

138. Some delegations welcomed the inclusion of **draft conclusion 19** (particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) and emphasized the importance of cooperation. While some considered that such a duty to cooperate was part of customary international law, others were of the view that the provisions concerning the consequences of a breach of a peremptory norm did not reflect customary international law.

139. An observation was made that the Commission had missed an opportunity to address further the specific consequences of serious violations by only reproducing the provisions from the articles on responsibility of States for internationally

wrongful acts. Another view was expressed that the debate in the Commission had helped to clarify in the commentary what was meant by "serious violations".

140. It was further noted that the Commission had not explained in draft conclusion 19 how States should discharge their obligations in relation to their conduct within international organizations. Another view welcomed the references to the current practice of States and international organizations in the commentary to draft conclusion 19, while other delegations opposed the references to recent examples.

141. On **draft conclusion 21** (recommended procedure), some delegations were of the view that a recommended procedure was unnecessary and not appropriate for inclusion in a set of draft conclusions concerning the methodology for the identification of peremptory norms. In terms of a similar view, the draft conclusion did not reflect *lex lata*, nor did it contribute to the formation of *lex ferenda*. While it was noted that the wording was adjusted to make clear that the recommended procedure was not binding on States, others considered that it was impractical, because it could be difficult to ascertain the States concerned in relation to a rule of customary international law or a general principle of law. Reference was made to the importance of respecting the principle of free choice of means for the peaceful settlement of disputes in accordance with Article 33 of the Charter of the United Nations, and it was recalled that that there was no compulsory jurisdiction of the International Court of Justice. Some delegations welcomed the decision of the Commission to present the procedure as a recommended practice and not a binding one.

142. Concerning **draft conclusion 22** (without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail), it was pointed out that the Commission should have addressed the legal consequences of certain peremptory norms.

143. On **draft conclusion 23** (non-exhaustive list) and the annex, several delegations welcomed the inclusion of the illustrative list in the annex. It was recalled that the list did not exclude the existence or future identification of other peremptory norms. Some delegations welcomed the fact that the commentary expressly stated that it included peremptory norms identified in the previous work of the Commission. Other delegations queried why the list had not included all the norms the Commission had identified as peremptory in its previous work, such as the prohibition of the crime of piracy. It was also emphasized that the Commission's previous references to peremptory norms were not based on the kind of inquiry mandated by the draft conclusions themselves.

144. Several delegations expressed reservations regarding the norms contained in the illustrative list, or even the need to include a list, but noted that it was without prejudice to the existence or subsequent emergence of new peremptory norms. Other delegations pointed out that, no matter how it was described, the status of the list would potentially cause confusion and would be treated by some readers as exhaustive and/or a codification of existing peremptory norms, which could impede the natural evolution of such norms. The view was also expressed that the "without prejudice" clause contained in draft conclusion 23 referring to the non-exhaustive character of the list did not address some of the concerns expressed by some States. It was noted that some of the norms in the annex lacked an agreed definition, which would make it difficult to assess or apply the norms. The view was also expressed that the inclusion of the list went beyond the Commission's mandate. Other delegations suggested that the list could have been included in the commentary.

145. As regards the content of the list, it was suggested that the "prohibition of aggression" be replaced by the "prohibition of the use of force". Some delegations emphasized the importance of the right to self-determination, but others questioned the decision to include it. Moreover, the view was expressed that the reference to

"basic rules of international humanitarian law" was not sufficiently precise. Some delegations noted that the Commission should have been more ambitious and included other peremptory norms, such as the obligation to protect the environment and territorial integrity. Still other delegations expressed the view that certain norms in the Charter of the United Nations constituted peremptory norms, and that the principles listed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations should have been included.

B. Protection of the environment in relation to armed conflicts

1. General comments

146. Delegations generally commended the adoption of the 27 draft principles and commentaries thereto on second reading. Several delegations highlighted the risk of harm to the environment inflicted by armed conflict and the importance of its protection, with some delegations emphasizing recent events affecting chemical and nuclear power plants. The timeliness and importance of the draft principles were stressed. Some delegations underlined that the draft principles contributed to systematizing and integrating the relevant fields of international law, in particular international humanitarian, human rights and environmental law, while concern was expressed that the draft principles could conflate the rules of those areas thereby misrepresenting their substance or scope of application.

147. It was stated that the draft principles provided valuable guidance to the international community, while a view was expressed that their broadness limited their practical use and inhibited a satisfactory outcome.

148. Regarding the normative character of the draft principles, some delegations welcomed the combination of *lex lata* and *lex ferenda*, while others emphasized that the draft principles mainly, or only, reflected progressive development of international law, and that they could not give rise to new obligations for States, nor change existing international humanitarian law.

149. Differing views were expressed concerning the use of the term "environment". While support was expressed, it was noted with regret that no definition of the term "environment" was included. It was pointed out that the use of the term, instead of "natural environment", was not intended to alter the scope of the existing conventional and customary international humanitarian law, nor to expand the scope of what was meant by "natural environment" in international humanitarian law.

2. Specific comments

150. The inclusion of the **draft preamble** was welcomed by some delegations, as it provided useful guidance on interpreting the draft principles.

151. Concerning **draft principle 1** (scope), support was expressed by a number of delegations for the temporal approach taken by the Commission. However, some delegations expressed doubts about the scope of application before and after an armed conflict, since those situations were governed by other bodies of international law. It was emphasized that the principles did not concern international law on the use of force. The importance of the draft principles in peacetime was also highlighted.

