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Chair: Mr. Jaiteh (Vice-Chair) . . . . . (Gambia)

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19-19154 (E)

In the absence of Mr. Mlynár (Slovakia), Mr. Jaiteh (Gambia), Vice-Chair, took the Chair.

The meeting was called to order at 10.05 a.m.

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session (*continued*) (A/74/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VII and IX of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

2. **Ms. Telan** (Philippines) said that her delegation agreed with the Commission that the starting point for consideration of the topic "General principles of law" must be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, in which "the general principles of law recognized by civilized nations" were identified as a source of international law. It was appropriate for the first two elements of that formulation – "general principles of law" and "recognition" – to be analysed, although that would be an admittedly complex undertaking. The term "civilized nations", however, was outmoded and might no longer be of any normative value or might need to be replaced with a more inclusive formula, such as the "community of nations".

3. Referring to the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732), she said that draft conclusion 1 rightly captured the notion of general principles of law as a source of international law. Her delegation agreed with the assumption and formulation in draft conclusion 2 that, for a general principle of law to exist, it must be generally recognized by States, and took note of the view that other actors, including international tribunals and international organizations, might be involved in the formation of general principles of law. Under the Philippine Constitution, generally accepted principles of international law were part of the law of the land and, as indicated by the case law of the country's courts, included general principles of law in the sense of Article 38, paragraph 1 (c). That case law also indicated that general principles of law were established by a process of reasoning based on the common identity of all legal systems. Their status as a primary source of obligations was derived from their *jus rationale* character and their validity across human societies. Those principles were developed through the use of concepts from municipal law by international courts to fill gaps and/or address weaknesses in international law through legal reasoning and analogy from said municipal law.

4. The Commission should determine whether there was sufficient State practice to consider as general principles of law "those formed within the international legal system", as set forth in draft conclusion 3 (b). Even though the *travaux préparatoires* of the Statute of the International Court of Justice did not preclude that possibility, given that general principles of law traditionally derived from municipal or domestic law, it might be more prudent for the Commission to study the matter further.

5. In response to the proposal for the preparation of an illustrative list of general principles, her delegation was concerned that the exercise might dilute – rather than clarify – the matter and could become a distraction from the core issues. Nonetheless, one could be included in the commentaries later in the process. On the matters set forth for consideration by the Commission, her delegation supported the study of the functions of general principles of law and their relationship with other sources of international law, including the issue of hierarchy and whether general principles of law were supplementary in nature. Examination of their relationship with customary international law was also needed, in order to avoid confusion between the two sources of international law. Her delegation did not support addressing "regional" or "bilateral" general principles of law at the current juncture, as it took the view that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice applied to all States as a whole.

6. Her delegation supported the proposal that the outcome of the work on the topic take the form of draft conclusions accompanied by commentaries, given that the objective was to elucidate the concept of general principles of law as a source of international law and to examine the relevant State practice.

7. **Mr. Radomski** (Poland), referring to the topic "Succession of States in respect of State responsibility", said that relevant State practice was largely context-specific. His delegation therefore agreed with the Special Rapporteur that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned. In the light of that and the scarcity of State practice, his delegation invited the Commission to consider an outcome in another form, such as a final report, instead of draft articles.

8. With regard to the topic "General principles of law", his delegation believed that, although used less frequently than treaties and customary international law as a source of international law, general principles of law were a distinct source of international law and also required due consideration. It hoped that the Commission would explain and clarify the topic, as it

had done for the topic of identification of customary international law, and not prepare a catalogue or an illustrative list of the principles. Moreover, general principles of law should not be equated with general principles of international law, as set forth, for example, in General Assembly resolution 2625 (XXV) of 1970. While his delegation considered that international organizations could contribute to the formulation of general principles of law, it agreed with the Special Rapporteur that for a general principle of law to exist it must be generally recognized by States.

9. **Mr. Haxton** (United Kingdom) said that his delegation had always retained an open mind as to the utility of the work of the Commission on the topic "Succession of States in respect of State responsibility". It had already expressed a number of concerns, including that it would be difficult to reach broad agreement among States, given the dearth of existing practice; that any existing practice was context-specific and sensitive and must be viewed in its historical, political and even cultural context; that the Special Rapporteur should not rely unduly on academic writings, especially in situations where they might be used as the basis for the inclusion of draft articles based on "new law" or progressive development of law; and that it was undesirable to have draft articles that were based on practical and policy considerations, rather than on existing practice or law.

10. In his third report on the topic (A/CN.4/731), the Special Rapporteur had confirmed rather than alleviated those concerns. He acknowledged that State practice on the matter was diverse, context-specific, sensitive, and non-conclusive and that, as a result of that non-conclusiveness, his proposed draft articles would constitute progressive development of international law or new international law. In that regard, his delegation welcomed the Special Rapporteur's agreement, in his concluding remarks, as conveyed in the report of the Commission (A/74/10), that that could be stated clearly at the outset of the general commentary to the draft articles and in relation to specific draft articles.

11. The addition of the new paragraph 2 to draft article 1 showed that the draft articles would apply only in the absence of any agreement between the parties. Nonetheless, the Special Rapporteur continued to propose draft articles based on examples of purported State practice that were, in fact, arrangements underpinned by agreements or treaties and to which, under that new paragraph, the draft articles would not apply were those arrangements to be put in place currently. Furthermore, the Special Rapporteur continued to provide examples that were in fact context-specific arrangements and did not constitute evidence of an *opinio juris* regarding a general rule in connection with the succession of States.

12. Given that the first report of the Special Rapporteur on the topic "General principles of law" (A/CN.4/732) was preliminary and introductory in nature and that the Drafting Committee had provisionally adopted only one draft conclusion, his delegation would wait until work had advanced further before making detailed comments. It remained of the view that questions concerning sources of international law were natural topics for consideration by the Commission and that a careful and well-documented study focusing on the "third" source of international law listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice could assist States and practitioners alike.

13. His delegation concurred with the Special Rapporteur that the Commission should confine its parameters on the topic to an explanation of how to identify general principles of law and a clarification of their nature, scope and functions. It agreed in particular with the Special Rapporteur that the Commission should not address the substance of the principles in its work on the topic, and that preparing an illustrative list of such principles would be impractical, necessarily incomplete and would divert attention away from the central aspects of the topic. References to examples of general principles of law should be included in the commentaries and for illustration only.

14. The United Kingdom welcomed the affirmation by the Special Rapporteur in his report that the Commission's work on the topic should be done in a pragmatic way based on current law and practice, and noted that there was little by way of State practice on the topic from which to draw conclusions, particularly regarding some of the more detailed questions that the Special Rapporteur hoped to answer. His delegation therefore agreed with the Special Rapporteur that "as the present topic is likely to touch upon certain fundamental aspects of the international legal system, a cautious and rigorous approach is required". The Commission must be transparent if State practice was insufficient. His delegation agreed with the Special Rapporteur that the requirement of "recognition" was essential to determining the existence of a general principle of law. Explaining the meaning of that term and how it was to be assessed would be an important part of the Commission's work. The United Kingdom agreed that the term "civilized nations" was anachronistic and should be avoided.

