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Chair: Ms. Al-Thani . . . . . (Qatar)
later: Ms. Krutulytė (Vice-Chair) . . . . . (Lithuania)

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21-15906 (E)

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

Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (*continued*) (A/76/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI and IX of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

2. **Ms. Talia** (Tuvalu), referring to the topic "Sea-level rise in relation to international law", said that sea-level rise was a defining issue for her country. With an average land elevation of no more than two metres above sea level, Tuvalu was extremely vulnerable to the adverse impact of rising sea levels, which threatened the livelihood, health, culture and well-being of its population, and its infrastructure. Tuvalu was spearheading an initiative to protect the statehood, sovereignty, rights and heritage of small atoll nations facing existential threats from sea-level rise. Like other Pacific Island countries, Tuvalu relied heavily on the ocean as its life source. It had planned its current and future development in reliance on the rights and entitlements guaranteed under the United Nations Convention on the Law of the Sea.

3. On 6 August 2021, the leaders of the Pacific Islands Forum had adopted the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, a formal statement of their views on how the Convention's rules on maritime zones applied to sea-level rise. In the Declaration, they had reaffirmed the region's commitment to concluding negotiations on all outstanding maritime boundary claims and zones and to preserving Forum members' rights in the face of sea-level rise.

4. In the first issues paper of the Study Group on the topic (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), the Co-Chairs had stressed that the overarching concern to preserve legal stability, security, certainty and predictability was at the very centre of the topic, in line with the general purpose of the United Nations Convention on the Law of the Sea, as set out in its preamble. Tuvalu acknowledged that several of the requirements for effective statehood were referred to in article 1 of the Montevideo Convention on the Rights and Duties of States.

5. While several international legal instruments, literature and human rights case law addressed the situation and status of refugees and stateless persons, international law did not explicitly apply to the situation of persons displaced by sea-level rise. The human rights of such persons must be protected. The carefully balanced and equitable package of rights and responsibilities in the United Nations Convention on the Law of the Sea must be preserved, and the injustices of climate change should not be perpetuated by an international legal regime that further disadvantaged those affected by climate change-related sea-level rise. The response of international law must reflect the interests of small island developing States, which were especially affected by sea-level rise yet least responsible for its causes.

6. **Ms. Bhat** (India) said that some of the fundamental aspects of the topic "Immunity of State officials from foreign criminal jurisdiction" were controversial and did not benefit from significant State practice, as exemplified by article 7 of the draft articles which the Commission had provisionally adopted so far. The Commission would therefore need to reconcile the divergent views of its members on that draft article before completing its first reading on the topic.

7. The need to consider the question of inviolability and the outstanding definitions in draft article 2 [3] must also be examined in that context. As the topic was politically sensitive for some States, diligence, prudence and caution were needed to decide whether the Commission should focus on codification or progressive development. That would be clear only when the Commission was able to show consistent State practice and treaty practice to support the exceptions asserted in the draft article.

8. The status and nature of the duty of persons claiming immunity was a factor of core importance. There could be a situation where a person, although enjoying immunity under the law of a given State in respect of acts committed during the course of his or her official duties as a State official, undertook a contractual assignment other than or in addition to those duties. In such a situation, factors such as the status of the official, the nature of the official's functions, the gravity of the offence, international law on immunity, the victim's interests and all related circumstances should be taken into account in determining immunity. The provisions under consideration should not be viewed as codifying existing international law in any manner.

9. As to the topic "Sea-level rise in relation to international law", India believed that sea-level rise was an existential crisis for small island developing States. The maritime zones allocated under the United Nations Convention on the Law of the Sea were central to their statehood, economies, food security, health, education, livelihoods and cultures. Thus, the work of the Commission on the topic was of particular importance to them. It was unnecessary, however, to have the issue

discussed in other United Nations bodies, such as in the Security Council, where it was linked arbitrarily to international peace and security.

10. The first issues paper of the Study Group on the topic (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) had shown clearly that the United Nations Convention on the Law of the Sea did not explicitly deal with the impact of climate change-related sea-level rise on maritime zones and the rights and entitlements that flowed therefrom, and that the challenges posed to the legal order had not been anticipated at the time of its conclusion. Her delegation hoped that the second issues paper of the Study Group, which would deal with issues related to statehood and to the protection of persons affected by sea-level rise, would provide valuable input for the ongoing efforts of the international community to assist small island developing States in addressing the challenges posed by sea-level rise. It also hoped that, in their discussions, the Commission and the Study Group would follow the general approach outlined in the 2018 syllabus.

11. **Ms. Villalobos Brenes** (Costa Rica), referring to the topic "Sea-level rise in relation to international law", said that sea-level rise was a matter of great urgency for her country, because it would result in, among other things, loss of beaches and islands, saline intrusion into aquifers, flooding in urban areas and an increase in diseases. It would also have a great impact on the communities that depended on coastal resources for their subsistence and for business and tourism. Against that background, her delegation welcomed the Commission's decision in 2018 to include the topic in its programme of work, not only because of its environmental importance, but also for its legal significance.

12. The analysis of the legal dimension of an environmental issue that would have an impact in the future but that demanded joint solutions currently must be based on the overarching framework established by the United Nations Convention on the Law of the Sea, and the outcome of that analysis should not be used to make changes to what had already been established in the Convention. It was noteworthy that the Study Group on the topic had acknowledged from the outset that sea-level rise was a scientifically demonstrated fact, and a result of climate change, hence a mainly human-induced phenomenon.

