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Report of the International Law Commission on the work of its seventy-first session (2019)

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

Contents

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I. Introduction

1. At its seventy-fourth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, held on 20 September 2019, to include in its agenda the item entitled "Report of the International Law Commission on the work of its seventy-first session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 23rd to 33rd and 35th meetings, held from 28 October to 1 November and on 5, 6 and 20 November 2019. The Chair of the International Law Commission at its seventy-first session introduced the report of the Commission on the work of that session (A/74/10) at the 23rd meeting, on 28 October, and the Committee considered the report in three clusters, namely: cluster I (chapters I to V and XI) at its 23rd to 28th meetings, from 28 October to 1 November, cluster II (chapters VI, VIII and X) at its 28th to 31st meetings, on 1 and 5 November, and cluster III (chapters VII and IX) at its 31st, 32nd and 33rd meetings, on 5 and 6 November.

3. At its 35th meeting, on 20 November 2019, the Sixth Committee adopted draft resolution A/C.6/74/L.20 entitled "Report of the International Law Commission on the work of its seventy-first session" without a vote. On the same day, the Committee also adopted without a vote a draft resolution entitled "Crimes against humanity" (A/C.6/74/L.21). After the adoption of the draft resolution, the representative of Austria, on behalf of several States, made a statement in explanation of position. After the General Assembly had considered the relevant report of the Sixth Committee (A/74/425), it adopted the draft resolutions, respectively, as resolutions 74/186 and 74/187, at its 51st plenary meeting, on 18 December 2019.

4. The present topical summary has been prepared pursuant to paragraph 36 of resolution 74/186, 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-fourth session of the Assembly.

5. The present topical summary consists of two parts. The first part contains five sections, reflecting the current programme of work of the Commission: succession of States in respect of State responsibility (A/74/10, chap. VII); immunity of State officials from foreign criminal jurisdiction (*ibid*., chap. VIII); general principles of law (*ibid*., chap. IX); sea-level rise in relation to international law (*ibid*., chap. X); and other decisions and conclusions of the Commission (*ibid*., chap. XI). The second part contains summaries on the topics: Peremptory norms of general international law (*jus cogens*) (A/74/10, chap. V); and Protection of the environment in relation to armed conflicts (*ibid*., chap. VI), on which the Commission completed work at its seventy-first session on first reading. The Commission will resume its consideration of these topics at its seventy-third session, in 2021. The second part also contains the summary on the topic, "Crimes against humanity" on which the Commission has completed work on second reading during its seventy-first 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. A number of delegations underlined the importance of the topic, while other delegations observed that the complexity and scarcity of State practice in the area

posed challenges. Several delegations commended the Special Rapporteur for the extensive analysis in his third report and expressed appreciation for the memorandum prepared by the Secretariat. Delegations generally recalled the Special Rapporteur's assessment that available State practice was diverse, context-specific and sensitive, and therefore called for a careful review of the *opinio juris* and relevant practice of States, including from geographically diverse sources. It was further remarked that the Commission should be cautious to avoid over-reliance on academic literature and the work of the Institute of International Law in such a sensitive area.

7. Several delegations emphasized that the topic was governed by the general rule of non-succession, which should be subject to well-defined exceptions. Several other delegations favoured the flexible approach of the Special Rapporteur, although clarification was needed as to where such an approach would deviate from the general rule of non-succession. Some delegations took the view that the topic should not focus on identifying any general rule, which was not supported by State practice. Rather, it was suggested that the progressive development of international law in this area could provide useful guidance to States in reaching mutually agreed solutions to matters of succession of States. In that connection, the Commission was urged to clarify the status of the draft articles as *lex lata* or *lex ferenda*. Another suggestion was to focus on the analysis of specific problems arising in practice regarding the non-implementation of obligations stemming from treaties and judgments relating to a predecessor State. Support was also expressed for a closer examination of special agreements or *ex gratia* payments by States and their impact on the principle of full reparation. It was pointed out that the determination of responsibility should turn on the facts of each case of succession of States.

8. Delegations generally reiterated the importance of maintaining consistency, in terminology and substance, with the previous work of the Commission, although doubt was expressed regarding the extent to which provisions in the 1978 Vienna Convention on Succession of States in Respect of Treaties[1] and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[2] such as those concerning newly independent States, should be replicated. It was further recalled that the proposed draft articles should be compatible with the articles on State responsibility[3] and the articles on diplomatic protection.[4] The question of changing or retaining the title of the topic elicited diverging views.

2. Specific comments

9. Several delegations welcomed the provisional adoption by the Commission of draft articles 1, 2 and 5. In particular, a number of delegations highlighted **draft article 1** (scope), paragraph 2, which clarified the subsidiary nature of the draft articles and the priority to be given to agreements between the States concerned. Concerns were expressed as to the necessity of paragraph 2, and the approach of relying on such agreements as State practice in formulating the draft articles. Nonetheless, it was considered that the draft articles could provide a useful reference for the negotiation of agreements between States. In relation to **draft article 2** (use

[1] Vienna, 23 August 1978, United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[2] *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, *Documents of the Conference* (A/CONF.117/16 (Vol. II)), p. 141 (document A/CONF.117/14).

[3] 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.

[4] General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission 2006*, vol. II (Part Two), paras. 49–50.

of terms), the view was expressed that no additional terms needed to be defined. Regarding **draft article 5** (cases of succession of States covered by the present draft articles), it was suggested that the draft articles establish clear rules addressing reparation in all cases, without providing any advantage to States violating international law.

10. Delegations also commented on the draft articles proposed by the Special Rapporteur in his third report. In relation to the scheme of the draft articles, support was expressed for the proposal to organize the draft articles in parts, with **draft articles X and Y** indicating the scope of each part. Some delegations agreed with the broad distinction between situations where the predecessor State continued to exist and where it ceased to exist, although doubt was expressed regarding the inclusion of provisions on the responsibility of predecessor States that continued to exist. While some delegations preferred an analysis according to specific categories of succession of States, some other delegations favoured the formulation of draft articles in which the three categories of succession of States were merged. Opposing views were expressed on the question of whether issues concerning rights and claims arising from an internationally wrongful act could be treated separately from issues concerning obligations arising from such act.

11. Regarding **draft article 2 (f)**, it was suggested that the meaning of the term "States concerned" be further clarified, either in the text or in the commentary.

12. Some delegations stated general support for **draft articles 12 to 14**. Although the view was expressed that the draft articles could be developed based on the principle of unjust enrichment, it was pointed out that such principle fell outside the scope of the rules on responsibility of States. The expression "may request" used in draft articles 12 to 14 received some support, but further deliberation was called for, particularly in order to distinguish the procedural possibilities of claiming rights from substantive rights and obligations. Doubt was also expressed that such provisions should not be included as *lex ferenda*. Moreover, it was suggested that the term "reparation" in draft articles 12 to 14 be clarified in line with the articles on State responsibility. In relation to draft article 12 (cases of succession of States when the predecessor State continues to exist), paragraph 2, a more detailed explanation of the phrase "special circumstances" was requested. Regarding draft article 13 (uniting of States), the view was expressed that cases of merger of States and cases of incorporation of a State into another existing State should be treated in separate draft articles, and that paragraph 2 could be deleted. As to draft article 14 (dissolution of States), support was expressed for the proposal to redraft paragraph 1 to focus on the dissolution of a State without referring to separation of part of the State. Further, it was suggested that the references to "such claims and agreements", "nexus" and "other relevant factors" in draft article 14, paragraph 2, be elaborated upon. Clarification was requested regarding the distinction between the rights of a successor State and the potential right of an individual to claim reparations as well.

13. Regarding **draft article 15** (diplomatic protection), some delegations expressed concerns with addressing the issue of diplomatic protection in the proposed draft articles, potentially deviating from the articles on diplomatic protection of 2006. Some other delegations supported the inclusion of draft article 15, affirming the more flexible approach of allowing an exception to the principle of continuous nationality in cases of succession of States, to avoid inequitable situations in which an individual lacked protection. It was recalled that the articles on diplomatic protection generally adopted a broad definition of "nationality", and further addressed cases of multiple nationality. At the same time, support was expressed for the inclusion of safeguards intended to avoid abuses and prevent "nationality shopping" if the rule of continuous nationality was lifted. Moreover, clarification was sought as to whether draft article 15 covered both natural and legal persons, and it was suggested that a

distinction be made between situations when the predecessor State continued to exist after the date of succession and when the predecessor State ceased to exist.