15. With regard to draft conclusion 3 proposed by the Special Rapporteur, his delegation would reserve its

detailed comments until the Drafting Committee had concluded its consideration of it. Nonetheless, while it agreed with the first category of general principles of law set out in the draft conclusion (those derived from national legal systems), it found the second category (those formed within the international legal system) unclear. His delegation was not convinced that the practice referred to in the Special Rapporteur's report in support of that category was sufficient to reach a conclusion on the matter.

16. As for the future programme of work, his delegation welcomed the indication by the Special Rapporteur that he would take into account the suggestions formulated by members of the Commission to further address the requirement of recognition and the identification of general principles of law in his next report. It was, however, not convinced that an analysis of general principles of law at the regional or bilateral level, as suggested by the Special Rapporteur, fell within the scope of the topic.

17. **Ms. Lungu** (Romania) said that her delegation encouraged the Special Rapporteur for the topic "Succession of States in respect of State responsibility" to continue surveying State practice, however scarce, and the case law of international courts and tribunals, and to rely less on academic literature and the work of the Institute of International Law as he had done so far. Her delegation agreed with the basic premises of the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), including with regard to their subsidiary nature and the general rule of non-succession. More work needed to be done, however, to ensure that they were consistent with the previous work of the Commission on State responsibility and diplomatic protection. In particular, the term "injury" should be avoided, given that "wrongful acts" rather than "damage" or "injury" triggered State responsibility under the articles on responsibility of States for internationally wrongful acts.

18. In connection with the residual nature of the draft articles, special agreements or *ex gratia* payments by States and their impact on the full reparation principle should be addressed in greater depth. Her delegation acknowledged the flexible stance taken by the Special Rapporteur on the "clean slate" principle, in particular where the predecessor State continued to exist, but required more clarity on whether such an approach would deviate from a general rule of non-succession.

19. Regarding the outcome of the topic, her delegation agreed that the Commission should decide on the most suitable option at a later stage, especially as the current discussion seemed to indicate that draft articles were not the most appropriate outcome. Indeed, the draft articles considered so far lacked normative value, since they did not refer to rights or obligations, but only to options and possibilities, with the frequent use of the word "may" and hardly any use of the word "shall". Another form of outcome, such as draft principles or draft guidelines, might be preferable.

20. Despite the Special Rapporteur's suggestion to return to the question of the title of the topic at a later stage after the provisional adoption of all the draft articles, her delegation remained of the view that the title should be revised. In its present form, it could be misinterpreted as suggesting that a successor State automatically succeeded to the responsibility incurred by a predecessor State. In any event, the topic should be studied without undue haste, given that it pertained largely, if not entirely, to progressive development of international law.

21. Turning to the topic "General principles of law", she said that her delegation agreed with the proposed programme of work, in particular with regard to the identification of general principles of law. It believed that recognition was an essential element for the existence of a general principle of law, and therefore supported further work on that particular element. While it agreed that general principles of law were supplementary sources of international law, the goal should be to examine the relationship between general principles of law, the fundamental principles of international law and the principles regulating various branches of international law.

22. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan), referring to the topic "Succession of States in respect of State responsibility", said that the survey of relevant State practice, jurisprudence and doctrine set out in the third report of the Special Rapporteur (A/CN.4/731), while commendable, would benefit from closer analysis. 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. It was important to maintain consistency, in terminology and substance, with the previous work of the Commission. His delegation had doubts concerning the extent to which provisions in the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, such as those concerning newly independent States, should be replicated.

23. Referring to the draft articles proposed by the Special Rapporteur in his report, he said that they should be compatible with the articles on responsibility of

States for internationally wrongful acts and the articles on diplomatic protection. His delegation favoured retaining the current title of the topic.

24. In draft article 2 (Use of terms), the term "States concerned" was somewhat vague and should be interpreted or clarified.

25. With regard to draft article 12 (Cases of succession of States when the predecessor State continues to exist), his delegation believed that the term "special circumstances" in paragraph 2 should be clarified. It agreed with the Special Rapporteur on the broad distinction between situations where the predecessor State continued to exist and situations where it ceased to exist. His delegation supported the formulation of the draft article in which three categories of succession of States had been merged.

26. With regard to draft article 13, his delegation believed 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 should be deleted. It agreed with the proposal to redraft paragraph 1 of draft article 14 to focus on the dissolution of a State without referring to separation of part of the State, and believed that the reference to agreements in paragraph 2 needed to be explained.

27. Although the principle of unjust enrichment could form a foundation for progressive development of international law in draft articles 12 to 14, it fell outside the scope of rules of State responsibility.

28. His delegation welcomed the first report of the Special Rapporteur on the topic "General principles of law" (A/CN.4/732) and agreed with him that a cautious and rigorous approach was required. The Commission should aim to provide an authoritative clarification of the nature, scope and function of general principles of law, as well as of the criteria and methods for their identification. There was a need to distinguish between general principles formed within the international legal system and those derived from national legal systems. The Commission should consider making a distinction between principles and rules, even though there was no consensus on the matter in jurisprudence. General principles of law were deemed to have a more general and more fundamental character; however, in the light of current practice, some general principles of law might not have those qualities.

29. His delegation agreed with the Special Rapporteur that recognition was the essential condition for the existence of a general principle of law, in accordance with Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and the *travaux préparatoires* of the Statute of the Permanent Court of International Justice. It also agreed with him that the essential condition of recognition of general principles of law differed clearly from the conditions for the identification of customary international law, namely a general practice and its acceptance as law (*opinio juris*).

30. Lastly, his delegation agreed with the Special Rapporteur that the term "civilized nations" should not cause major difficulties for the work of the Commission, since it had become anachronistic and should be avoided. Taking into account existing practice and the principle of sovereign equality, it must be understood as referring to all States of the international community.

31. **Mr. Milano** (Italy) said that, owing to the paucity of State practice on succession of States in respect of State responsibility, the topic might not be ripe for codification of existing customary law. As an exercise in progressive development of the law, study of the topic might provide useful guidance to States on normative parameters for context-based, mutually agreed solutions, which were the only realistic means of resolving matters of State succession.

32. In that exercise, the Commission should state clearly which provisions represented existing general international law and which ones were aimed at its progressive development. His delegation supported the approach adopted by the Special Rapporteur and the Commission to consider State practice in different categories of State succession, in order to identify emerging rules regulating State succession in matters of State responsibility, and to fully take into account the views expressed by Member States in the Sixth Committee. Italy also supported the avoidance of any general rule, either along the lines of the "clean slate" rule or of automatic succession. Due regard should also be given to the proposal of Austria to give full expression to the principle of unjust enrichment. His delegation would consider submitting any relevant State practice that it found at a later stage.

33. Turning to the topic "General principles of law", he said that his delegation took note of the Special Rapporteur's proposal to consider two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. His delegation had a particular interest in further examining the latter category.

34. His delegation suggested that the Commission identify the essential features of general principles of international law and, in particular, the factors distinguishing them from customary international law and from the rules regulating the formation of the latter.

Should the Commission conclude that general principles of international law were inferred from the rules of customary international law, then it should reconsider the decision to include them in the work, as they would qualify as principles of customary international law proper and their qualification as "general principles of law" under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice would probably generate confusion between the different sources of international law. If, however, a different concept were identified, its contours should be clearly traced and the rules for the formation of general principles of international law should be identified.