13. Costa Rica agreed with the view expressed by the Study Group in its first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) concerning the need to apply the principles of legal stability, security, certainty and predictability in order to preserve the balance of rights and obligations between coastal States and other States. It was also important to take account of international conventions, customary law and international jurisprudence, such as the judgments of the International Court of Justice.

14. In that connection, Costa Rica was pleased that the Commission had included in its consideration a judgment of the Court which had served to establish the maritime boundaries between Costa Rica and Nicaragua, using a moving delimitation line in a segment that connected the coast with the fixed point of the start of the maritime border. As that case showed, in some situations where the coastal geomorphology was variable, a solution such as the one determined by the Court in that specific case was an ideal alternative for providing security and stability to the parties despite frequent variations in the land boundary terminus.

15. Her delegation welcomed the Study Group's initiative to analyse the practice of African States with regard to maritime delimitation, and suggested that the analysis be expanded to include other geographic regions. It looked forward to the next study, on statehood and the protection of persons affected by sea-level rise.

16. **Ms. Arumpac-Marte** (Philippines) said that the topic "Immunity of State officials from foreign criminal jurisdiction" must be approached with the aim of balancing respect for the sovereign equality of States and protection of State officials from politically motivated or abusive exercise of criminal jurisdiction, on the one hand, with the recognized need to combat impunity for international crimes, on the other.

17. Referring to the topic "Sea-level rise in relation to international law", she said that the Philippines was an archipelagic State with numerous low-lying coastal areas and communities that were highly vulnerable to sea-level rise and its impact on maritime rights and entitlements. It agreed with the Commission's premise that sea-level rise was a scientifically proven reality. Steady progress on the topic, especially as it related to the United Nations Convention on the Law of the Sea, statehood and protection of persons affected by sea-level rise, was urgently needed.

18. Her delegation took note of the work of the Study Group on the topic, as set out in its first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), concerning the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces measured from the baselines, and of the analysis of the ambulation of baselines as a result of sea-level rise. It also took note of the highlighted case of an archipelagic State whose existing archipelagic baselines could be

impacted by the inundation of small islands or drying reefs, which could lead to loss of archipelagic baselines status, and of the discussion on the status of islands and rocks under article 121 of the United Nations Convention on the Law of the Sea and the consequences of reclassification as a rock due to sea-level rise, including as a rock that "cannot sustain human habitation or economic life of [its] own". Despite the significant work done by the Study Group, those questions needed further consideration by States.

19. Her delegation cautioned against an inference in favour of ambulatory baselines, unless supported by State practice and *opinio juris*, and of any interpretation that would undermine the delicate balance of rights and obligations set out in the United Nations Convention on the Law of the Sea or its universal and unified character. It was important to proceed on the basis of legal stability, security, certainty and predictability in international law.

20. Her delegation agreed with the view that the application of principles of public international law could favour permanent maritime boundaries, in light of the principle of immutability of borders inherited from the colonial era, in accordance with the principle of *uti possidetis juris*. The limitation on the application of the principle of *rebus sic stantibus*, as provided for in the Vienna Convention on the Law of Treaties, also militated in favour of permanent maritime boundaries, with the consequence that boundary treaties could not be affected by a fundamental change of circumstances.

21. When examining State practice, the Study Group should give close consideration to the submissions of affected States. It should also draw on the inputs of technical experts and scientists, as necessary, given the technical nature of the topic.

22. **Ms. Solano Ramirez** (Colombia) said, with regard to the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), that her delegation was reviewing the scope of draft article 17 (Settlement of disputes), in particular with regard to choosing between the two proposed mechanisms and the need to refer expressly to them. It would be informing the Special Rapporteur of its thinking on that matter following existing procedures.

23. For Colombia, the topic "Sea-level rise in relation to international law" was of vital importance, as climate change and the resulting rise in sea levels represented the greatest challenge facing humanity. The effects of sea-level rise were felt worldwide but were particularly severe in vulnerable countries, especially those in Latin America and the Caribbean. According to estimates, in Colombia, 55 per cent of the population living on the Caribbean coast and 45 per cent of the population living on the Pacific coast would be directly affected by sea-level rise by 2050.

24. The only way to meet those challenges was through coordinated efforts with the involvement of the entire United Nations system. In that context, the work of the Commission, and the Study Group on the topic in particular, was vital. Colombia was therefore pleased that in 2022 the Study Group would be focusing on the subtopics of sea-level rise in respect of statehood and the protection of persons affected by sea-level rise. It called on the Study Group to consider all sources of international law, which went beyond the United Nations Convention on the Law of the Sea.

25. Lastly, Colombia would be providing the Commission with information on its practice and other relevant data relating to sea-level rise in relation to international law by 31 December 2021, and urged other States to follow suit. It would also be submitting comments on specific issues, including examples of its State practice and all other material of relevance to the topic.

26. **Archbishop Caccia** (Observer for the Holy See), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that, in the light of the *Jordan Referral re Al-Bashir* case, the Commission had rightly placed special emphasis in 2021 on the relationship between the immunity of State officials from foreign criminal jurisdiction and the jurisdiction of international criminal tribunals.