3. Future work

14. While it was hoped that the draft articles would be completed soon on first reading, the Commission was encouraged to take sufficient time in its consideration of the topic, bearing in mind its complexity.

4. Final form

15. Some delegations voiced support for the draft articles as the final form for the topic, consistent with the previous work of the Commission on matters of State succession, although concerns were raised about the limited prospects of concluding a treaty on the topic. Several delegations asked the Commission to consider alternative outcomes, such as draft guidelines, conclusions or principles, or an analytical report which could provide a model for States to follow in specific cases of succession. Some other delegations suggested that the Commission decide on the most appropriate option at a later stage.

B. Immunity of State officials from foreign criminal jurisdiction

1. General comments

16. Delegations generally recalled the importance of clarifying the procedural aspects of the topic and welcomed the analysis in the sixth and seventh reports of the Special Rapporteur. A number of delegations called for greater focus on the *opinio juris* and practice of States, particularly from diverse regions, as well as views expressed by States. Although some delegations appreciated the Special Rapporteur's acknowledgment that certain draft articles were proposed as progressive development of international law, other delegations expressed caution against formulating new norms. Concerns were raised regarding the status of the draft articles in relation to the Rome Statute of the International Criminal Court.[5] The Commission was also asked to maintain consistency in its work on related topics.

17. Delegations highlighted the need for procedural provisions and safeguards, particularly in the context of avoiding abusive or politically motivated proceedings. Several delegations voiced support for the inclusion of specific safeguards linked to draft article 7. Further, a number of delegations reiterated their concerns about draft article 7, and expressed doubts that procedural safeguards could cure its inherent flaws. It was further suggested that safeguards be included to address cases involving States that might not willingly cooperate.

18. A number of delegations pointed out that the draft articles should take into account various national legal systems and accord flexibility to States without being overly prescriptive. In this regard, delegations generally emphasized the primary or central role of diplomatic channels in communications concerning immunity between the forum State and the State of the official. It was observed that the competent authorities of each State in matters concerning immunity would depend on national law, while a requirement for decisions to be taken at the highest level received some support. Several delegations also stressed that procedural safeguards should balance the interests of the forum State and the State of the official. Diverging views were expressed concerning the ways in which the distinction between immunity *ratione personae* and immunity *ratione materiae* should be reflected in the draft articles.

[5] Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

Several delegations urged the Commission to streamline the draft articles and ensure consistent terminology.

2. Specific comments

19. In relation to **draft article 8** (consideration of immunity by the forum State) and **draft article 9** (determination of immunity), clarifications were sought regarding the content of the obligations of consideration and determination, as well as their differences. Support was expressed for draft articles 8 and 9 to be broadly drafted in order to cover all possible situations that might arise under national law. Some delegations stressed that immunity should be examined at the earliest stage. It was suggested that draft article 8 should address the consideration of immunity in administrative proceedings or investigations, although a contrary view was expressed that immunity would not bar investigations. It was further suggested that an illustrative list of coercive measures be included in the commentary. Similarly, it was noted that draft article 9 should specify that immunity should be determined before criminal jurisdiction was exercised or before coercive measures were taken against the official. While some delegations appreciated the recognition of the authority of the courts of the forum State in determining immunity, several delegations pointed out that the role of other organs should not be ruled out in draft article 9. It was also suggested that consideration be given to whether there were additional formal or informal mechanisms by which the State of the official could provide relevant information to the forum State before any determination of immunity. Moreover, the principle of sovereign equality was recalled, as some delegations highlighted the need for the forum State to take into account invocation or waiver of immunity by the State of the official.

20. Further consideration of **draft article 10** (invocation of immunity) and **draft article 11** (waiver of immunity) was called for. The view was expressed that there was no obligation to immediately invoke immunity, but rather that there should be a presumption of immunity. In this connection, it was suggested that a "without prejudice" clause be included in draft article 10 to clarify that any delay in invocation should not be to the detriment of the State of the official, and that the requirement of invocation be balanced against a requirement that the State intending to exercise jurisdiction inform the State of the official without delay of its intention to do so. The conditions of invocation in draft article 10, paragraph 3, raised certain doubts. Some delegations favoured the differentiated approach between immunity *ratione personae* and *ratione materiae* reflected in draft article 10, paragraph 6, whereas several delegations took the position that the forum State should also consider *proprio motu* the applicability of immunity *ratione materiae* to the acts of the official. As to draft article 11, some delegations agreed that waiver should be express and clear, and suggested that this be elaborated on. Nonetheless, a number of delegations doubted that a waiver deduced from an international treaty could be deemed an express waiver as stated in draft article 11, paragraph 4. It was also emphasized that participation by the State of the official in an exchange of information should not be construed as recognition of the jurisdiction of the forum State or as an implied waiver of immunity. The view was expressed that a waiver should be revoked only and exceptionally by agreement between the State of the official and the forum State.

21. Other specific comments were made in relation to the effects of a waiver, including retroactive effect, waiver of immunity for part of the criminal proceedings, the difference between waiver of immunity and waiver of inviolability, waiver of immunity in cases of a Security Council referral of a situation to the International Criminal Court, waiver of immunity *ratione materiae* in cases where the official has allegedly committed a crime other than one in draft article 7.

22. Support was expressed for **draft article 12** (notification of the State of the official). It was suggested that the forum State be required to notify the State of the official once the official claimed immunity or once there was any indication that immunity might apply to the official. However, notification of the State of the official, in the absence of assurances that the official would not be notified, raised concerns of jeopardizing a criminal investigation.

23. Several delegations expressed support for **draft article 13** (exchange of information). It was suggested that paragraph 1 require the forum State to request information from the State of the official and to consider such information in good faith. Concerning paragraph 4, other possible grounds for refusal of a request for information were mentioned, such as cases involving a political crime or prosecution on discriminatory grounds, where the request was inconsistent with the law of the State of the official, or where it was considered to be a provocation or intended to circumvent customary international law. In view of the right of the State of the official to refuse a request, it was suggested that the word "sufficient" be deleted from paragraph 6.

24. In relation to **draft article 14** (transfer of proceedings to the State of the official), some delegations requested clarification regarding the right of the State of the official to request a transfer of proceedings from the forum State, the way in which the proceedings could be transferred, and the cases in which the State of the official would need to request extradition of the official from the forum State. Concern was expressed with respect to the discretion granted to the forum State under paragraph 1. It was asserted that the forum State should consider the transfer of criminal proceedings to the State of the official as its primary option. The duty of the forum State to cooperate with the authorities of the State of the official was also highlighted. Further, it was suggested that the suspension of the criminal proceedings under paragraph 2 be limited to a reasonable period of time. Some delegations spoke in favour of proposals aimed at preventing the potential abuse of transfer of proceedings, such as requiring the State of the official to be genuinely able and willing to exercise its jurisdiction, and ensuring that a forum State could not arbitrarily deny a request for the transfer of proceedings. Nonetheless, it was noted that further issues could arise from assessing the legal system of the State of the official or requiring assurances to be provided, as well as the consequences that would ensue if the State of the official did not exercise jurisdiction.

25. **Draft article 15** (consultations) was welcomed in light of the importance of flexible mechanisms for consultations between the forum State and the State of the official. It was suggested that compulsory consultations be required as a procedural obligation.

26. Some delegations voiced support for **draft article 16** (fair and impartial treatment of the official), highlighting the need to ensure protection of the official against abuse. It was proposed that paragraph 2 cover different stages of criminal proceedings, particularly where deprivation of the liberty of the official was concerned. Nonetheless, paragraph 3 raised certain doubts. It was suggested that reference be made to the nearest "competent" or "appropriate" representative of the State of the official. The view was also expressed that, when applicable, consular notification was only required if requested by the detained official, and that there was no entitlement to assistance. Moreover, it was asserted that no precautionary or temporary measures should be taken against the official during the process of determination of immunity.

27. **Draft article 8** ***ante*** (Application of Part Four), as provisionally adopted by the Drafting Committee, was welcomed by several delegations, who concurred with the application of the procedural provisions and safeguards in Part Four to the draft

articles as a whole, including draft article 7. Given that the draft articles were mutually interrelated, it was suggested that draft article 8 *ante* deserved further deliberation due to its possible impact on other relevant draft articles.