35. His delegation would consider submitting written comments at a later stage.

36. **Mr. Jiménez Piernas** (Spain) said that he welcomed the inclusion of the topic "General principles of law" in the Commission's programme of work, as it had clear practical value and posed important theoretical challenges. It was remarkable that, since the inclusion of general principles of law in the Statute of the Permanent Court of International Justice, that topic had not been addressed by the international legal system. Indeed, to date, neither that Court nor the International Court of Justice had decided cases on the basis of one or more general principles of law. Yet, other courts, notably the Court of Justice of the European Union, had referred extensively to general principles of law in their judgments.

37. While Spain agreed with the Commission's understanding that the consideration of the practice of regional entities should be excluded from its preliminary work on the topic, the relevant case law of the Court of Justice of the European Union could serve as inspiration for the Commission's future work in that area. Although Spain was in favour of an outcome in the form of draft articles, it recognized that the outcome in the form of draft conclusions chosen by the Special Rapporteur might be better adapted to the Commission's objective of clarifying the nature, origin and functions of general principles of law as a source of international law, as well as the criteria for their identification, in order to avoid findings of *non liquet*.

38. Firmly anchored in relevant State practice, international case law and the Commission's previous work on the law of treaties, responsibility of States for internationally wrongful acts and identification of customary international law, the three draft conclusions proposed by the Special Rapporteur were legally sound and indisputable. They established that general principles of law were a source of international law, distinct from treaties and customary international law, and that, for such principles to exist, they must be generally recognized by States, with the understanding that the practice of international organizations could contribute to that recognition. Establishing both the degree of that recognition and the forms that it might take would be one of the challenges that the Commission would have to overcome.

39. Another challenge would be to identify general principles of law formed within the international legal system and general principles of law derived from national legal systems, although his delegation believed that the first category would be easier to identify than the latter. Spain supported the Commission's principled position that providing a list of general principles of law would be a distracting and futile exercise. It might suffice, however, for it to provide illustrative examples of general principles of law in order to advance the work of codification. His delegation also agreed with the Commission's cautious approach to leave the establishment of a definition of a general principle of law until the end of the work.

40. It was important for the Commission to resolve issues of terminology that might arise owing to the use of conceptually different formulations. For example, a clear distinction must be drawn between general principles of law and fundamental principles of international law, as set forth in Article 2 of the Charter of the United Nations and developed further in General Assembly resolution 2625 (XXV). The principles set out in that resolution, exemplified by the principles of sovereign equality and non-interference in the internal affairs of States, expressed fundamental legal and organizational values, of a customary nature, and formed a basic set of rules of a universal character that constituted the core of contemporary international law. Although some principles, such as that of good faith, might fall into either category, the fundamental principles of international law had nothing to do with general principles of law which the Commission was considering. His delegation had no objection to the Special Rapporteur's proposed future programme of work, on the understanding that it could be adapted to reflect new developments within the Commission.

41. **Ms. Durney** (Chile) said that, as no judicial organ of the United Nations had previously examined the topic of general principles of law in detail, the Commission's work in that regard was timely and would enable States and international courts to apply such principles more effectively. The Commission must nevertheless take a cautious and rigorous approach to the topic, as indicated by the Special Rapporteur, by focusing on the points of greatest consensus. Chile welcomed the fact that the Chair of the Drafting Committee had presented an

interim report to the Commission on the work of its seventy-first session, as that would give States more time and more material to prepare their comments on the project.

42. The four main issues proposed by the Special Rapporteur in his first report (A/CN.4/732) for consideration by the Commission in relation to general principles of law were essential to ensure the success of the work on that topic from theoretical and practical perspectives. However, Chile was of the view that the question of the relationship between general principles of law and other sources of international law should not be considered as an annex to the third issue, concerning the functions of such principles. On the contrary, that relationship should be considered in connection with the first issue, namely the legal nature of general principles of law as a source of international law. That would enable the Commission to determine the degree of autonomy of that formal source, its position in the normative hierarchy and the cases in which it might take priority over customary or treaty-based norms, before exploring the range of functions that said formal source might perform and the reasonable limits that should be observed in its application. In addition, before addressing the four issues identified by the Special Rapporteur, the Commission should clarify questions of terminology, since the difference, if any, between, say, "principles of law" and "principles of international law", or between "rules" and "principles", was directly linked to the legal nature and functions of the source in question.

43. With regard to the identification of general principles of law, the Commission should limit its focus to principles as a formal source of general international law and should not address principles of a regional or particular nature. It should be borne in mind that general principles of law with particular application, such as those with a regional or bilateral character or those that were part of the legal order of an international organization, might perform distinct functions and have distinct requirements for their formation or application, depending on the agreement reached by the subjects involved or on the legal system that might be involved. It would therefore be inappropriate to develop general conclusions on such issues, as they might fail to capture the specific characteristics that certain principles of particular application might have. Furthermore, a detailed analysis of principles of regional or bilateral scope would exceed the scope of the topic.

44. Despite her delegation's suggestion that the Commission limit its analysis to general principles of law as a source of general international law, in order to give due attention to the most relevant issues and avoid those that might be more controversial and could affect the support that the current project already enjoyed, the Commission could include a "without prejudice" clause in the draft conclusions indicating that none of the provisions established therein excluded the existence of principles of law with a particular scope.

45. Chile welcomed the Special Rapporteur's thorough research on references to general principles of law in the Commission's previous work, which had yielded examples both of general principles of law derived from national legal systems and of general principles of law formed within the international legal system, including the general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law. In addition, the examples, outlined by the Special Rapporteur, of treaties providing for the application of general principles of law and of decisions of various courts in which such principles had been invoked would serve as a useful basis for a systematic analysis of the topic.

46. Her delegation noted with interest the Special Rapporteur's assessment in paragraph 130 of his report (A/CN.4/732) that in some cases the International Court of Justice had "considered that, since rules of conventional or customary international law addressed the situation at hand, it was not necessary for it to determine the existence of a general principle of law". That might suggest that, in the event of incompatibilities between general principles of law and other sources of international law, priority should be given to the latter on the basis of the *lex specialis* rule.

47. Her delegation agreed with the Special Rapporteur that recognition was an essential condition for the existence of a general principle of law as a source of international law, and was essential to ensuring that such principles were applied objectively in order to prevent the improper or arbitrary use of that source. In identifying general principles of law, the Commission should establish the degree of that recognition and the forms that it might take.

48. The Special Rapporteur had identified two categories of general principles of law that might fall under the topic: general principles of law derived from national legal systems; and general principles of law formed within the international legal system. Chile was pleased that he had provided a preliminary analysis of both categories in his report, and hoped that he would further develop that analysis in future reports.

49. The Special Rapporteur had also set out two criteria for identifying general principles of law derived from national legal systems, namely, that the principle

in question must be common to the generality of national legal systems or principal legal systems of the world, and that it must be applicable in the international legal system (sometimes referred to as "transposition"). In formulating the first requirement, the Special Rapporteur had correctly emphasized that the decisive factor was whether the principle was common to the principal legal systems of the world and not whether it was expressly set out in the national laws of the large majority of States. The latter interpretation would make it practically impossible to apply general principles of law and would not take into account the ways in which such principles were applied in practice.