27. Immunity of State officials was a crucial, longstanding principle of State sovereignty and international diplomacy that must be respected in order to ensure peaceful and friendly relations among States. It protected State officials from undue and politically motivated prosecution and facilitated diplomatic relations. Traditional defences based on the functional immunity of public officials should not apply for the most serious crimes. At the same time, the immunity *ratione personae* of the highest official of the State while in office must be preserved as a precondition for the orderly conduct of international affairs and for any mediation or peacebuilding efforts. Prosecutorial discretion, crucial at both the national and the international level, should be exercised with the greatest care, particularly in cases of democratic transition and at the end of civil wars.

28. On the topic "Sea-level rise in relation to international law", his delegation stressed that sea-level rise was much more than a legal issue. Considering that

a quarter of the world's population lived on or near a coast and that most megacities were situated in coastal areas, the number of persons directly affected by sea-level rise would continue to increase.

29. The Commission had wisely adopted a broad approach to the topic, while also setting out the legal challenges posed by sea-level rise in such specific areas as the law of the sea, statehood, human rights and migration. The potential impact of sea-level rise on maritime delimitations, baselines, the jurisdiction and rights of States, the application of existing treaties and the continuing discussions on the instrument on the use of marine biodiversity of areas beyond national jurisdiction and the International Seabed Authority code were complex and evolving legal issues that demanded careful study. The Holy See noted with appreciation that sea-level rise was being discussed in the Commission in relation to the notion of a "fundamental change of circumstances".

30. **Ms. Escobar Hernández** (Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction") said that she had taken note of the great interest expressed by Committee members for the topic, and of their comments, criticisms, observations and suggestions, and also of the request by several delegations that the Commission continue to give careful consideration to the more controversial draft articles, in particular draft article 7. She would make every effort to reach a consensus that would make it possible to adopt the full set of draft articles on first reading at the 2022 session.

31. **Ms. Oral** (Co-Chair of the Study Group on sea-level rise in relation to international law) said she welcomed the many comments which delegations had made on the first issues paper and the summary of the work of the Study Group, which had provided vital guidance for future work. The many members of the Committee who had spoken had acknowledged the importance of the topic and had referred to the legal aspects of the challenge that sea-level rise posed. The Study Group welcomed in particular the recognition of the need for information on State practice and other materials, which would greatly assist it in its work. In 2022, the second issues paper and the meeting of the Study Group would focus on protection of persons and on statehood.

32. **The Chair** invited the Committee to begin its consideration of chapters VII and VIII of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

33. **Ms. Hansen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said with regard to the topic "Succession of States in respect of State responsibility" that the Nordic countries were pleased with the thorough consideration which the Special Rapporteur continued to give to the comments of States in his reports. They agreed on the whole with the Special Rapporteur's general approach in his fourth report (A/CN.4/743), in which he had usefully reverted to a number of general aspects of the topic.

34. Referring to the draft articles proposed by the Special Rapporteur in the report, she said that in the view of the Nordic countries, draft article 7 bis (Composite acts) was of particular importance, since some of the most serious internationally wrongful acts had a composite character. The Nordic countries noted the discussion in the Commission on the need for further clarity regarding the scope of paragraphs 1 and 2. Questions had also arisen about the responsibility of the predecessor State when it continued to exist and whether it was necessary to discuss shared responsibility. Those questions would probably be answered as work on the topic progressed, and draft article 7 bis should be fine-tuned accordingly. The Nordic countries also agreed with several members of the Commission that the work of the Institute of International Law on continuing and composite acts provided particularly useful guidance.

35. Referring to the draft articles provisionally adopted by the Commission, she said that draft articles 7, 8 and 9 appeared firmly aligned with the 2001 articles on responsibility of States for internationally wrongful acts, which were to a large extent considered to be customary international law. It was thus predominantly a matter of applying existing law to the particular circumstance of succession of States. While the Special Rapporteur stipulated that an injured State "may request" restitution or compensation, as the case might be, in the proposed draft articles 16, 17 and 19, it had been stipulated in paragraph 1 of draft article 9 that an injured State was "entitled to invoke the responsibility of the predecessor State". The Nordic countries had a slight preference for the "entitled to invoke" formulation being used throughout the draft articles, as it seemed to be more normative and precise.

36. The Nordic countries were pleased that the Special Rapporteur intended to focus his next report on legal problems arising in situations where there were several successor States, both as injured States and as responsible States. Shared responsibility, which he also planned to address, was a challenging and important issue. The Nordic countries agreed with the Commission that the most suitable option for the outcome of the topic could be decided later. As a form, draft articles were consistent with the Commission's earlier work on State

responsibility and State succession, but the form of the outcome was not of major importance: what counted was a well-drafted and balanced set of provisions that would be useful in practice.

37. With regard to the topic "General principles of law", the Nordic countries subscribed on the whole to the general approach adopted by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1) and to his preliminary conclusions. However, caution approach was warranted, given the many sensitivities at play, coupled with the cross-cutting nature of the topic. The Nordic countries welcomed the progress in the Commission's work on the topic, and commended the Special Rapporteur for the broad survey of relevant State practice, jurisprudence and teachings.

38. While Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was an obvious starting point for work on the topic, it contained an unfortunate reference to recognition by "civilized nations", an anachronistic and inappropriate expression that had no place in the Commission's draft conclusions. The Nordic countries were amenable to replacing it with the proposed wording "community of nations" in draft conclusion 2, but would prefer "international community of States", which seemed clearer and more in line with standard terminology.