3. Future work

28. A number of delegations encouraged the Commission to complete the first reading of the draft articles in 2020, while emphasizing the need for adequate time to be given to consideration of the topic. It was suggested that the Commission should address issues concerning alleged or *ultra vires* acts of State officials, international responsibility and civil liability of the State of the official, and recognition of States and Governments.

29. Some delegations considered it appropriate for the Commission to analyse the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation of States to cooperate with international criminal courts or tribunal. However, several other delegations were of the view that this issue was irrelevant to, or beyond the scope of, the topic. In this connection, caution was expressed against reliance on the judgment dated 6 May 2019 of the Appeals Chamber of the International Criminal Court in the case involving Jordan.[6]

30. Diverging views were expressed on the question of establishing a mechanism for the settlement of disputes between the forum State and the State of the official in the draft articles. It was suggested that a dispute settlement mechanism could address the link between the procedural aspects of the topic and the exceptions to immunity set out in draft article 7 by providing for any dispute relating to the interpretation and application of those exceptions to be submitted to the International Court of Justice. The possible inclusion of recommended best practices on the topic was also subject to differing views.

4. Final form

31. Some delegations urged the Commission to consider the final outcome of its work at the present stage, although others expressed doubts. The question of preparing a draft convention on the topic elicited differing views. It was stressed that the draft articles should be supported by consensus before being adopted.

C. General principles of law

1. General comments

32. Delegations generally highlighted the importance of and interest in the topic, as it would complement the work of the Commission in regard to the sources of international law listed in Article 38 of the Statute of the International Court of Justice. Several delegations agreed with the Special Rapporteur that in approaching this topic, a cautious and rigorous approach was required.

33. Several delegations were of the view that the work of the Commission would constitute a useful clarification on the nature of general principles of law, their function, and the methods for their identification and application. Some delegations agreed with the Commission that the starting point for the consideration of this topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. However, delegations in general agreed with the Special Rapporteur that the

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

term “civilized nations” in the Statute was anachronistic and should no longer be employed.

34. Delegations noted that the Special Rapporteur advanced in his first report the idea that two categories of general principles of law may fall under the purview of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice: general principles of law derived from national legal systems and general principles of law formed within the international legal system. Delegations generally agreed with the description of the first category, and its relevance to the topic. However, in regard to the second category, some delegations expressed doubts as to whether those principles were within the scope of the topic, whether there was enough State practice to reach meaningful conclusions, or whether such principles fell under a different source of international law. Several States were supportive of considering general principles of law formed within the international legal system as part of the topic. It was also noted by delegations that the Commission should pay attention to the distinction between general principles of law and customary international law.

2. Specific comments

35. Some delegations noted that the Special Rapporteur had proposed three draft conclusions in his first report and made comments thereto. In regard to draft conclusion 1 (scope), the view was expressed that the term “source of international law” presented conceptual challenges, and that further clarification on its meaning may be needed.

36. Concerning draft conclusion 2 (requirement of recognition), delegations welcomed that the term “civilized nations” was avoided for the determination of the level of recognition required for the ascertainment of a general principle of law. However, the view was expressed that narrowing recognition of principles by States only would limit the scope of the work. Both positive and negative views were expressed with regard to the inclusion of international courts and international organizations as entities playing a role in the formation and recognition of general principles.

37. With regard to draft conclusion 3 (categories of general principles of law), some delegations supported the inclusion of principles derived from national legal systems, as well as those formed within the international legal system, and expressed the hope that the Commission’s work would provide clarification as to the second category. Some delegations suggested that the Commission should further study the second category, including ascertaining if there were sufficient State practice for such a category to be covered within the topic.

3. Future work

38. Delegations generally supported the future programme of work for the topic, and some particularly noted the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems. Delegations also supported the future consideration of the relationship between general principles of law and other sources of international law.

39. Different views were expressed with regard to the inclusion of regional or bilateral principles as a matter for future consideration. While several delegations expressed doubts as to whether the scope of the topic included principles of limited application, the view was expressed in support of the existence of regional principles and their study as part of the topic.

40. Diverging views were also expressed as to the usefulness of drawing a non-exhaustive list of principles. Several delegations noted that such a list is not the

goal of the Commission's work, and therefore warned against diverting attention from the general aspects of the topic. However, some delegations found the exercise valuable addition to the work of the Commission.

41. As to the final outcome of the Commission work on the topic, delegations generally supported that it would take the form of conclusions with commentaries.

D. Sea-level rise in relation to international law

1. General comments

42. Delegations welcomed or commended the Commission's decision to place the topic on its programme of work, considering that it was reflective of the needs and interests of States as expressed in the General Assembly. A number of delegations noted that sea-level rise was an issue of serious concern to all Member States and expressed their appreciation for an accelerated consideration of the topic. Other delegations underlined that the topic raised broad and complex questions which the Commission was well-suited to address. Some delegations took note of the decision, while others expressed the view that, although sea-level rise posed pressing problems, it was either not a matter of interest to the entire international community or did not lend itself to codification.

43. Delegations stressed the need for a strong commitment by States to cooperate in finding universal solutions to the unprecedented challenge posed by sea-level rise. They pointed to the potential of sea-level rise to generate humanitarian and economic disasters or conflict, in particular as many maritime boundaries were not settled, and the threat it posed to the very survival of some States. It was also observed that the cost of implementing physical measures to maintain the baselines would affect the poorest and most vulnerable States. Further, the unprecedented challenges to the health of the ocean and the people who depend on it for their way of life, as well as the need to focus on the protection of the rights of affected peoples, were recalled.

2. Specific comments

44. General support was expressed for the establishment of an open-ended study group and for its proposed format, as well as for the subtopics to be addressed successively by the Study Group (issues related to the law of the sea (in 2020), and issues related to statehood and the protection of persons affected by sea-level rise (in 2021)). The concern was expressed that the proposed method of work seemed to mark a departure from the normal procedure within the Commission.

45. Several delegations emphasized the need to ensure transparency through public discussion of the topic in the Commission's plenary sessions and by means of the consideration of the outcome of the Commission's work in the Sixth Committee.

46. Some delegations observed that the initial stage of work on the legal implications of sea-level rise through the consideration of the subtopic "Issues related to the law of the sea" would be critical and that it would benefit not only coastal States, but also the international community as a whole. Some indicated their particular interest in an approach that supported certainty and stability of the United Nations Convention on the Law of the Sea,[7] in particular in relation to the delimitation of maritime boundaries, and the protection of maritime zones established under the Convention, as well as of other instruments in the field of environmental law (such

[7] Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

as the Paris Agreement[8]), international human rights law or international humanitarian law.

47. While it was considered that a fundamental change of circumstances, under article 62, paragraph 2, of the Vienna Convention on the Law of Treaties,[9] should not be invoked in relation to maritime boundaries, the view was also expressed that physical measures for coastal reinforcement, such as the construction of seawalls or other measures for artificial protection, coastal protection and restoration, and the negotiation and conclusion of maritime boundary agreements were worth supporting.

48. A view was expressed emphasizing the need for the Commission to take a cautious approach in relation to the measurement of baselines and whether they should be allowed to be moved as a consequence of sea-level rise. The view was also expressed that modifying baselines and maritime boundaries would have a negative impact on small island developing States, although they had least contributed to climate change. It was reaffirmed that the United Nations Convention on the Law of the Sea provided the relevant international legal framework within which all activities in the oceans and seas must be carried out, and that the ability to maintain existing maritime entitlements should also apply to maritime boundaries delimited by agreement between States or by decisions of international courts or arbitral tribunals. It was also suggested that the Study Group could play an important role in identifying existing legal rules and gaps in the legal framework that the international community would need to address in responding to the challenges posed by sea-level rise. According to another view, although the real threat that sea-level rise posed, especially to coastal areas and low-lying coastal countries, and the need to prepare for its potential implications were recognized, the Study Group should rely upon the application of existing principles of customary international law, rather than on developing new legal principles.

49. Conversely, the view was expressed that the three subtopics identified by the Study Group should be addressed in a manner that could provide practical assistance to States in determining the appropriate measures to adopt, and thereby lay the basis for the progressive development of rules of international law in relation to climate change, in particular those pertaining to State responsibility, the precautionary approach, mitigation, adaptation, damage and loss, and compensation.

50. It was also observed that the legal consequences of sea-level rise must be seen in tandem with – and not overshadow – Member States' political determination to address climate change.