50. Indeed, to her delegation's knowledge, no international court had rendered judgments in which they closely analysed the national laws of all or nearly all the States in the world. Conversely, there was often an allusion to the fact that the principles must be recognized by the "principal legal systems of the world", the formulation used in the examples provided by the Special Rapporteur in paragraphs 117 to 168 of his report. Draft conclusion 2 should be modified in view of those considerations, and her delegation considered that the Special Rapporteur's proposal, set out in paragraph 243 of the Commission's report (A/74/10), could be a satisfactory solution in that regard.

51. It would also be appropriate for the Special Rapporteur to refer to the requirement of transposability in connection with the identification of general principles of law and possibly also to the degree of discretion that international courts appeared to have in determining whether it was appropriate to use a principle derived from national law to resolve an issue of international law. Lastly, Chile supported the decision of the Drafting Committee to keep draft conclusions 2 and 3 under consideration until the Commission had been able to fully examine the matters therein, as that would enable the Commission to adopt formulations that took into account all relevant issues and were consistent with future draft conclusions on the topic.

52. **Mr. Lippwe** (Federated States of Micronesia), referring to the topic "General principles of law", said that general principles of law, as a source of international law, remained under-studied by the Commission when compared to treaties and customary international law, as reflected in the inconsistencies in views of States and international judicial bodies as well as within the Commission on their nature, scope and application, as well as their relationship to other sources of international law. A key question to be addressed was whether general principles of law were confined to those common to national legal systems or whether they included rules to which States consented at the international level. His delegation supported the final outcome of the Commission's work being in the form of draft conclusions, in line with its work on the identification of customary international law. There could be overlaps between the Commission's work on the current topic and its work on peremptory norms of general international law (*jus cogens*), including in terms of general principles of law possibly serving as bases for *jus cogens*.

53. Referring to the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732), he said that the omission of a reference to "civilized nations" was a welcome development. That term was anachronistic, unnecessary, violative of the fundamental principle of sovereign equality of States and deeply inappropriate, because it insinuated that only principles common to all major Western legal systems were properly considered general principles of law. In that connection, his delegation welcomed the reference in draft conclusion 2 to general principles being "generally recognized by States". The expression "generally recognized" still required clarification, however.

54. In draft conclusion 3, the Special Rapporteur favoured the notion that general principles of law comprised not just those derived from national legal systems but also those formed within the international legal system. In the view of his delegation, while the first category was well-grounded in the relevant practice and jurisprudence, the second category needed careful consideration, especially in terms of the methodology to be used when determining the meaning of the terms "formed" and "international legal system" and whether general principles of law that were derived from national legal systems possessed a normative value in some way inferior or superior to that of customary international law. A similar question arose with regard to the hierarchy of general principles of law formed within the international legal system. In Article 38 of the Statute of the International Court of Justice, the sources of international law were listed in a non-hierarchical fashion, which would seem to argue against such weighting. In any event, the Commission would do well to address the matter.

55. His delegation supported the Special Rapporteur's proposed future programme of work for the Commission on the topic. In particular, given the close link between general principles of law and customary international law as key sources of international law and the fact that regional or particular customary international law was permissible, including on a bilateral basis, it welcomed the suggestion that the possibility of general principles of law with a regional or bilateral scope of application

could be addressed in a future report. It was indeed worth examining whether it was permissible to have regional or particular general principles of law, including on a bilateral basis. For instance, a number of norms that were accepted and used in multiple national legal systems in the Pacific region and some of its subregions might not be accepted elsewhere. They included norms regarding the natural environment and certain cultural sources of legal authority. His country would submit comments on the matter to the Commission in due course.

56. **Ms. Pham** (Viet Nam), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation commended the Special Rapporteur and the Commission for taking into account the comments and observations of States in the work on what was a diverse, context-specific and sensitive area of international law, for which there was little relevant State practice. Her delegation welcomed the methodology and approach taken by the Special Rapporteur, aimed at providing a comprehensive overview of State practice, case law and doctrine. The topic should be considered through open negotiations and in an appropriate timeframe.

57. Referring to the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), she said that her delegation concurred with the Special Rapporteur on the subsidiary nature of the draft articles and the priority to be accorded to agreements between the States concerned. Such agreements should be given more detailed attention, especially in cases of the continued existence of the predecessor State, unification or separation of territory. That said, the principle of "non-succession" remained the predominantly applicable principle in such situations, unless the successor State agreed to share the responsibility incurred by the predecessor State.

58. Turning to "General principles of law", she said that her delegation commended the Commission for its work on the difficult and highly theoretical topic. While noting the methodology proposed by the Special Rapporteur, her delegation was of the view that the direction and focus of the project should be examined thoroughly. In particular, the role of general principles of international law as recognized and applied in international judicial practice should be given due regard. Without overlooking the other sources of international law mentioned in Article 38, paragraph 1, of the Statute of the International Court of Justice, it should be recalled that those principles had been discussed, identified and applied before international judicial mechanisms in many instances.

59. Many Member States would benefit from the Commission's guidance on general principles of international law in their inter-State engagements. The rule of law at the international level depended greatly on a clearer understanding of those principles. Therefore, in addition to general principles of law derived from national legal systems, the Commission needed to deepen its study of general principles of law formed within the international legal system.

60. **Ms. Takagi** (Japan) said that her delegation trusted that the commentary to the draft conclusions on the topic "General principles of law" would include references to State practice and authoritative views of jurists. Although the significance of draft conclusions, as opposed to draft articles or a proposed treaty, was unclear, domestic courts might still refer to them as having normative value. For that reason, Member States and the Commission should proceed with caution. The scope of the topic as defined in draft conclusion 1 was unclear. The phrase "as a source of international law" and the definition of "general principles of law" would require further explanation in the draft conclusions and the commentaries thereto.

61. **Ms. Fierro** (Mexico) said that the draft articles on succession of States in respect of State responsibility proposed by the Special Rapporteur in his third report (A/CN.4/731) were based on the notion that wrongful acts committed by States at or around the time of succession processes must not remain unpunished, and that, consequently, it was important to establish clear rules on attribution of State responsibility and on reparation for injury. The draft articles reflected established principles of international law, including those concerning diplomatic protection exercised by a State in respect of its nationals, by indicating that the States that could claim reparation for harm caused to certain citizens or territories were in principle those that had a bond of nationality or other tie of attachment with said citizens or territories. In cases where succession processes affected that possibility for recourse, unambiguous rules must exist to ensure that no one was without legal protection. For example, an exception could be made to the principle of continuous nationality in cases of State succession, as provided for in draft article 15 (Diplomatic protection). It was critical to achieve a balance between the interests of States that underwent political changes like succession and the interests of the persons affected by those changes and by wrongful acts independent thereof. Given that, in the future, the Commission might consider specific forms of reparation in relation to cases of State succession, attention should be paid to the general rules that had

arisen from its previous work, specifically the articles on State responsibility for internationally wrongful acts.

62. The scope of cases covered by the draft articles, defined in draft article 5 as those occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations, elicited questions regarding reparation in cases that fell outside those parameters. As the succession of States was a real phenomenon motivated by political considerations, clear rules must be established for all cases, irrespective of their legal classification, without prejudice to the importance of not providing any advantage to States violating international law, as indicated in the commentary to draft article 5.