39. Although general principles of law constituted a primary source of international law, alongside treaties and customary international law, they usually played a subsidiary role, acting mainly as a means of interpretation or for filling gaps or avoiding situations of *non liquet*. The International Court of Justice had only rarely referred explicitly to general principles of law, and when it did, it was primarily in the context of procedural obligations rather than substantive law obligations. The criteria for identifying general principles of law must thus be sufficiently strict, to avoid exaggerating their legal significance in relation to the other primary sources of international law.

40. Referring to the draft conclusions proposed by the Special Rapporteur in his report, she said that the Nordic countries agreed with the two-step approach to the identification of general principles derived from national legal systems, as set out in draft conclusions 4, 5 and 6. They noted the importance of the second criterion in draft conclusion 4, namely that the principles derived from national legal systems must be transposable to the international level. They further agreed that general principles of law could also emanate from the international legal system, as highlighted in draft conclusion 7. Distinguishing such principles from customary international law would require careful consideration and rigorous analysis. By and large, the Nordic countries agreed with the three approaches for determining the existence and content of a general principle of law formed within the international legal system, as set out in points (a), (b) and (c) of draft conclusion 7.

41. The Nordic countries supported the proposed outcome of the topic, namely draft conclusions and commentaries thereto.

42. **Mr. Kanu** (Sierra Leone), referring to the topic "Succession of States in respect of State responsibility", said that while the Commission had made considerable effort to clarify the applicability of the general rules of State responsibility to the specific context of succession, a matter that was not addressed in the 2001 articles on responsibility of States for internationally wrongful acts, both the Special Rapporteur and the Commission had acknowledged that succession in respect of State responsibility was often resolved by political negotiations and was often context-specific. Therefore, the general view remained that, regardless of the outcome, the Commission's work on the topic should be treated as subsidiary to agreements entered into by the concerned States. Legal guidance on the subject remained helpful, however, even if the issues to which it gave rise were primarily settled by negotiations.

43. His delegation concurred with the view that there was limited State practice on the topic, implying that the Commission's work, while alluding to codification, might largely be a form of progressive development. Nonetheless, in the current discourse on codification and progressive development in the work of the Commission, the critical factor was transparency as to what constituted progressive development and what represented codification. Sierra Leone appreciated the fact that the aim was to ensure that, with regard to the general rules, State responsibility standards would continue to apply and should be followed.

44. Sierra Leone sensed that there was a change in the Commission in favour of a position that neither a "clean slate" rule nor an automatic succession rule should be accepted as a general rule in relation to succession in respect of State responsibility for an internationally wrongful act. The Commission should indicate clearly whether it was proposing a change in existing rules of international law. It should also be attentive to the established rules of succession under customary law, the views of developing States, and also the practice of African States, which had been largely missing from the work to date.

45. It appeared that draft articles were the preferred outcome for the topic. However, it was not yet clear

whether the Commission would be proposing that States negotiate a treaty on the topic. The Commission should make that clear.

46. The topic of general principles of law was of high importance to Sierra Leone, given its impact on how the country viewed international law in the current pluralistic context. His delegation acknowledged the complexities of the topic and agreed with the Special Rapporteur that the analysis of general principles of law, as one of the three principal sources of international law, required careful and extensive treatment.

47. His delegation agreed that the starting point of the Commission's work on the topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, which was to be examined through State practice and the decisions of international and national courts. It concurred with the general view within the Commission and the Committee that the term "civilized nations" found in that Article was anachronistic and not reflective of the current nature of the international community. In lieu of amending the Statute of the Court, the phrase "community of nations", already employed to refer to sources of international law in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, should be utilized in the work on the topic and throughout the United Nations system.

48. As to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said in respect of draft conclusion 4 (Identification of general principles of law derived from national legal systems) that Sierra Leone agreed with the Special Rapporteur that the analysis must be wide and representative, covering as many national legal systems as possible. His delegation therefore welcomed the formulation in subparagraph (a) that it was necessary to ascertain "the existence of a principle common to the various legal systems of the world".

49. Sierra Leone looked forward to the Special Rapporteur's third report, which would address the functions of general principles of law and their relationship with other sources of law. It urged the Commission to be cautious and not delve into matters that would be addressed under the topic "Subsidiary means for the determination of rules of international law".

50. His delegation thanked the members of the Commission for their commitment to ensuring that work progressed at its seventy-second session despite the challenges associated with online participation. The 2021 experience suggested, however, that in-person meetings should be ensured in future sessions. The practice of making plenaries accessible on the United Nations webcast should also be maintained.

51. Sierra Leone would like to seek the support of Member States for the candidature of Charles Jalloh for re-election to the Commission for its upcoming term.

52. *Ms. Krutulytė (Lithuania), Vice-Chair, took the Chair*.

53. **Mr. Abdelaziz** (Egypt), referring to the topic "Succession of States in respect of State responsibility", said that his delegation agreed with the general considerations for the Commission's work as noted in paragraph 126 of the report of the Commission (A/76/10), particularly with regard to the subsidiary nature of the proposed draft articles on the topic, the importance of preserving consistency with the previous work of the Commission, the specificity of cases of succession of States that inevitably combined political and legal considerations, and the need to combine codification with progressive development of international law. His delegation agreed with the view that further efforts should be made to confirm the status of the "clean slate" rule and the automatic succession rule as customary international law. Given the complex and composite nature of the topic, and the range of actual or potential situations involved, the wording of the draft articles should be made simpler and more precise.

54. Referring to the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), he said that it was important to review draft article 7 bis (Composite acts) and, in particular, paragraph 2 thereof, whereby, if an internationally wrongful act occurred only after the last action or omission by the successor State, the international responsibility of that State extended over the entire period in which the actions or omissions took place.