51. Some delegations considered that patterns of State practice were emerging and noted that there already existed a sizeable body of scholarly commentary on the subject of sea-level rise (including proposals made *de lege ferenda*), accordingly the need to thoroughly analyse State practice as well as related legal questions in order to produce objective, balanced and valuable outcomes was emphasized. Support was also expressed for the Commission's approach of drawing on current State practice concerning the identification of basepoints and definition of maritime zones to help inform its recommendations around sea-level rise and international law. It was further noted that the lack of practice was a methodical challenge, which should not prevent the Commission from considering the issue. It was also stated that the topic required an analysis of unprecedented issues, as suitable analogies may not necessarily be

[8] Paris, 12 December 2015, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, Addendum: Part two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex, text also available from https://treaties.un.org, *Depositary, Certified True Copies*.

[9] Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

available and that consideration could be given to unconventional solutions, if necessary.

52. However, other delegations either expressed the view that the topic involved a new area of law in which State practice and *opinio juris* were not yet clearly established or that it called into question some cardinal and well-established law of the sea rules reflected in the United Nations Convention on the Law of the Sea. The lack of treaty-based practice on sea-level rise and of decisions of international courts and tribunals was also noted in a view calling for a careful approach to be taken.

53. It was further suggested that, since the topic was predominantly of a scientific and technical character, it was best considered by competent technical and scientific expert bodies and inter-governmental forums with the mandate to deal with issues relating to the law of the sea. In addition, the Commission should take into account the progress of the work in other relevant forums on the law of the sea in order to ensure consistency and complementarity. A suggestion was also made to include the international and historical responsibility of States for sea-level rise in the Study Group's programme of work.

54. Support was expressed for various declarations by States calling for the acceptance of defined baselines in perpetuity irrespective of the possible implications of sea-level rise, in particular the declaration made by the Polynesian Leaders Group on 16 July 2015 (the Taputapuatea Declaration on Climate Change), and the declaration by eight Pacific Island leaders (the Delap Commitment on Securing Our Common Wealth of Oceans: reshaping the future to take control of the fisheries), adopted in March 2018.

3. Future work

55. Several delegations expressed their commitment to fully supporting the topic and closely following its outcomes, with some indicating that they had taken due note of the Commission's request for examples of States' practice that may be relevant to sea-level rise in relation to the law of the sea or subsequent subtopics, noting that they would provide relevant information in due course.

56. It was also stated that, if the final form of the outcome of the consideration of the topic were to be an analytical study, it should reaffirm the unified character of the United Nations Convention on the Law of the Sea and the vital importance of preserving its integrity, and ought to be prepared in close dialogue with States.

57. With a view to ensuring transparency in the consideration of the topic, the view was expressed that the Commission would eventually revert to its normal procedure, perhaps by establishing a new system of joint Special Rapporteurs, or that its deliberations would otherwise be published regularly so that States could comment on them each year. The wish was also expressed that the Commission engage with Member States across all regions, taking into account the diverse interests of States, including those that were particularly vulnerable to the threat of rising sea levels.

58. With regard to the subtopics, the view was expressed that the Study Group should focus on the issues related to the protection of persons affected by sea-level rise and that the second subtopic on issues related to statehood might be of interest to academia but did not seem to be appropriate for the Commission, or required further clarification in the context of the current study. The point was also made supporting the Study Group's consideration of the potential effects of rising sea levels on questions of statehood and migration.

E. Other decisions and conclusions of the Commission

1. Future work of the Commission

59. The view was once more expressed that there were too many topics on the programme of work of the Commission for it to realistically analyse within its existing capacities. To this end, it was noted that the Commission should slow down the pace of its work in order to provide States with an opportunity to more carefully analyse its output. More concentrated focus on the topics included in the current programme of work was called for by several delegations. Moreover, it was considered that the Commission should focus on the conclusion of topics included in the programme of work. The Commission was urged to consider carefully the inclusion of new topics in its programme of work, with a suggestion being made that no further topics be added to the programme of work at the seventy-second session of the Commission. Conversely, the view was expressed that the inclusion of new topics in the Commission's programme of work was appropriate given the number of topics concluded during the quinquennium.

60. A number of delegations called on the Commission to include the topic "Universal jurisdiction" in its programme of work. The view was expressed regretting that the topic had not been included in the programme of work during the seventy-first session. Other delegations, however, indicated that the topic was an item still under discussion in the Sixth Committee, while also expressing their concern about the parameters of a potential study on the topic.

61. Also proposed for inclusion on the programme of work of the Commission were the topics "Evidence before international courts and tribunals", "The settlement of disputes to which international organizations are parties" and "Extraterritorial jurisdiction."

62. The inclusion of the topic "Sea-level rise in relation to international law" in the programme of work of the Commission was welcomed by delegations. It was highlighted that the topic met the criteria for the selection of topics set out by the Commission. Several delegations supported its proposed scope and welcomed the proposed programme of work of the Study Group. The creation of an open-ended study group on the topic was also generally welcomed. Nonetheless, the view was expressed cautioning that the Study Group format risked harming the transparency of the debates on the topic.

63. Several delegations welcomed the inclusion in the Commission's long-term programme of work of the topic "Prevention and repression of piracy and armed robbery at sea", with some delegations highlighting that further study of the topic would contribute to its legal certainty. The Commission was also called upon to ensure that the study on the topic did not conflict with existing treaties and frameworks on the law of the sea, notably with the United Nations Convention on the Law of the Sea.

64. Nevertheless, doubts were expressed by other delegations on the inclusion of the topic, which noted that its inclusion was premature, that the Commission had not satisfied the criteria for the selection of the topic and that there was an extensive body of international law on piracy that did not need further clarification.

65. With respect to the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", some delegations had doubts regarding the need for work on the topic as the Commission's prior work on diplomatic protection and State responsibility, as well as the studies undertaken by various other bodies, already contained an analysis of existing best practices and could offer good guidance on the subject. Some

delegations expressed support for the inclusion of the topic and viewed its consideration complementary.

66. The suggestion was made for the Commission to consider such topics as the right to development in the context of the Sustainable Development Goals and the legal aspects of artificial intelligence and other new technologies.

2. Programme and working methods of the Commission

67. Some delegations noted that it would be valuable to consider the workload and working methods of the Commission and called for the consideration of topics to be addressed in the future. In this connection, the Commission should abide by its own recommendations on the criteria for selection of topics. Some other delegations indicated that the Commission should provide detailed reasoning for the inclusion of new topics in its programme of work.

68. The Commission was also urged to consider, when making decisions about the addition of new topics in its programme of work, a balanced approach in the selection of Special Rapporteurs so as to enhance the legitimacy of its work.

69. The Commission was called on to provide more clarity on the taxonomy of its products by several delegations, particularly with regard to the usage of "guidelines" and "principles". The Commission was encouraged to produce a variety of outcomes, such as guidelines and principles, in order to provide States with the fullest set of options to take advantage of the expertise of the Commission, while another suggestion was made that the question of outputs proposed by the Commission be subject to discussion in the Sixth Committee.

70. The suggestion was made that the Commission make clear in its work products the distinction between the provisions reflecting the codification of existing international law and the ones reflecting progressive development.

71. Some other delegations highlighted the importance of encouraging the linguistic diversity of the sources of the products of the Commission. To this end, the Secretariat was called upon to ensure that more resources were allocated for the translation of the Commission's work products.

72. Some delegations proposed methods for enhancing the interaction between the Commission and the Sixth Committee, including the need for more guidance on the strategic and policy priorities from the General Assembly and the possible preparation by the Commission of questions requiring simple and direct answers when requesting information on State practice. Moreover, the Commission was requested to ensure that its working methods did not reduce the opportunity for States to comment on and inform the Commission's work. Some delegations also expressed concern at the speed with which important topics were being dealt with by the Commission. The importance of taking into account the priorities of States was highlighted by some delegations.

73. The publication of an advanced copy of the Commission's report was encouraged to allow States to better prepare their interventions and comments on the report.

74. Support for the International Law Seminar was also expressed by delegations.

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

On first reading

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

1. General comments

75. Delegations welcomed the adoption of the draft conclusions on first reading on the topic, with several delegations commending their value as a practical guide for identifying peremptory norms and their legal effects.