63. The Commission's work on the topic "General principles of law" complemented its previous work in the areas of customary international law and the law of treaties. Her delegation agreed that international practice was a useful starting point for the examination of that topic. However, national practice and case law, as well as doctrine would also be relevant. Particular attention should also be paid to defining the scope of the work to be done, as well as its practical dimension and relevance. Recalling that, in 1971, Mexico, together with Guatemala, had called for the deletion of the term "civilized nations" from Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, her delegation agreed that that term had no relevance to the current topic.

64. **Ms. Ozgul Bilman** (Turkey) said that the political and legal aspects of the topic "Succession of States in respect of State responsibility" were inextricable from one another. While the Special Rapporteur's third report (A/CN.4/731) was well written and well researched, there was a dearth of relevant State practice, and what little practice existed varied considerably, even within the same category of State succession. A cautious approach should therefore be taken to future work on the topic.

65. Her delegation agreed that the outcome of the Commission's work on the topic "General principles of law" should take the form of conclusions accompanied by commentaries, in keeping with the purpose of the project. It was important to find a common understanding of general principles of law. Her delegation believed that the Commission could provide illustrative examples of such principles, together with all relevant materials, in the commentaries, but should avoid a list, which would be incomplete. The Commission should take a cautious and rigorous approach to future work on the topic.

66. **Ms. Piškur** (Slovenia), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation agreed with the Special Rapporteur that it was difficult to affirm the existence of a general rule in connection with State responsibility in cases of State succession, and that the inconclusiveness of State practice did not point towards a "clean slate" rule. That view was in line with the previous work of the Commission. Her delegation also supported the notion that the topic could draw on general principles of law and that, however, cautious consideration of the role of those principles was required. It also agreed that the current title of the topic should be retained for consistency with the Commission's previous work. Slovenia agreed with some members of the Commission that the proposed draft articles on the topic should be organized according to specific categories of succession of States, and that the possible transfer of rights and obligations should be addressed together in those same draft articles. Alternatively, should the Commission decide to treat issues concerning rights and issues concerning obligations in distinct draft articles, it should address each category of State succession in a separate draft article.

67. **Ms. Melikbekyan** (Russian Federation) said that the position of her delegation with regard to the topic "Succession of States in respect of State responsibility" remained largely unchanged. It was doubtful whether the methodology employed to identify rules of international law in that regard, the nature of the practice referred to by the Special Rapporteur and the format chosen by the Commission would lead to a useful final product. Moreover, such product was highly unlikely to reflect the current state of international law.

68. Not only did State practice not support the conclusions on which the draft articles on the topic were based, but there was no observable trend towards the formation of rules of international law in respect of the topic. Furthermore, succession and continuity were distinct concepts in international law and should not be confused. The concept of continuity should be excluded from the scope of the topic.

69. The drawing of any conclusions on the topic required a balanced and cautious approach. Her delegation was pleased to note that the Special Rapporteur himself pointed out the non-conclusiveness of the State practice on which he was basing his analysis.

70. The Commission's work, including within the Drafting Committee, was proceeding at a slow pace. Naturally, her delegation was not suggesting that the

Commission speed up. On the contrary, all the topics on the current programme of work required detailed analysis, and their consideration did not necessarily have to be completed within one quinquennium. However, the draft articles on succession of States in respect of State responsibility proposed by the Special Rapporteur either would never leave the Drafting Committee or would be substantially amended by it. The Drafting Committee had not been able to complete its consideration of those draft articles during the session. That made it difficult for States to comment on the other topics under consideration and forced them to rely on interim reports presented by the Chair of the Drafting Committee for information only.

71. In her delegation's view, the topic of succession of States in respect of State responsibility was not yet ripe for the formulation of any universal rules. The draft articles presented thus far emanated from the general rules on State responsibility rather than any rules on succession. Provisions on the responsibility of predecessor States that continued to exist would apparently also be included in the draft articles. Her delegation had already made known its disagreement with that approach.

72. With regard to draft articles 1, 2 and 5 provisionally adopted by the Commission, her delegation welcomed the inclusion of draft article 1, paragraph 2, which provided for the subsidiary, or residual, nature of the draft articles in relation to solutions agreed upon by the States concerned, which could take a variety of forms. Overall, her delegation had no objections to draft articles 2 and 5. However, it was impossible to form an opinion about the fate of the draft text as a whole on the basis of those provisions, which were general in nature and, by and large, did not touch upon potentially problematic aspects of the topic.

73. The Commission should reconsider what would be the most appropriate form for its work on the topic. Draft articles were more suitable for codifying existing rules of international law with a view to the negotiation by States of a convention. It was clear that there was currently no question of a convention on succession of States in respect of State responsibility. The most appropriate final form of the Commission's work on the topic would be an analytical report covering the main problem areas and the difficulties involved in determining and correctly interpreting State practice and in identifying corresponding rules of international law. Such a report could provide a possible model for States to follow in specific cases of succession, which should be based primarily on the need for them to make arrangements or conclude agreements between themselves.

74. Should the Commission proceed with draft articles, it ought to review their structure. Her delegation had previously raised doubts about organizing them on the basis of whether or not the predecessor State continued to exist. The Commission should take its cue from the 1983 Vienna Convention, which was organized by category of succession. Her delegation welcomed the memorandum by the Secretariat containing information on treaties which might be of relevance to the Commission's future work on the topic (A/CN.4/730), the content of which supported the view that matters relating to the succession of States in respect of State responsibility were largely addressed by means of treaties.

75. With regard to the topic "General principles of law", the first report of the Special Rapporteur (A/CN.4/732) provided a useful historical overview of the development of general principles of law, including practice prior to the adoption of the Statute of the Permanent Court of International Justice and practice after the adoption of that Statute and of the Statute of the International Court of Justice. The report also reflected the drafting history of Article 38 of both Statutes, which was of significant interest for future work on the topic. Her delegation welcomed the stated intention of the Special Rapporteur to adopt a cautious and balanced approach to the topic. However, at the current stage it was difficult to assess objectively the prospects for the Commission's work. The first report, by the author's own admission, was preliminary and introductory in nature.

76. One of the main initial tasks was to determine the origin of general principles of law, a task closely related to the process of identifying those principles and establishing criteria for their recognition. Overall, her delegation supported the Special Rapporteur's intention to adhere in his examination of the topic to the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It was opposed to including consideration of the practice of international courts and tribunals in the scope of the Commission's work.

77. Her delegation had previously stated that it was doubtful whether general principles of law constituted an autonomous source of international law. The Commission was currently leaning towards a different conclusion, even though some members had expressed views similar to those of her delegation. The question of the recognition by States of any given principle as a general principle of international law was therefore even more crucial. It was also important to clarify the relationship between general principles of law and customary international law, and also treaties.

78. The examples provided by the Special Rapporteur to show that general principles of law were reflected in judicial and State practice revealed that such practice was ambiguous. In addition, there was currently no uniform terminology relating to general principles of law; indeed, the examples in the report demonstrated that the term "general principles of law" was seldom employed. Terms such as "principle", "general principle", "principle of international law", "general principle of international law" and others were far more common. That issue required serious analysis; premature conclusions regarding the interchangeability of the terms mentioned should be avoided. Furthermore, the substance of the examples provided was not clear.