152. Support was also expressed for **draft principle 2** (purpose).

153. Several delegations commended **draft principle 3** (measures to enhance the protection of the environment). It was emphasized that the measures required under the draft principle did not go beyond existing obligations under international law.

154. **Draft principle 4** (designation of protected zones) was welcomed by some delegations. It was stated that the designation of protected zones should be based on objective criteria. It was also stated that the term "cultural" could relate to Indigenous Peoples who may warrant special protection. The view was expressed that States should designate protected zones around nuclear power plants.

155. A number of delegations welcomed the adoption of **draft principle 5** (protection of the environment of Indigenous Peoples). The participatory rights of Indigenous Peoples relating to their lands were emphasized and, in particular, that those rights had a larger temporal application than the post-conflict phase indicated in paragraph 2. It was noted that the draft principle appeared to assert a new substantive legal obligation of a mandatory nature, while its basis was not clear.

156. **Draft principles 6** (agreements concerning the presence of military forces) and **7** (peace operations) were welcomed. A concern was expressed that the commentary to draft principle 7 did not adequately demonstrate the legal bases for it to be expressed as a binding rule, while the customary nature of the principle was questioned.

157. Several delegations supported the adoption of **draft principle 8** (human displacement). It was stated that the principle, as well as draft principle 14, appeared to prioritize the protection of the environment over rules of international humanitarian law, which was anthropocentric in nature and should not be undermined.

158. A number of delegations welcomed the adoption of **draft principle 9** (State responsibility). It was noted that full reparation for damage caused to the environment included, *inter alia*, conducting post-armed conflict environmental assessments, removing toxic and hazardous remnants of war, clearing minefields, providing relief and assistance, and making full reparation for victims.

159. Some delegations commended the inclusion of **draft principles 10** (due diligence by business enterprises) and **11** (liability of business enterprises). It was suggested that the obligations under draft principles 10 and 11 extended to business enterprises that were operating in or from unlawfully occupied territories effectively controlled by the Occupying Power. It was stated that the obligation under draft principle 10 was not sufficiently established in international law. It was questioned why the principles did not address insurgents, militias, criminal organizations, and individuals, who also had obligations under international humanitarian law.

160. A number of delegations welcomed the adoption of **draft principle 12** (Martens Clause with respect to the protection of the environment in relation to armed conflicts). Doubt was expressed regarding the reference to principles of humanity and public conscience, as well as the introduction of the concept of "humanity" to the topic and a humanization of the concept of "nature".

161. **Draft principle 13** (general protection of the environment during armed conflict) received support from several delegations. Some delegations welcomed the express mention of the limitations on the use of methods and means of warfare. Concern was expressed that the draft principle allowed for the environment to be attacked if it was a military objective. Regret was expressed that the draft principle did not expressly confirm that international environmental law applied during armed conflicts and in the territory under occupation. It was stated that under customary international law, the protection of the natural environment would be anthropocentric in nature, so that it constituted a civilian object only when it was used or relied upon by civilians for their health or survival. It was suggested that the term "widespread, long-term and severe damage" lacked specificity.

162. **Draft principle 14** (application of the law of armed conflict to the environment) was welcomed by some delegations. A view was expressed that no attack directed at

a military objective should be considered proportionate when it was intended, or may be expected, to cause widespread, long-term and severe damage.

163. **Draft principle 15** (prohibition of reprisals) was welcomed by some delegations, while a view was expressed questioning the customary nature of prohibitions of attacks against the environment as reprisals.

164. Some delegations commended the adoption of **draft principle 16** (prohibition of pillage), in particular its application in situations of occupation.

165. Some delegations welcomed the adoption of **draft principle 18** (protected zones). It was questioned why the draft principle did not refer to designation of areas of environmental importance by virtue of instruments of international law other than agreements, in a similar manner to the text of draft principle 4. It was proposed that the draft principle also encompass the importance of natural heritage.

166. Some delegations voiced support for **draft principles 19** (general environmental obligations of an Occupying Power), **20** (sustainable use of natural resources) and **21** (prevention of transboundary harm). The use of the terms "protected persons" and "protected population" as terms of art under international humanitarian law instruments was appreciated.

167. It was emphasized that the term "applicable law" in draft principle 19 referred also to international environmental and human rights law. In that connection, a number of delegations recalled the recognition by the General Assembly of the human right to a clean, healthy and sustainable environment in its resolution 76/300 of 28 July 2022.

168. It was stated that draft principle 20 reflected existing rules on sustainable use of natural resources in an occupied territory and that it did not conflict with article 55 of the 1907 Hague Regulations. It was highlighted that the use by the Occupying Power of such natural resources had to benefit the protected population.

169. The adoption of **draft principle 22** (peace processes) was welcomed by several delegations.

170. The adoption of **draft principles 23** (sharing and granting access to information) and **24** (post-armed conflict environmental assessments and remedial measures) was welcomed.

171. Some delegations expressed support for **draft principle 25** (relief and assistance). It was commended that paragraph (1) of the commentary clarified that the responsible State was not exempted from its obligation to make reparation.

172. While some delegations welcomed the adoption of **draft principle 26** (remnants of war), it was noted that the commentary did not adequately demonstrate the legal bases for the principle to be expressed as a binding rule.

173. Some delegations welcomed the adoption of **draft principle 27** (remnants of war at sea). It was pointed out that the Commission's approach left room for the development of law, while not undermining existing international legal obligations. It was noted that the principle placed an inappropriate burden on States, since it could be read as entailing an obligation to act in any case in which remnants of war were identified, even outside territorial waters.