76. Some delegations observed that the draft conclusions followed closely existing international law, in particular the 1969 Vienna Convention on the Law of Treaties (the "1969 Vienna Convention"), the rules on the responsibility of States for internationally wrongful acts and the guide to practice on reservations to treaties. It was also noted that the added value of the draft conclusions may only lie in bringing under a single instrument a number of consolidated notions of international law relevant to *jus cogens*. Other delegations asked for more clarification regarding the relationship between the draft conclusions and the 1969 Vienna Convention. It was pointed out that the effects of *jus cogens* nowadays extend beyond articles 53 and 64 of the 1969 Vienna Convention.

77. Several delegations supported the Commission's procedural focus on the identification and consequences of *jus cogens*. While emphasizing the importance of the topic, some delegations reiterated the need for a cautious approach in order to secure wide support from States and for reliance on State practice, which was not always the case with the draft conclusions on first reading. A number of delegations further pointed to the paucity of relevant practice, which made codification difficult and did not justify the expansive approach taken by the Commission. Several delegations also noted that the Special Rapporteur had relied on theory rather than on State practice, which was considered to risk undermining the legal authority and accuracy of the draft conclusions. While some delegations emphasized that the Commission should not attempt to provide answers to theoretical debates, others suggested that the topic should be approached through a conceptual and analytical lens.

78. Some delegations expressed concern over the apparent method of work on the topic, regretting the fact that a full set of draft conclusions and commentaries thereto had only been presented to the plenary session of the Commission once a full set of conclusions and commentaries had been adopted.

79. Several delegations supported the decision not to address regional *jus cogens*, but it may have been useful to also justify this decision in the commentaries.

2. Specific comments

80. There was support expressed for **draft conclusion 1** (scope), which would not extend to the content of *jus cogens*. The draft conclusions should not be absolute or restrictive in their scope. Some delegations expressed their agreement with the definition provided for in **draft conclusion 2** (definition of a peremptory norm of general international law (*jus cogens*)), which relied on article 53 of the 1969 Vienna Convention.

81. Some delegations welcomed the confirmation in **draft conclusion 3** (general nature of peremptory norms of general international law (*jus cogens*)) that *jus cogens* norms are universally applicable and therefore do not apply on a regional or bilateral

basis. It was noted that *jus cogens* is applicable to all subjects of international law, including international organizations. Several delegations welcomed the reference to fundamental values, which should also serve as a criterion for the identification of *jus cogens*. Others emphasized that the Commission should clarify that the references to fundamental values do not affect the definition of *jus cogens*. Some delegations noted that draft conclusion 3 was superfluous and should be deleted. It was observed that the reference to hierarchical superiority without exception in draft conclusion 3 should take into account the distinction between procedural and substantive rules of international law.

82. In relation to **draft conclusion 4** (criteria for the identification of a peremptory norm of general international law (*jus cogens*)), it was noted that the Commission should strictly adhere to the criteria for the identification of *jus cogens*. Concern was expressed regarding the ostensible positive law (*jus dispositivum*) basis of peremptory norms as "super custom", which should rather be based on natural or moral law (*jus naturale*). It was also observed that the Charter of the United Nations constitutes its own source of *jus cogens*. The Commission was asked to further clarify the application of the criteria stipulated in draft conclusion 4, for instance by providing more examples based on case law or State practice.

83. It was observed that **draft conclusion 5** (bases for peremptory norms of general international law (*jus cogens*)) had limited utility as there was no substitute for establishing the existence of the relevant criteria for *jus cogens*. Several delegations supported the inclusion of paragraph 2. It was also suggested that the Commission include a draft conclusion on general principles of law, and noted that the Commission should further clarify the role of general principles of law and treaty law in the formation of peremptory norms of general international law (*jus cogens*). It was proposed that paragraph 2 should also recognize that treaty provisions and general principles of international law may "reflect" bases for development of *jus cogens*. Others noted that a general principle of law could not serve as a basis for *jus cogens*.

84. Several delegations emphasized the importance of acceptance and recognition, as stated in **draft conclusion 6** (acceptance and recognition), in identifying *jus cogens*. In relation to **draft conclusion 7** (international community of States as a whole), some delegations noted that the notion "a very large majority" should be carefully interpreted to ensure that the community of States as a whole was considered. In that context, several delegations welcomed the reference to acceptance and recognition across regions, legal systems and cultures. Further clarifications regarding the threshold of "a very large majority" were sought, including examples from case law. It was noted that the threshold should not only be "a very large majority" but virtually universal acceptance and recognition, in line with article 53 of the 1969 Vienna Convention. It was also proposed that the draft conclusion should refer to "an overwhelming and representative majority of States". Other delegations supported the reference to a "very large majority", which the commentary interpreted as "overwhelming majority". It was also observed that the difference between acceptance by a very large majority and "total acceptance" was negligible.

85. Regarding **draft conclusion 8** (evidence of acceptance and recognition), the Commission was requested to apply the different methods of identifying *jus cogens* more rigorously and distinguish them from the identification of customary international law; in particular, a resolution by an international organization could not serve as a means to identify *jus cogens*. The practice of non-State actors should not be used. Other delegations noted that the list in paragraph 2 was not exhaustive and should include resolutions of regional organizations of States. It was suggested that the status of ratification of treaties should be included in the list. The view was expressed that draft conclusion 8 did not adequately reflect the cumulative requirement of "acceptance *and* recognition". Moreover, draft conclusions 8 and 9

(subsidiary means for the determination of the peremptory character of norms of general international law) did not distinguish between acceptance and recognition of *jus cogens* norms as such, and norms of general international law that are not *jus cogens*. In relation to **draft conclusion 9**, some delegations noted that the subsidiary means should not supersede the practice of States and international organizations, while others emphasized the important role of courts. A concern was voiced that draft conclusion 9 seemed to exclude decisions by national courts.

86. Some delegations emphasized the importance of **draft conclusion 10** (treaties conflicting with a peremptory norm of general international law (*jus cogens*)). The commentaries to articles 53 and 64 might be very helpful in affirming that it is the nature of its subject matter, rather than its form of adoption, which gives a general international law norm the status of *jus cogens*. It was reiterated that the analysis with regard to draft conclusions 10 and 11 should take into account international organizations. Some delegations requested that the Commission elaborate on who determines the coming into existence of a new peremptory norm and suggested that it should be only States party to a treaty that should be able to do so.

87. In relation to **draft conclusion 11** (separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)), the Commission was encouraged to include examples concerning the distinction between "void in whole" and "void in part". Some delegations did not support paragraph 1 of draft conclusion 11. While some delegations supported draft conclusion 11, others were not in favour of paragraph 2. It was appreciated that **draft conclusion 12** (consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)) followed the wording of article 71 of the 1969 Vienna Convention. Some delegations asked for further clarification whether a reservation under paragraph 1 of **draft conclusion 13** (absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)) was permissible at all.

88. In relation to paragraph 1 of **draft conclusion 14** (rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)), it was suggested that reference should be made to the process of formation of a norm of customary international law, which would not come into existence if it was in conflict with a peremptory norm of general international law (*jus cogens*). While some delegations noted that the two elements of custom should be used to determine *jus cogens*, others reiterated that those elements could not give rise to a *jus cogens* norm. It should be clarified that customary international law in contradiction with *jus cogens* did not exist. Some delegations invited the Commission to further explain the exclusion of the application of the persistent objector rule. It was noted that, given that virtually universal acceptance and recognition were legally required, it was doubtful that a *jus cogens* norm could indeed develop and crystallize in the face of significant objection. Accordingly, the persistent objector rule would not apply to peremptory norms.

89. Some delegations would have preferred an explicit reference to the Security Council in **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*)), while others supported the omission of such a reference. On the one hand, it was noted that not even the Charter of the United Nations could be exempted from the application of *jus cogens*, and that the Commission should not shy away from recognizing that the Security Council was bound by peremptory norms. On the other hand, it was emphasized that the Security Council was at the core of the collective security mechanism of the United Nations and that it was inconceivable that its resolutions would conflict with *jus cogens*. Some delegations noted that there was not sufficient State practice to support the conclusion

that a State could refuse compliance with a Security Council resolution based on an assertion of a breach of a *jus cogens* norm. The Commission was asked to clarify whether the draft conclusion constituted progressive development of international law.