79. Her delegation expected the Special Rapporteur, in his future work, to take a thoughtful approach to the selection and analysis of relevant practice. It was possible that, through a more detailed study of the topic, he would identify additional practice that would shed greater light on the meaning and legal nature of general principles of law. One of the most important questions requiring detailed analysis was the determination of the origins of general principles of law. The Special Rapporteur had considered two possible categories: general principles of law derived from national legal systems and general principles of law formed within the international legal system. As far as her delegation could tell, most members of the Commission considered that general principles of law, in accordance with Article 38 of the Statute of the International Court of Justice, were derived principally from national legal systems. Nonetheless, her delegation supported the Special Rapporteur's decision not to rule out the possibility of their being formed at the international level.

80. It was very difficult to understand how general principles of law were recognized by States and subsequently transposed to international law. It was doubtful that that process occurred automatically and that all general principles of law existing in national legal systems were applicable by default and to the same extent in the international legal system. In addition, certain general principles of law might be characteristic only of relations between sovereign States and might not be capable of being formed in national legal systems.

81. If Article 38 of the Statute of the International Court of Justice, the elements of which also required close study, was taken as a starting point, a number of issues should be borne in mind. The fact that general principles of law were principles recognized by civilized nations meant that they could be applied in the international legal system only if States recognized them as valid rules of international law by custom or treaty. It seemed that the Special Rapporteur was still seeking an answer to the question of what precisely constituted "recognition"; there was also no consensus on that score within the Commission. Her delegation hoped that the Special Rapporteur would take its views on the matter into account and that the Commission would reach an objective view on the basis of careful analysis. In his future reports, the Special Rapporteur should consider in detail the major issues relating to general principles of law, which would help the Commission to decide on the optimum format for the outcome of its work on the topic. Her delegation agreed with the Special Rapporteur that it would not be appropriate, bearing in mind the proposed scope of the topic, to include an illustrative list of general principles of law.

82. **Mr. Amaral Alves De Carvalho** (Portugal), referring to the topic "Succession of States in respect of State responsibility", said that his delegation appreciated the clarifications provided by the Special Rapporteur in his third report (A/CN.4/731) with regard to the exclusion of both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States. Portugal also welcomed the Special Rapporteur's assessment that State practice in the area of succession of States in respect of State responsibility was diverse, context-specific and sensitive. Indeed, such State practice did not constitute a sufficient basis for affirming the existence of a general rule in connection with State succession.

83. His delegation agreed with the Special Rapporteur that the draft articles on the topic should be of a subsidiary nature and that priority should be given to agreements between the States concerned. It was pleased that that point was made clear in paragraph 2 of draft article 1 of the draft articles on the topic adopted so far by the Commission. The draft articles could serve as a useful point of reference for the negotiation of such agreements, which must be concluded in good faith and in accordance with the principle of the sovereign equality of States. While his delegation kept an open mind on the title and outcome for the topic, it understood that the title and outcome of any topic were important guides for defining its object and scope. Greater clarity on those matters could therefore be helpful, particularly in guiding discussions of issues on which Commission members had differing views. He hoped that the Commission would soon complete its first reading on the topic.

84. The inclusion of the topic "General principles of law" in the Commission's programme of work was timely, and the envisaged work in that area would complement the existing work on other sources of

international law. The long history of references to general principles of law in international instruments and in judicial practice across jurisdictions demonstrated the relevance of such principles to international law. Although it was important to examine the relationship between the various sources of international law, a hierarchy should not be established among them. It should also be taken into account that, in addition to providing an ethical and normative basis for other legal norms, general principles of law played a supplementary role of filling gaps in international law and preventing findings of *non liquet*.

85. With regard to the draft conclusions proposed by the Special Rapporteur, Portugal concurred with draft conclusion 1 and agreed that general principles of law were fundamental and general in nature. It also took note of the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems, although further work was needed to determine what such recognition entailed.

86. The term "civilized nations" referred to in the Statute of the Permanent Court of International Justice was clearly outdated and had no relevance in a contemporary context. However, before narrowly interpreting "civilized nations" as "States", as reflected in draft conclusion 2, the Commission should study further the role of international organizations in the formation and recognition of general principles of law.

87. Portugal agreed with the two categories of general principles of law set out in draft conclusion 3, namely general principles of law derived from national legal systems and general principles of law formed within the international legal system, and looked forward to the Commission's work to establish methods for identifying the components of each category. His delegation would be particularly interested to learn the Commission's views on how to determine whether a principle was common to the generality of national legal systems or to the principal legal systems of the world. The three draft conclusions demonstrated a fresh approach to the topic of general principles of law.

88. More detailed comments reflecting his delegation's position on those topics could be found in his written statement, available on the Committee's PaperSmart portal.

89. **Mr. Abdelaziz** (Egypt) said that, with regard to the topic "Succession of States in respect of State responsibility", it was important to ensure that any draft articles adopted were consistent with the existing provisions of general international law, in particular the 1978 Vienna Convention on Succession of States in Respect of Treaties, and with other projects of the Commission, such as the articles on responsibility of States for internationally wrongful acts. His delegation looked forward to providing its written comments and observations on the topic at a later time.

90. The topic "General principles of law" was especially important, given that those principles were mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice as one of the sources of law that the Court should apply. General principles of law were common legal principles derived from national legal systems that could be applied in international relations. One such principle, good faith, had proven crucial in civil and trade transactions and had been applied by international courts in numerous cases.

91. His delegation agreed with the Special Rapporteur that the term "civilized nations" had become anachronistic. It should therefore be understood as referring to all States. His delegation supported the future programme of work proposed by the Special Rapporteur, including the proposal to address the relationship of general principles of law with other sources of law and the issue of the identification of some of those principles as sources of international law. Given that the practice of international courts and tribunals was crucial for the recognition of general principles of law as a source of international law, it was vital to examine their decisions relating to such general principles.

92. **Mr. Yedla** (India) said that the complex nature of the work on the topic "Succession of States in respect of State responsibility" was evident from the reports submitted thus far. Any draft articles adopted on the topic must be in accordance with the relevant international conventions, including the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

93. With regard to the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), the Special Rapporteur needed to clarify whether draft article 12 (Cases of succession of States when the predecessor State continues to exist) and draft article 13 (Uniting of States) were intended to establish the procedural possibility of claiming reparation or to identify substantive rights and obligations. In respect of draft article 14 (Dissolution of States), his delegation sought further clarification on how to distinguish between the right of a successor State to claim reparation and the potential right of individuals to claim reparation without intervention by the State. The Special

Rapporteur should also elaborate further on the issue of diplomatic protection, as provided for in draft article 15, taking into account the articles on diplomatic protection, which covered cases of multiple nationality.

94. The Commission's work on the topic "General principles of law" should be informed by its previous work on similar topics, including the law of treaties, responsibility of States for internationally wrongful acts, fragmentation of international law and identification of customary international law. India believed that there was no hierarchy among the sources of international law indicated in Article 38 of the Statute of the International Court of Justice, and that, therefore, general principles of law should be referred to as a supplementary, rather than a subsidiary or secondary, source. While the *travaux préparatoires* of the Statute might suggest that the inclusion of general principles of law as a source of international law had been driven by a desire to avoid findings of *non liquet* and to limit judicial discretion in the determination of international law, an excessive focus on *travaux préparatoires* would undermine the importance of general principles of law and their contemporary relevance in practice. The draft conclusions on proposed by the Special Rapporteur should therefore focus on the evolution of general principles of law as a source of international law over time.