55. In draft article 16 (Restitution), the expression "a burden out of all proportion" required commentary and clarification. With regard to draft article 17 (Compensation), it should be explained on what basis a successor State could request compensation in the event that there were several successor States. The Commission might wish to harmonize the standards mentioned in draft articles 16, 17, 18 and 19. It would also be useful to consider the form that the Commission's output would take, in order to ensure that it was appropriately drafted. In view of the importance of the topic, the Commission should not complete its work with undue haste.

56. As to the topic "General principles of law", his delegation concurred with the six main points

highlighted by the Special Rapporteur, as set out in paragraphs 174 to 179 of the Commission's report (A/76/10). It agreed that the term "civilized nations" contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice should be abandoned. Any of the alternatives suggested in the report would better reflect the current international situation. In selecting an alternative, it would be useful to solicit written observations with a view to reflecting the general understanding of the concept and taking into account the principle of equality of States. Care should be taken to ensure that concepts and definitions were used precisely. For instance, a distinction should be made between general principles of law and other principles, such as principles of customary law and peremptory norms.

57. The proposed topic "Subsidiary means for the determination of rules of international law" would be of considerable benefit to States and would complement the topic "General principles of law".

58. **Mr. Evseenko** (Belarus) said with regard to the topic "Succession of States in respect of State responsibility" that his delegation continued to favour a cautious approach to the presumption of succession in situations where the predecessor State ceased to exist. In such instances, it was important to take account of all factors, for example the circumstances surrounding the cessation of the predecessor State and the degree to which any successor State had participated in the governing of the predecessor State (and thus in the commission of an internationally wrongful act). That made it doubtful that uniform rules could be elaborated. His delegation recognized that the topic was highly context-specific and sensitive and that related issues were generally settled on an ad hoc basis. It agreed on the priority to be given to agreements between the States concerned and on the subsidiary role of the proposed draft articles on the topic.

59. Referring to the draft articles provisionally adopted so far by the Commission, he said that his delegation agreed with the view expressed by the Commission in its commentary to draft article 7, with regard to succession in respect of State responsibility for acts having a continuing character, that identifying and defining the scope of State responsibility in respect of predecessor and successor States was considered essential. It supported the formulation of draft article 9 concerning retention of obligations by the predecessor State arising from the commission of an internationally wrongful act by the predecessor State, when the predecessor State continued to exist after the date of the succession, and the possibility of an agreement between the successor State and the injured State.

60. Pertaining to the usefulness or necessity of the draft articles, his delegation endorsed the Special Rapporteur's position that the articles on responsibility of States for internationally wrongful acts did not cover all aspects relevant to the current topic and that, accordingly, the draft articles on succession of States in respect of State responsibility could be viewed as complementing existing rules, the aim of work on the topic being to fill the gaps in the codification of rules of State responsibility and rules on the succession of States. His delegation therefore welcomed the Special Rapporteur's view that State practice did not support the primacy of either the "clean slate" rule or the automatic succession rule. In the law of State succession, as developed in the past, the "clean slate" rule was the rule applicable with respect to newly independent States; thus, it was not universal and could not be applied to all categories of succession.

61. The topic of general principles of law seemed very promising in that it had not yet been studied in a systematic way, despite the existence of judicial practice, precedent and doctrine in that area. His delegation shared the Special Rapporteur's view that the topic was complex and required extensive analysis. His delegation looked forward to the outcome of the Commission's work on such matters as the functions of general principles of law, their identification and their relationship with other sources of international law.

62. **Ms. Keen** (Australia), referring to the topic "General principles of law", said that her delegation urged the Commission to clarify how the terminology used in the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1) interacted with the draft conclusions on identification of customary international law. For example, draft conclusion 5, paragraph 2, required that, to identify a general principle of law, a comparative analysis must be "wide and representative". That was similar to the requirement in the draft conclusions on identification of customary international law that State practice must be "widespread and representative". It would be helpful if consistent terms were used across the two sets of draft conclusions, where appropriate. Otherwise, where the Commission intentionally adopted different wording, it should explain the different terminology used clearly in its commentaries.

63. Australia welcomed the outline in the Special Rapporteur's report on how to identify that a principle had been "transposed" to the international legal system. It recommended that the Commission provide further clarification on what constituted "fundamental principles of international law" with which a principle

must be compatible in order to be "transposed" to the international legal system. A definition of "fundamental principles of international law" and "conventional international law" would also improve the draft conclusions. Her delegation appreciated the explanation of how a general principle formed within the international legal system would be identified and how its identification differed from the identification of customary international law.

64. Given the limited practice on general principles formed within the international legal system, the Commission should be clear about which parts of the draft conclusions represented the codification of existing international law, and which parts represented the progressive development of international law. The Commission should also further clarify how general principles of law derived from the international legal system differed from other sources of international law, such as customary international law or treaties.

65. In that connection, her delegation welcomed the inclusion, in the Commission's programme of work, of the relationship between general principles of law and other sources of international law. Australia also supported the Commission's proposed work on the functions of general principles of law, in particular in order to clarify the "gap-filling" role often ascribed to such principles, as demonstrated by State practice and the decisions of international courts and tribunals.