90. **Draft conclusion 17** (peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)) was commended for making a valuable contribution to explaining the relationship between *jus cogens* norms and *erga omnes* obligations. Some delegations supported **draft conclusion 19** (particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)) and noted that it found confirmation in the recent *Chagos* advisory opinion of the International Court of Justice.[10] The importance of paragraph 2 of draft conclusion 19 was emphasized. While it was noted that draft conclusion 19 strengthened the work of the Commission on the law of international responsibility, the Commission was asked to clarify the additional consequences referred to in paragraph 4. Opposition was expressed to attaching legal consequences to the violation of a peremptory norm of general international law that went beyond those stipulated in the 1969 Vienna Convention. The Commission was requested to reconsider whether only serious breaches of *jus cogens* implied a duty of non-recognition.

91. In relation to **draft conclusion 21** (procedural requirements), some delegations supported the development of tertiary norms on international dispute settlement and welcomed the inclusion of a procedural draft conclusion that underlined that the far-reaching consequences of a conflict with *jus cogens* may not be triggered automatically. It was suggested that the draft conclusion address the situation in which the jurisdiction of the International Court of Justice could not be activated owing to the lack of consent of States and that it should be clarified whether the procedure under articles 65 to 67 of the 1969 Vienna Convention really applied in case of article 64 situations. It was pointed out that only a State party to a treaty should be able to make the determination of invalidity due to a treaty's conflict with *jus cogens*. The Commission was asked to clarify what kinds of "measures" could be taken and why it chose a three-month period. Others suggested the deletion of draft conclusion 21 because the draft conclusions were not draft articles proposed for inclusion in a convention. Some delegations observed that the draft conclusion did not constitute customary international law. It was considered problematic to include a provision on dispute settlement. Some delegations noted that the reference to the International Court of Justice in draft conclusion 21 inadvertently limited the options of dispute settlement in Article 33 of the Charter of the United Nations, and others highlighted that priority should be given to those peaceful means of dispute settlement. Considering the procedural nature of the draft conclusion and the use of terms such as "is to" and "are to", the Commission was requested to clarify its intention regarding the future of the draft conclusions.

92. With regard to **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 identification of norms as constituting *jus cogens* could have severe consequences for the actions of States in areas such as extradition, international legal assistance and obligations to extradite or prosecute in cases linked to international crimes. While some delegations welcomed that the Commission had not included provisions on criminal jurisdiction and exceptions to immunity *ratione materiae*, others expressed regret that it had not addressed these issues. It was also

[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019.

observed that the elaboration of a "without prejudice" clause was not in line with the scope of the topic and that the clause should be deleted.

93. Several delegations welcomed the inclusion of an illustrative list in the annex to **draft conclusion 23** (non-exhaustive list). However, it was emphasized that a list should result from a careful, elaborated and inductive analysis of the practice and legal opinions of States. It was suggested that the formulation "most frequently cited candidates for the status of *jus cogens*" be used so as to avoid requiring the Commission to examine each of the criteria listed in Part Two of the draft conclusions. Other delegations pointed out that it was currently not clear on what basis a norm was included in the list. Some delegations pointed out that the list might send a false or counterproductive message to States regarding those norms that were not included. Some delegations stated that if the list was retained it should not go further than the current neutral, descriptive statement of norms to which the Commission had previously referred.

94. It was noted that there would be value in the elaboration of a list that the Commission today saw as containing rules of *jus cogens* based on the practice of States, international organizations and courts and tribunals. It was also asked why the list did not include all the norms the Commission had identified as *jus cogens* in its previous work, such as "obligations 'of essential importance for the safeguarding and preservation of the human environment or of the seas'". Others noted that certain norms in the Charter of the United Nations constituted *jus cogens*, and that the principles listed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex) and "prohibition of terrorism" should be included in the list.

95. Several delegations expressed reservations regarding the illustrative list but noted that it was without prejudice to the existence or subsequent emergence of new *jus cogens*. The importance of the clarifications in the commentary to draft conclusion 23 was noted. Other delegations pointed out that no matter how it was described, the status of the list would cause confusion and would be treated by some readers as exhaustive and/or a codification of existing *jus cogens* norms, which could impede the natural evolution of *jus cogens* norms. Moreover, the draft conclusion and the annex could give the wrong impression that the Commission was the main body to recognize and identify *jus cogens* rules.

96. Some delegations preferred that the Commission did not include a list of peremptory norms of international law (*jus cogens*). It was noted that the Commission failed to provide convincing arguments for the inclusion of those norms in accordance with its own criteria for the identification of *jus cogens*. It was also emphasized that the Commission's previous references to *jus cogens* norms were not based on the kind of inquiry mandated by the draft conclusions themselves. It was observed that a list was likely to generate significant disagreement among States and dilute the concept of *jus cogens*. The inclusion of a list would change the nature of the topic, deviating from the codification of secondary norms. It was noted that the far-reaching consequences of the list could outweigh its benefits. As a compromise, it was proposed that the Commission only include examples of peremptory norms of general international law (*jus cogens*) in the commentaries, or that the Commission should make a reference to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts.

97. In relation to the specific norms included in the annex to the draft conclusions, some delegations noted that those norms lacked an agreed definition, which would make it difficult to assess or apply these norms. Several delegations requested that the term "prohibition of aggression" be further clarified and possibly 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. While all *jus cogens* norms constituted obligations *erga omnes*, the reverse was not always the case, as illustrated by the right to self-determination. Moreover, it was questioned which norms of international humanitarian law were included in the reference to "basic rules of international humanitarian law", and whether such ambiguous norms should be included in the list at all.

3. Future work

98. Some delegations raised questions about the future intended status of the text. It was noted that if the Commission intends to advance the understanding on peremptory norms of general international law (*jus cogens*), a study may be better suited. If it aims at devising a practical tool, it would be preferable to see a step-by-step drafting process with input by States.

B. Protection of the environment in relation to armed conflicts

1. General comments

99. Delegations commended the adoption of the 28 draft principles and commentaries thereto on first reading. Regarding the normative character of the draft principles, some delegations welcomed the combination of *lex lata* and *lex ferenda* and considered that the commentary provided useful clarification on the legal status of each draft principle, while other delegations found the draft principles to lack sufficient normative coherence.

100. Regarding the applicability of the draft principles to both international and non-international armed conflicts, various views were expressed. Several delegations considered that the draft principles should govern both types of conflict, particularly given the prevalence of non-international armed conflicts today, while other delegations emphasized the difference between the rules applicable to each type. A number of delegations welcomed the discussion in the commentaries concerning non-State actors, especially relating to private actors and corporate due diligence. However, it was also submitted that the current draft principles did not sufficiently address the responsibility and accountability of non-State armed groups with respect to damage to the environment. The definition of environment was likewise discussed, and several delegations noted the need to clarify and harmonize the use of the terms "environment" and "natural environment" across the draft principles.

2. Specific comments

101. Concerning **draft principle 1** (scope), the temporal approach taken by the Commission, which was to consider the phases before, during and after armed conflicts, found overall support, as different legal regimes could apply during the different phases. However, the point was also raised that the temporal phases were not entirely clearly delineated and interlinked and that more emphasis could be placed on the phase during armed conflicts.

102. On **draft principle 2** (purpose), some delegations sought further elaboration as to what was encompassed within the scope of the term "preventive measures".

103. Regarding **draft principle 3** [4] (measures to enhance the protection of the environment), concern was expressed regarding the reference in the commentary to common article 1 of the Geneva Conventions.

104**. Draft principle 4** [I-(x),5] (designation of protected zones) was welcomed by several delegations. The complementarity and possible overlap with draft principle 17

with respect to protected zones was noted. It was also emphasized by some that adequate measures should be taken to ensure the special protection of those areas with indigenous presence. Some delegations also called for a multilateral treaty on the designation of protected areas while others posited that the use of the term "protected zone" was inappropriate.

105. **Draft principle 5** [6] (protection of the environment of indigenous peoples) was welcomed by some delegations, although others were of the view that the concept of "indigenous peoples" did not enjoy broad consensus in the context of the law of armed conflicts or customary international law. The view was also expressed that draft principle 5 was not directly related to the topic.

106. In respect of **draft principle 6** [7] (agreements concerning the presence of military forces in relation to armed conflict), it was highlighted that the need for such environmental protection provisions as contained in the draft principle was not present in conventional practice.

107. Concerning **draft principle 7** [8] (peace operations), it was suggested that the draft principle could serve to help mitigate and remediate the negative impact of peace operations on the environment. Nonetheless, the question was raised of how compensation and reparations would be determined, including between States and international organizations.