95. The term "civilized nations" used in Article 38, paragraph 1 (c) was outdated and inappropriate and should not be used in the draft conclusions. His delegation noted that some Commission members had proposed term "community of nations", used in article 15, paragraph 2, of the International Covenant on Civil and Political Rights. India understood, however, that the use of the word "States" in draft conclusion 2 was a conscious attempt to use more appropriate terminology in the draft conclusions.

96. **Ms. Pelkiö** (Czechia), referring to the topic "Succession of States in respect of State responsibility" and the draft articles provisionally adopted so far by the Commission, said that her delegation welcomed the adoption by the Commission of draft articles 1, 2 and 5, as well as the commentaries thereto. Czechia supported the current formulation of draft article 2, which contained definitions identical to those set out in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and did not see the need for additional definitions. Her delegation also supported draft article 5 (Cases of succession of States covered by the present draft articles), whose focus on the effects of succession occurring in conformity with international law was consistent with the approach taken by the Commission in its past work on other topics concerning succession of States.

97. Referring to the draft articles provisionally adopted by the Drafting Committee at the seventy-first session, as reproduced in document A/CN.4/L.939/Add.1, she said that draft article 7, which dealt with the issue of continuing wrongful acts, fell outside the scope of the current topic. The only internationally wrongful acts that should be of interest under the topic were illegal acts committed by a predecessor State before the date of succession. Any wrongdoing committed after that date, whether by the successor State or by the predecessor State, in the event that that State continued to exist, was clearly covered in the articles on State responsibility, and should therefore not be dealt with under the current topic.

98. Moreover, the current topic should focus on cases in which full reparation for injury caused by any internationally wrongful act of a predecessor State had not been made before the date of succession. Whether the act was of a unique or continuing character was irrelevant. It was therefore illogical to single out acts of a continuing character in the draft articles, as was the case in draft article 7. Furthermore, even if an act of a continuing character committed by a predecessor State resulted in the breach of an international obligation, and even if, after the date of succession, the successor State immediately committed such an act itself, those acts had a continuing character but would still be two independent acts committed by two different States. Contrary to the suggestion of the Chair of the Drafting Committee in his interim report dated 31 July 2019, they would not become one continuing wrongful act, even "to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own", to use the wording of draft article 7. That draft article should therefore be reconsidered.

99. Referring to draft article 9 (Cases of succession of States when the predecessor State continues to exist), she welcomed the merger of the three original draft articles covering such cases into a single draft article. However, the provision in paragraph 1 that "an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession" created confusion as to the range of situations covered. By shifting the focus from the question of reparation for injury, as proposed by the Special Rapporteur, to that of invocation of responsibility, the provision failed to fully reflect the applicability of the draft article to situations, possibly among the most frequent in practice, in which the injured State had invoked the responsibility of the

predecessor State before the date of succession, but in which the predecessor State had not made full reparation for the injury prior to that date.

100. It was her delegation's understanding that paragraph 2, which stated that "in particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury", addressed situations in which making full reparation after the date of succession might require the involvement of the successor State, for example, when such reparation entailed the repair or reconstruction of a facility that had been illegally disabled or removed by the predecessor State and that was now located in the territory of the successor State. In that respect, the solution proposed in the paragraph was insufficient. The suggestion that the injured State and the successor State had an equal obligation to endeavour to reach an agreement for addressing the injury minimized the degree of responsibility of the successor State for remedying the material consequences of the internationally wrongful act of the predecessor State.

101. Even though the successor State had an international legal personality distinct from that of the predecessor State, the legal fiction of that personality could not mask the material reality of statehood, which, in some cases, might be essential for making reparation. For example, in cases in which the necessary legal remedies for an internationally wrongful act of the predecessor State were, after the date of succession, only available in the courts of the successor State, a request by the injured State for such remedies would only be meaningful if addressed to the successor State. It would be wrong to suggest that, in such situations, talks between the injured State and the successor State would start from a "clean slate". Paragraph 2 was thus disappointing and should be revisited, to strengthen and protect the position of the injured State.

102. More detailed comments reflecting her delegation's views on the topic could be found in her written statement, available on the PaperSmart portal.

103. With regard to the topic "General principles of law", Czechia expected that the Commission would provide States with practical conclusions and commentaries, as well as clarification of relevant terms, based on an analysis of State practice, case law and the views of scholars. Referring to the first report of the Special Rapporteur (A/CN.4/732), she said that her delegation agreed with the Special Rapporteur that an illustrative list of general principles of law, as proposed by certain members of the Commission, would be incomplete and would divert attention away from the central aspects of the topic. Her delegation maintained, however, that specific examples of such principles, together with relevant references, should be provided in the commentaries to the relevant draft conclusions.

104. Czechia had doubts about the existence of general principles of law of a regional or bilateral scope and about their relevance to the current topic, and therefore believed that the Commission should limit its work to those principles that were found in all or most national legal systems. Her delegation also doubted the existence of a category of general principles of law formed within the international legal system. In accordance with the prevailing opinion in doctrine, Czechia understood general principles of law as principles commonly applied in national legal systems which could be transposed to and applied in relations among States. On the other hand, rules formed and recognized by States in international relations were part of customary international law, a distinct source of international law with specific requirements for its establishment.

105. Czechia agreed with the majority of the members of the Commission that general principles of law were a supplementary source of international law. Although under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, general principles of law were listed as a separate source of international law with the same importance as international conventions and international custom, in practice they could only be applied in circumstances where customary law and treaty law did not provide the required solution. However, the application of general principles of law could give rise to the development of new international custom or treaties, further attesting to the relevance of the topic.

106. **Ms. Rivera Sánchez** (El Salvador), referring to the topic "Succession of States in respect of State responsibility", said that El Salvador welcomed the provisional adoption of draft articles 1, 2 and 5, in particular the acknowledgment of the subsidiary nature of the draft articles. Her delegation believed, however, that it was important to indicate that the draft articles would apply only in the absence of any agreement between the parties, given the existence of specific State practice which might suggest that the parties concluded bilateral agreements setting out rules on State succession.

107. Referring to the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/731), she said that, with regard to the proposed inclusion of the term "States concerned" in draft article 2, as its paragraph (f), her delegation was of the view that the term "concerned" could cause confusion. It gave a State so described a meaning that was different from that of a

State referred to in the draft provision, and was not particularly instructive as to whether the State in question was the State responsible for an internationally wrongful act or a State injured by such an act or a successor State of either of those States. Her delegation therefore recommended that the cases applying to the various categories of States be set out separately.

108. With regard to draft articles 12 to 14, the legal definition of the term "reparation" should be clarified, in line with the articles on responsibility of States for internationally wrongful acts, to indicate how restitution, compensation and satisfaction would be applied in cases of State succession in respect of State responsibility.