66. **Ms. Joyini** (South Africa) said her delegation remained convinced of the importance of the topic "General principles of law" and of an improved understanding of the reference in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice to general principles of law as a primary source of international law. South Africa agreed with the unanimous view that the wording "civilized nations" contained in the Article was anachronistic. The words "international community" – or "community of nations", as used in the International Covenant on Civil and Political Rights – were more appropriate. Her delegation encouraged the Commission to continue to explore the most preferable and accurate terminology to be used without modifying the scope or content of Article 38, paragraph 1 (c).

67. The members of the Commission appeared to agree that the scope of the topic included the legal nature of general principles of law as a source of international law; the origins and corresponding categories of general principles of law; the functions of general principles of law and their relationship with other sources of international law; and the identification of general principles of law. In determining the general principles of law falling under Article 38, paragraph 1 (c), the Commission included the categories of general principles of law derived from national legal systems and general principles of law formed within the international legal system. Nonetheless, that categorization was problematic. South Africa recognized that general principles of law formed within the international legal system might be considered a source of international law. However, the difference between general principles of law formed within the international legal system and customary international law or conventional international law had not been adequately explored or determined.

68. South Africa noted the view that the process for the determination of peremptory norms of international law might serve as a model that could be adapted to determine general principles of law formed within the international legal system. It agreed with the potential pitfalls of not drawing an adequate distinction between not only the different categories, but also the methods, factors and processes for doing so. Thus, while supporting the Special Rapporteur's proposal to address in his third report the functions of general principles of law and their relationship with other sources of law, her delegation believed that it might be difficult for the Commission to address the matter if it did not consider the processes through which general principles of law emerged, changed or ceased to exist.

69. It was the view of her delegation that principles of law derived from national legal systems needed to be adapted to the international context in order to be used in determining general principles of law. Her delegation was satisfied that the Commission and the Special Rapporteur were bearing that in mind in addressing the current topic.

70. Lastly, for her delegation, the intended result of the Commission's work on the current topic, namely draft conclusions and draft commentaries, continued to be the preferred option, as opposed to draft articles.

71. **Ms. Vaz Patto** (Portugal), referring to the topic of succession of States in respect of State responsibility, said that her delegation remained open-minded regarding the format of its outcome. It agreed with the Special Rapporteur and other members of the Commission that the progressive development of international law in relation to the impact of succession of States on forms of responsibility should be consistent with the articles on responsibility of States for internationally wrongful acts. Coherence and consistency must drive any effort to progressively develop the public international legal framework.

72. Portugal continued to believe that State practice on the question was diverse, context-specific and sensitive and did not constitute a sufficient basis for affirming the existence of a general rule in connection with State succession. It also believed 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 therefore pleased to see that the Commission made it clear in paragraph 2 of article 1 of the draft articles which it had provisionally adopted so far that the draft articles were applicable "in the absence of any different solution agreed upon by the States concerned".

73. Her delegation concurred that the commentaries to the draft articles should include examples of succession agreements between States, and that model clauses could be drafted to be used as a basis for the negotiation of such agreements. Nonetheless, the Commission should proceed with caution, to avoid inferring general conclusions and principles from particular instruments and practices.

74. Turning to the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), she said with regard to draft articles 16, 17, 18 and 19 that Portugal agreed that the obligation of cessation and assurances and guarantees of non-repetition, and other forms of reparation, were forms of remedies, rather than forms of responsibility, and should therefore be treated accordingly. As *lex specialis*, the draft articles and the legal solutions they envisaged should aim to cover as many scenarios of State succession as possible. Otherwise, the Commission ran the risk of merely rewriting the general law on State responsibility for internationally wrongful acts.

75. In the view of her delegation, the long-established principle of full reparation did not, as a rule, prevent States from concluding settlement agreements, including lump-sum agreements. However, an exception should be in place in situations involving breaches of peremptory norms of general international law or *erga omnes* obligations. In those cases, the validity of such agreements depended on them meeting the necessary threshold of full reparation. *Jus cogens* and *erga omnes* obligations aimed to protect values and interests of the whole international community, and not exclusively those of the States directly involved in the breach. It would therefore be unreasonable if the concerned States alone could settle on the remedy for their breach. In situations in which the interests and values of the international community as a whole were at stake, the principle of full reparation should be fully respected, with no exceptions.

76. Her delegation believed that there was no evidence suggesting that the prosecution of international crimes constituted a form of satisfaction. It would nonetheless be helpful if the Special Rapporteur could provide examples of State practice indicating the opposite view. As to whether a State must offer appropriate assurances and guarantees of non-repetition, draft article 19, paragraph 1, made it dependent on the circumstances of the case. Portugal considered that the expression "if circumstances so require", which implied a case-by-case analysis, failed to provide States with enough guidance. It would be helpful to substantiate the meaning and scope of that expression either in the provision itself or in the commentaries.

77. The topic "General principles of law" gave the Commission the opportunity to complement the existing work on other sources of international law and to provide added guidance on the nature, identification and application of general principles of law, as well as on their relationship with other sources of international law.

78. Referring to the draft conclusions on the topic provisionally adopted by the Commission, she said her delegation was pleased that the Commission had not used the expression "civilized nations" in draft conclusion 2, as it was archaic and had no place in contemporary international relations. It also encouraged the Commission to further study the role of international organizations in the formation and recognition of general principles of law. Her delegation was well aware that the Commission had noted in paragraph (5) of its commentary to the draft conclusion that "international organizations may also contribute to the formation of general principles of law". Nonetheless, it would be preferable to include a phrase in the draft conclusion itself that could unambiguously encompass international organizations, instead of "community of nations".

79. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), she said that Portugal supported the two-step analysis set out in draft conclusion 4 for the identification of general principles of law derived from national legal systems. The comparative analysis referred to in draft conclusion 5 must be sufficiently wide and representative, in line with the approach followed by the Commission in the draft conclusions on identification of customary international law. Elements for determining representativity must include an analysis of diverse geographical and linguistic criteria.

80. With respect to both draft conclusion 5, paragraph 3, and draft conclusion 8, Portugal stressed that national

courts might rely on sources of law different from those applicable under international law. That should be taken into consideration when analysing the decisions of national courts for determining the existence of a general principle of law. Bearing in mind Part Five of the draft conclusions on identification of customary international law, her delegation would welcome draft conclusions on the usefulness or significance of other subsidiary means for the determination of general principles of law, which could cover, for example, resolutions of the United Nations or international expert bodies and outputs of the Commission.

81. Lastly, in his next report, which would focus on the functions of general principles of law and their relationship with other sources of international law, the Special Rapporteur should avoid establishing a hierarchy between the various sources of international law and should also bear in mind that general principles of law, in addition to serving as an ethical and normative model for other norms, had a supplementary role of filling gaps and avoiding situations of *non liquet*.

82. **Mr. Xu** Chi (China), addressing the topic of succession of States in respect of State responsibility, said that each case had its own special political background and thus could not be seen as reflecting universal practice and the *opinio juris* of all States. China, along with several other States, had therefore suggested that the outcome of work on the topic be draft guidelines instead of draft articles, or else an analytical report. His delegation again asked the Commission to give weight to such opinions and to proceed with caution in its future work on the topic.

83. Referring to the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/732), he said that while draft articles 16, 17, 18 and 19 referred to specific forms of compensation in relation to State responsibility, they merely restated the general rules of State responsibility without clarifying how those rules were applied in the case of State succession. The Commission should therefore clarify the matter further.

84. Concerning the topic "General principles of law", he said that when the Commission had provisionally adopted draft conclusion 2, the wording "civilized nations" had been changed to "community of nations", with which China agreed. The new expression helped to safeguard the principle of sovereign equality and embodied equity and justice.

85. As to the draft conclusions proposed by the Special Rapporteur is his second report (A/CN.4/741 and A/CN.4/741/Corr.1), the Commission should make it clear in its commentary to draft conclusion 5 that a legal principle recognized by only a few countries or group of countries must not be considered to be a principle common to the principal legal systems of the world. Draft conclusion 7, subparagraphs (a) and (b), were in fact mandatory requirements of State practice and *opinio juris*, thus constituting rules of customary international law. As such, there was no need to discuss those elements in the context of general principles of law. His delegation hoped that the Commission would clarify the scope of the draft conclusion subsequently.

86. **Mr. Simcock** (United States of America) said that draft guidelines or draft principles might be the more appropriate outcome for the topic "Succession of States in respect of State responsibility", as the substance of the initial draft articles considered by the Commission continued to show. For example, it was stipulated in paragraph 2 of draft article 16 proposed by the Special Rapporteur in his fourth report (A/CN.4/743) that an injured State "may request" restitution from a successor State in certain circumstances. Such permissive wording might be appropriate in that area, as State practice was, at best, uneven, and determinations by predecessor or successor States to deny or accept liability were likely to be driven more by diplomatic and political, rather than legal, considerations.

87. In that connection, his delegation appreciated the fact that in his third report (A/CN.4/731), the Special Rapporteur had acknowledged that the proposed draft articles would constitute progressive development of international law. Some of the provisionally adopted draft articles, such as draft article 10, draft article 10 bis, paragraph 1, and draft article 11, raised a similar concern. The stipulation that two or more States "shall agree" on how to address an injury appeared to be binding, but it was unclear what that legal obligation entailed in practice, or what the legal consequences of a breach would be. If one party proposed a means to address an injury to which the other party did not agree, it was not clear whether that failure to agree constituted an internationally wrongful act. Despite the inclusion of seemingly binding wording, the draft articles appeared to be exhortations to cooperate, which seemed to be more appropriate for draft guidelines.

88. His delegation appreciated the Special Rapporteur's efforts to address composite acts, as compared to continuing acts, in draft article 7 bis. The United States had not formed a position on the draft article but noted that the inclusion of examples or a hypothetical in the commentaries would be helpful for States, courts and tribunals attempting to parse that complex subject in their work.

89. The United States agreed with the comments by some members of the Commission that the draft articles would be improved by avoiding controversial positions or unsettled areas of law that did not need to be addressed in the context of the topic. For example, the draft articles proposed by the Special Rapporteur included wording that highlighted the ability of an injured State to choose the form of reparation to invoke, as well as a reference to the articles on responsibility of States for internationally wrongful acts and the related commentaries in support of that choice.

90. If that suggested that such an invocation created an obligation for a responsible State to provide that particular form of reparation, his delegation did not believe it to be supported by the articles on State responsibility, the related commentaries, the cases cited in the commentaries or the discussions of the Commission when the relevant provisions had been drafted. His delegation understood that others might have different views on that point or, for example, might have views that did not align with the primacy of restitution. However, those differences of opinion did not need to be resolved in the context of State succession in respect of State responsibility and might obscure the Commission's important work on the topic. His delegation encouraged the Special Rapporteur and the Drafting Committee to consider revisions that minimized the need to address those unrelated issues.