108. Several delegations welcomed the adoption of **draft principle 8** (human displacement). The view was also expressed that the draft principle should apply to the territories through which displaced people transited. Some maintained that its application could be useful to the situation of occupation. Likewise, the reference of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa was appreciated. It was observed by others that draft principle 8 purported to introduce new substantive legal obligations. The Commission was also asked to further clarify what was meant by the term "displacement" and what kinds of "other relevant actors" were included under draft principle 8. It was put forward that the obligation to receive civilian population under satisfactory conditions should take priority over environmental effects. It was also expressed that draft principle 8 should be viewed as establishing a burden-sharing mechanism to help mitigate the environmental consequences of displacement.

109. A number of delegations welcomed the adoption of **draft principle 9** (State responsibility) regarding the obligation of a State to make full reparation for damage, including with respect to damage to the environment in and of itself. However, some delegations considered the non-prejudice clause in paragraph 2 to be unnecessary. It was also noted that the scope of reparation for environmental damage remained unclear. It was suggested that it may have been preferable to retain the language proposed by the Special Rapporteur, namely that the notion of "damage" included damage to ecosystem services irrespective of whether the damaged goods and services were traded in the market or placed in economic use. The view was also expressed that it should be possible to establish responsibility for non-prohibited activities as long as those could potentially cause damage to third parties. It was put forward that the Commission could study the enforcement mechanisms to ensure that States were held accountable in this context.

110. The inclusion of **draft principle 10** (corporate due diligence) and **draft principle 11** (corporate liability) saw general support, although some found their wording ambiguous and wondered whether the draft principles also covered private military and security companies. Some delegations were unconvinced by those draft principles, finding the norms applicable to the activities of private corporations as relevant in times of armed conflict as in peacetime, or pointing out that the regulation of activities of a company of an Occupying Power in an occupied territory could raise

questions on lawfulness, on which only some States had legislation. Concerning the scope of the draft principles, it was expressed that they should address also non-State armed groups. Additionally, the view was expressed that the responsibility of the State of domicile of the corporation should be greater than that of the State of operation, including because the latter could face governance challenges arising from armed conflict. It was also suggested that non-binding guidelines could be more effective.

111. Specifically, with regard to **draft principle 11** (corporate liability), it was thought that holding such entities liable would require adequate and effective procedures and fair and equitable remedies and reparations for the individual and communities that were the victims of such harm. In that regard, the Commission was also asked to consider the possibility of extraterritorial jurisdiction and address situations where, for instance, the judicial system of a State was ineffective. It was likewise emphasized that the negative effects of environmental degradation on human health should be sanctioned through national measures. A proposal was made to address affiliate entities in addition to subsidiaries, irrespective of the affiliate's position in the corporate structure.

112. Several delegations commended the Commission for the adoption of **draft principle 12** (Martens Clause with respect to the protection of the environment in relation to armed conflict). However, doubt was expressed as to whether principle of humanity was applicable in the context of the draft principles and whether the Martens Clause was appropriate since there was no reference to it in international instruments regulating environmental protection. It was suggested that it would be useful to explain that the principle of humanity did not imply a humanization of the concept of nature, even though the draft principles rightly addressed the threat to vital human needs caused by environmental destruction.

113. **Draft principle 13** [II-1, 9] (general protection of the natural environment during armed conflict) received general support, for instance for reflecting the intrinsic value of the environment. Appreciation was likewise expressed for the sense of solidarity conveyed by the draft principle as well as the recognition that attacks against the natural environment were prohibited unless it had become a military objective. It was pointed out that reference should be made to paragraph 3 of article 35 of the 1977 Protocol I additional to the Geneva Conventions.[11] The view was also expressed that the duty of care enunciated in the second paragraph should be considered together with the no-harm principle of international environmental law, given also that both entailed a due diligence standard. Concern was expressed that the draft principle allowed for the natural environment to be attacked if it was a military objective. It was also noted in that regard that the draft principle could inadvertently leave out situations where parts of the natural environment were attacked during military exercises.

114. **Draft principle 14** [II-2, 10] (application of the law of armed conflict to the natural environment) was welcomed. Although it was accepted that international humanitarian law applied, the view was expressed that there was no basis for presenting the protection of the environment as one of its objectives. It was also stated that the draft principle should draw a link between the rule concerning precautions during attack and the due regard clause as contained in certain instruments.

115. With respect to **draft principle 15** [II-3, 11] (environmental considerations), elucidation was sought regarding the meaning of the term "environmental considerations". It was also observed that the reference to the principles of proportionality and military necessity in draft principle 15 only addressed *ius in bello*; however, issues relating to *ius ad bellum* should also be covered. Similarly, it was

[11] Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

observed that the relationship between the law of armed conflicts and environmental law was not made sufficiently clear within the draft principles, as well as that draft principles 13, 14 and 15 could be merged and shortened.

116. Relating to **draft principle 16** [II-4, 12] (prohibition of reprisals), appreciation was expressed for the recognition of the intrinsic value of the natural environment and that reprisals against the natural environment are prohibited, while it was also pointed out that reference should be made to paragraph 3 of article 35 of the 1977 Protocol I additional to the Geneva Conventions of 1949, which supports the view that environmental protection in international humanitarian law has an intrinsic value. It was highlighted that a blanket prohibition against reprisals did not reflect the current state of customary international law and reservations by States to article 55, paragraph 2, of the Protocol I additional to the Geneva Conventions, and was thus not accepted.

117. Several delegations commended **draft principle 17** [II-5, 13] (protected zones). However, it was suggested that the draft principle should cover also sites whose protected status had not been established by agreement but through decisions of relevant treaty bodies, such as natural sites of outstanding universal value included in the World Heritage List under the Convention for the Protection of the World Cultural and Natural Heritage.[12] It was also recommended that the status and protection of a site under international law should be respected as long as it was not used as a military object and whenever such site had been designated as being of major environmental and cultural importance regardless of how that designation took place. It was suggested that the exclusion of oil platforms and other oil production and storage facilities from the list of vital infrastructures exempt from military targets would run counter to the purposes of drafters. Clarification was sought as to whether protected zones that were established other than by agreement would have the same protection as those established under agreement and whether both environmental and cultural conditions needed to be fulfilled for an area to qualify as a protected zone. In that connection, the view was expressed that draft principles 4 and 17 could be merged and harmonized.

118. Several delegations welcomed the adoption **draft principle 18** (prohibition of pillage). The importance of the draft principle was noted, especially in terms of its application to situations of occupation and after armed conflict, and it was observed that the provision would fit better in the part concerning situations of occupation or general application. It was regarded as an important provision to be incorporated into the body of rules on environmental protection in armed conflicts. It was also suggested that the commentary provide that any exploration or exploitation of natural resources in an occupied territory ought to be in accordance with the wishes and the interests of the local population in the exercise of their right to self-determination.

119. There was support for **draft principle 19** (environmental modification techniques). In terms of its scope, it was asked whether the prohibition of the use of environmental modification techniques also applied in non-international armed conflicts and whether it would have applicability beyond the period during the armed conflict and thereafter. The view was also advanced that the concept of "environment" implied a common good of all humanity and should not be reduced to natural resources available in a given area at a given time.

120. Appreciation was expressed for **draft principle 20** [19] (general obligations of an Occupying Power), **draft principle 21** [20] (sustainable use of natural resources) and **draft principle 22** [21] (due diligence), located in Part Four dealing with situations of occupation. It was suggested that the term "significant harm" could be

[12] Paris, 16 November 1972, United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151.

revised. Concern was expressed that draft principles 20 and 21 could be understood as granting latitude to an Occupying Power to use natural resources. The question was also raised why the term "population of the occupied territory" has been used instead of "protected persons" in the sense of article 4 of 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV).[13] It was suggested that the formulation of the two draft principles needs to be reviewed.

121. Concerning draft principle 20, appreciation was expressed regarding the fact that it made a link with other branches of international law, such as international environmental law and human rights law. In that connection, the point was advanced that the protection of a healthy environment had gained the status of a human right. It was posited in that context that there was a presumption in favour of the maintenance of the existing legal order and that the occupying State as a temporary authority should respect the essential interests of the territorial sovereign.