109. With regard to draft article 15 (Diplomatic protection), as the regulation of diplomatic protection was critical to upholding human rights, El Salvador agreed with the Special Rapporteur's approach of allowing an exception to the principle of continuous nationality in cases of succession of States. In future discussions on the draft article, it should be recalled that the Commission had generally accepted the definition of nationality as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, in which factors such as history, language, religion and culture played a central but ever-changing role within a set of common traditions and ideals. In that connection, her delegation believed that there was no issue that belonged intrinsically to the sphere reserved to the State or to its exclusive national jurisdiction. The implications of principles of contemporary international law, and especially of the obligations arising therefrom, such as the responsibility to protect, were therefore vitally important.

110. The title of the topic should be changed to "Reparation for injury resulting from internationally wrongful acts in cases of State succession", to put the focus of the draft articles on the effects of State succession on the international responsibility of States. Lastly, given the legal complexity of the topic, it was essential to continue to review the draft articles under development. More detailed comments reflecting her delegation's position on the topic could be found in her written statement, available on the PaperSmart portal.

111. Turning to the topic "General principles of law", she said that, owing to the legal nature of general principles of law, it was important to develop a draft conclusion setting out an agreed definition reflecting the specific characteristics of such principles, in particular their status as a source of international law, underpinned by legal convictions expressed in the principal legal systems of States of the international community. With that definition, the use of the term "civilized nations", a relic of classical international law, would be avoided, in favour of an approach in line with contemporary international law, in which the principle of sovereign equality of States was being progressively enshrined.

112. In addition, a distinction should be drawn between general principles of law and rules of customary international law: while the former guided the interpretation of international rules and their application in relation to the community and national law of States, the latter derived their compulsory nature from repeated State practice, with the legal conviction to uphold them. However, it should be borne in mind that those two sources of international law might be interrelated, such that the repeated application of a general principle of law might have a constitutive effect or give rise to a custom.

113. In response to the Special Rapporteur's proposal to consider the jurisprudence of international courts and tribunals, her delegation would suggest also giving consideration to the case law of regional courts, in which general principles of law reflecting the common legal convictions of the States belonging to the relevant region or integration organization were formed and applied. Lastly, extensive work and harmonization were needed to ensure a better understanding and use of the concept of general principles of law.

114. **Ms. Mägi** (Estonia), referring to the topic "Succession of States in respect of State responsibility", said that Estonia agreed with the wording of the draft articles proposed in the Special Rapporteur's third report (A/CN.4/731), including that of draft articles X and Y on the scope of Parts II and III.

115. With regard to reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State, the modern approach, whereby the right to such reparation was transferable to the successor State, should be followed. The 1939 decision of the Permanent Court of International Justice in the *Panevezys–Saldutiskis Railway* case between Estonia and Lithuania, cited in the Special Rapporteur's report (A/CN.4/731), demonstrated the problems arising from the use of the traditional approach, reflected in the principle of continuous nationality. Indeed, as illustrated by other examples in the report, a rigid application of the principle of continuous nationality could result in unfair treatment of private persons on whose behalf reparation was sought, and could lead to a situation in which no State was entitled to seek redress on behalf of their nationals in cases of State succession. Estonia welcomed the relevant work of the Institute of International Law and its resolution on State succession

and State responsibility, in which the Institute had supported the modern approach. The rules of international law should not prevent injured persons from benefiting from reparation. Her delegation nevertheless agreed that continuous nationality was the general rule applicable to diplomatic protection, as reflected in article 1, paragraph 1, of the articles on diplomatic protection, and that "forum shopping" should be avoided. Lastly, Estonia considered the Special Rapporteur's proposed future programme of work to be reasonable.

116. Estonia welcomed the inclusion of the topic "General principles of law" in the Commission's programme of work, as a useful supplement to its work on other sources of international law. The summary of the debate on the topic presented in the Commission's report (A/74/10) was accurate and comprehensive, providing an overview of the main relevant issues as a basis for further discussion among States. Her delegation supported the suggestion, reflected in paragraph 228 of the report, to limit the scope of the topic to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, but not limited to its application by the Court, and in the light of the practice of States and of international courts and tribunals. The title of the topic might need to be revised to reflect that limitation. Although Estonia was not opposed to the inclusion of an illustrative list of general principles of law, the Commission should further examine relevant case law and State practice before adding such a list, as including it at a later stage of analysis would provide more context for the substantive legal points made.

117. While Estonia agreed that further consideration should be given to the differences and similarities between general principles of law and customary international law, as indicated in paragraph 233, it believed that the commonalities between the two issues should also be considered. Estonia would also encourage further consideration of the distinction between principles, norms and rules, as indicated in paragraph 239 of the report. The latter distinction, in particular, had been discussed in relation to emerging areas of international law, such as that applicable to State conduct in cyberspace. While Estonia generally agreed with the views reflected in paragraphs 237 and 238 of the report, it was in favour of reviewing references to general principles of law in specific treaty regimes, as such principles were not universal and varied depending on the treaty regime. Her delegation also supported the inclusion of an analysis of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the report.

118. The Commission should address the level of recognition required for the existence of general principles of law, in line with its work on customary international law and *jus cogens* norms. Estonia commended the Special Rapporteur's approach to identifying the origins of general principles of law, with the understanding that it could be amended if necessary. An excessive focus on categorization should be avoided, and care should be taken in considering general principles of law formed within the international legal system, given the lack of relevant State practice. Lastly, Estonia supported the Special Rapporteur's proposed future programme of work.

119. **Ms. Jang** Ju Yeong (Republic of Korea) said that the Commission was to be commended for effectively leading the discussions on the topic "Succession of States in respect of State responsibility", despite insufficient State practice in that area. Given the dearth of such practice, the Commission should take the time needed to consider the topic, instead of drawing hasty conclusions. Her delegation welcomed draft articles 1, 2 and 5 provisionally adopted by the Commission and supported the outcome in the form of draft articles chosen by the Special Rapporteur, as it was consistent with the previous work of the Commission on matters of State succession. Her delegation also agreed that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned, as stated in draft article 1, paragraph 2.

120. The Republic of Korea supported draft article 2, which contained definitions identical to those set out in the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and the articles on nationality of natural persons in relation to the succession of States. Her delegation also supported draft article 5, which restricted the applicability of the draft articles to successions of States occurring in conformity with international law, in line with the long-standing practice of the Commission on matters of State succession and with the principle of *ex injuria jus non oritur*. However, it was concerned that, given that the draft articles might eventually be transformed into a treaty, the treatment of the transfer of rights and obligations in separate draft articles might lead to duplication of work.

121. The Commission's work on the topic "General principles of law" would contribute to the progressive development of international law. Referring to the draft conclusions proposed by the Special Rapporteur in his

first report (A/CN.4/732), she said that, with regard to draft conclusion 3, there had been no consensus among Commission members on the existence of general principles of law formed within the international legal system. Further work was needed in that regard, given the critical importance of that draft conclusion for defining the concept and content of general principles of law. The Commission should use the wording of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice as a model and should provide clear and persuasive justifications for any deviations therefrom. While an illustrative list of general principles of law could be helpful for understanding and identifying such principles, care should be taken to ensure that such a list did not unintentionally divert attention from the central aspects of the topic and thus weaken its main objectives.

The meeting rose at 1 p.m.