122. Regarding draft principle 21, it was observed that it should be considered in conjunction with the illegal exploitation of natural resources and the prohibition of pillage. It was also pointed out that, in that context, States shall exercise full sovereignty over their wealth, natural resources and economic activities. It was suggested that the commentary could provide that States should abstain from recognizing situations of illegal occupation and from engaging in economic or other forms of relationship with the Occupying Power. It was also emphasized that the duties of an Occupying Power regarding natural resources could not be interpreted as creating any grounds for territorial claims. The necessity of safeguarding the environment for future generations was stressed, and it was suggested that the intergenerational equity principle be integrated into the draft principle. The importance of curtailing the Occupying Power's right to exploit the natural resources of the occupied territory was underlined, while it was also highlighted that the temporary administration of the territory prevented the Occupying Power from using the resources of the occupied country or territory for its own domestic purposes. The applicability of the right to self-determination in that context was also reiterated.

123. With regard to the commentary to draft principle 22, a drafting suggestion was made to replace "shared natural resources" with "transboundary natural resources" and "international watercourses and transboundary aquifers" with "transboundary waters and aquifers".

124. **Draft principle 23** [14] (peace process) was welcomed, in particular for taking into account the drafting of modern peace agreements that already included provisions on environmental damage.

125. Appreciation was expressed for **draft principle 24** [18] (sharing and granting access to information), and the inclusion of important provisions on post-conflict measures, in particular the need for cooperation and the sharing and granting of access to information. A request was, nevertheless, made for examples of categories of information to which the draft principle could apply.

126. **Draft principle 26** (relief and assistance) was generally appreciated, while more discussion in the commentary regarding the modalities of assistance for communities was called for. It was likewise wondered whether "encouraging States" to take the measures in question was sufficiently forceful, and a drafting proposal was made to introduce the term "should". Another suggestion was made to add a provision clarifying that a State was not relieved from its secondary obligations under the law of State responsibility. It was also maintained that the Commission should establish more concretely the importance of mitigating the impact of environmental damage on public health and on those who depend on the environment for their livelihoods. The

[13] Geneva, 12 August 1949, United Nations, *Treaty Series*, No. 973, pp. 287 *et seq*.

view was also expressed that, although the draft principle highlighted the collective responsibility of all States to commit to relief and assistance, it should be viewed in light of the common but differentiated responsibilities of each State. Appreciation was expressed for draft principles 27 and 28, and for the intention to eliminate remnants of war that could have harmful effects on the environment.

127. **Draft principle 27** [16] (remnants of war) received general support, as the hazardous remnants of war were viewed as having an enormous environmental footprint. However, it was also advised that it should be made clear that an obligation to act would only arise after an environmental impact assessment had concluded that action was viable, necessary and appropriate. On the other hand, it was also submitted that the draft principle purported to expand certain obligations under the 2001 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.[14]

128. Several delegations appreciated that **draft principle 28** [17] (remnants of war at sea) reflected the views of States. Given that scope could also encompass leaking wrecks or warships, jurisdiction upon and removal of which are regulated by general international law, it was suggested that a reference to the applicable rules of international law be added, including the 1982 United Nations Convention on the Law of the Sea. The importance of cooperation by coastal States in clearing the remnants of war was also emphasized.

On second reading

Crimes against humanity

1. General comments

129. Delegations generally welcomed the adoption, on second reading, of the entire set of draft articles on the topic, with commentaries thereto.

130. A number of delegations supported the recommendation by the Commission that a convention be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. It was emphasized that such a convention would fill an important gap in the existing legal framework, contributing to the fight against impunity for crimes against humanity. In relation to an initiative to conclude a treaty for mutual legal assistance in respect of the most serious international crimes, several delegations stressed that a future convention and the initiative should be complementary while avoiding duplication. Other delegations, however, called for further consideration of the draft articles and highlighted the need to reach consensus before deciding on the question of elaborating a convention.

131. Attention was drawn to the importance of taking into account the diversity of national systems, including States parties and non-parties to the Rome Statute of the International Criminal Court, as well as diversity within national systems. While several delegations observed that the draft articles would complement the Rome Statute, it was cautioned that any inconsistency between the two instruments should be avoided. Some delegations suggested that the draft articles include safeguards against abuse, particularly to address concerns with the principle of universal jurisdiction and the risk of arbitrary or politically motivated proceedings.

[14] Geneva, 10 October 1980, United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137.

2. Specific comments

132. On the **preamble**, the reference to principles embodied in the Charter of the United Nations was welcomed, and the prohibition on the use of force was recalled. While some delegations supported indicating the prohibition of crimes against humanity as a peremptory norm, it was suggested that the question required further deliberation. Differing views were expressed as to whether the Rome Statute should be referred to in the preamble.

133. Some delegations expressed a preference for including genocide and war crimes in **draft article 1** (scope).

134. Concerning **draft article 2** (definition of crimes against humanity), clarifications were sought in respect of paragraph 1 (h) and (g). Suggestions were also made to define the crime of trafficking in persons as a separate crime from "enslavement" under paragraph 2 (c), to include transgender persons in the definition of "forced pregnancy" under paragraph 2 (f), and to broaden the definition of "enforced disappearance of persons" under paragraph 2 (i). Several delegations welcomed the Commission's decision not to define the term "gender", which would allow the term to be applied based on an evolving understanding as to its meaning, although other delegations criticized such an approach. While some delegations appreciated the inclusion of paragraph 3, it raised concerns about legal certainty. It was suggested that paragraph 3 adopt a more dynamic formulation to incorporate amendments to the Rome Statute.

135. Several delegations expressed support for **draft article 3** (general obligations) and **draft article 4** (obligation of prevention). Nonetheless, draft article 3, paragraph 1, raised concerns with issues of responsibility of States for internationally wrongful acts. In relation to draft article 4, doubts were expressed as to whether paragraph (b), which referred to cooperation with intergovernmental or other organizations, was too broadly drafted.

136. While **draft article 5** (*non-refoulement*) was welcomed by some delegations, it was suggested that paragraph 2 be linked to draft article 2.

137. Some delegations voiced support for **draft article 6** (criminalization under national law) and **draft article 7** (establishment of national jurisdiction). In relation to draft article 6, the view was expressed that a certain degree of discretion should be granted to States in the process of criminalization under national laws. It was noted that paragraph 2, which did not expressly refer to "incitement" and "conspiracy", did not affect the position under customary international law. Some delegations noted that paragraph 5 had no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, although it was cautioned that confusion could arise in practice regarding the distinction between criminal responsibility and immunity from foreign criminal jurisdiction. It was suggested that paragraph 5 specify that the official would be held criminally responsible in accordance with the law of the State of nationality. Moreover, concern was expressed that paragraph 6 could pose difficulties in implementation. Some delegations regretted that the death penalty was not expressly excluded in paragraph 7. While paragraph 8 received support, some delegations observed that the issue of criminal liability of legal persons remained controversial. As to draft article 7, clarifications were sought regarding the scope of the obligation of States to establish jurisdiction and the issue of priority of different bases of jurisdiction.

138. Some delegations expressed support for **draft article 8** (investigation), **draft article 9** (preliminary measures when an alleged offender is present) and **draft article 10** (*aut dedere aut judicare*). Doubt was expressed, however, regarding the reference in draft article 10 to competent international criminal courts or tribunals.

139. **Draft article 11** (fair treatment of the alleged offender) and **draft article 12** (victims, witnesses and others) were welcomed by some delegations. Regarding draft article 12, the absence of a definition of "victims" and the issues of reparation in paragraph 3 raised concerns.

140. Several delegations supported the inclusion of **draft article 13** (extradition), **draft article 14** (mutual legal assistance) and the draft annex. In relation to draft article 13, it was suggested that paragraph 1 be expanded to require States to expedite extradition. The sovereign right of States to establish jurisdiction for crimes committed in their territory or by their nationals was underscored. The view was expressed that paragraph 12 required a requested State to give due consideration to the extradition requests of other States, not only of the State in the territory under whose jurisdiction the alleged offence occurred. Concern was expressed regarding the absence of a dual criminality requirement. Further consideration of a provision on transit of persons in custody or extradited persons was also called for. Regarding draft article 14, some delegations welcomed the reference to cooperation with international mechanisms envisaged in paragraph 9, while some other delegations expressed doubts.

141. In relation to **draft article 15** (settlement of disputes), a suggestion was made to include a provision establishing the compulsory jurisdiction of the International Court of Justice. It was recalled that the jurisdiction of the Court was based on State consent.

142. A number of delegations made drafting proposals or specific comments on other aspects of the draft articles, such as the absence of a monitoring mechanism, the question of addressing amnesties and immunities, and the issue of reservations.