91. On the topic "General principles of law", the United States reiterated its view that the element of "recognition" was essential to the identification of general principles of law. The relevant determination was whether a legal principle was recognized by States, as evidenced by their practice.

92. As to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), his delegation shared the concerns raised about the potential ambiguity introduced by the proposed expression "recognized by the community of nations" in draft conclusion 2, and believed that "recognized by States" would provide better clarity for States, courts and tribunals as they applied the concept in practice.

93. His delegation encouraged the Commission to continue focusing on the need for recognition by States as the core consideration when drawing conclusions about the identification of general principles of law and when assessing whether there was sufficient information available from which to draw such conclusions. For example, a focus on State practice in the drafting of commentaries and subsequent conclusions could further elucidate when and how a general principle of law was transposed to the international legal system. It could also provide greater clarity with respect to whether, when and to what extent the activities of supranational or international organizations contributed evidence of the existence of a general principle of law.

94. On draft conclusion 7, the United States continued to believe that there was insufficient State practice in the international legal system to determine whether a particular principle "formed within the international legal system" might be considered a general principle of law. The Special Rapporteur's report did not alleviate the doubts about the availability and quality of evidence of such practice. It raised concerns about the lack of objective standards to guide the identification process, without which it would be impossible to achieve the goal, which his delegation shared with the Special Rapporteur, of ensuring that the criteria for determining the existence of a general principle of law were strict, and that they were not used as an easy shortcut to identifying norms of international law general principles. The lack of objective standards also opened the door to general principles being used as a means to assert claims about international law that were not properly established.

95. His delegation also shared the concerns raised about the reliance by the Special Rapporteur on decisions of international criminal courts and tribunals. As international criminal law was often *sui generis*, caution must be exercised when extrapolating from it to other areas of international law or to international law generally. To the extent that there was evidence of State practice from other areas of international law, inclusion from a more representative sampling would greatly enhance the effectiveness of the commentaries to the relevant draft conclusions. If such evidence was limited, his delegation encouraged the Commission to consider whether there was a sufficient basis for a conclusion concerning existing law and, if not, to clearly identify any resulting conclusion as progressive development of law.

96. The questions raised in the Special Rapporteur's second report with regard to distinguishing between general principles of law and other sources of international law merited additional careful consideration and would be better addressed following a review of his next report, in which he would examine the relationship between the sources of international law.

97. **Ms. Weiss Ma'udi** (Israel), referring to the topic "General principles of law", said that such principles might be considered and applied, if relevant, only where no treaty rule or customary international law applied to

a given situation. That would be consistent with the jurisprudence and Statute of the International Court of Justice.

98. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), she said, with respect to draft conclusion 2, that her delegation agreed with the Special Rapporteur and numerous States that the expression "civilized nations" was archaic and should be replaced with a more suitable phrase, such as "community of States" or "community of States as a whole". Her delegation believed that the word "States" was more appropriate than "nations". As to draft conclusion 3, subparagraph (a), Israel agreed with the Commission that there were general principles which might be derived from national legal systems. On draft conclusion 4, subparagraph (a), Israel believed that a principle could be considered "general" only if it was found in an overwhelming number of legal systems of States belonging to diverse legal traditions.

99. With regard to draft conclusion 5, her delegation agreed with the call for a rigorous comparative analysis of State practice. It disagreed, however, with the proposal of the Drafting Committee to add the phrase "other relevant materials" at the end of paragraph 3. That phrase was too vague and might lead to an overly broad interpretation of the draft conclusion. The Commission should clarify either in the draft conclusion itself or in the commentary thereto what "other relevant materials" might include. In her delegation's view, that should only refer to materials that clearly represented the authoritative legal view of the relevant State.

100. Concerning draft conclusion 3, subparagraph (b), Israel strongly believed that there was insufficient State practice to suggest or demonstrate the existence of the proposed category of general principles of law that might have developed within the international legal system. The Special Rapporteur himself had acknowledged the dearth of State practice in that regard. Moreover, that category did not seem to be supported by the *travaux préparatoires* of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, which only referred to general principles formed within domestic legal systems.

101. The significant divergence of views among States and even within the Commission concerning the very existence of such a putative source of international law, and not merely disagreement regarding its nature or contours, called for extreme caution. That might well be, in and of itself, a sufficient reason not to consider principles of the so-called second category to be a source of international law.

102. Draft conclusion 7 reflected the inherent problems associated with the suggested category of "general principles of law formed within the international legal system". The suggested criteria for the identification of such principles, which were supported by scant State practice, conflated the source of general principles of law with other sources of international law, namely international treaties and customary international law. Subparagraphs (a) and (b), for example, appeared to suggest that general principles of international law might emerge from, or overlap with, rules of conventional or customary international law. In their current form, the suggested criteria risked undermining the basic tenets of international treaties and customary international law, as well as their underlying foundational principle of State sovereignty.

103. The first identification criterion, mentioned in subparagraph (a), namely that a principle was widely recognized in treaties and other international instruments, could be interpreted as allowing for the application of certain treaty provisions to States which were not parties to the treaty in question. Such an interpretation could undermine the basic principle of international law that States were bound by a treaty only to the extent that they had agreed to be bound by it. Moreover, the phrase "other international instruments" was extremely vague. The Special Rapporteur's suggestion that general principles might be found in General Assembly resolutions was highly problematic, not least given the largely political, rather than legal, nature of said resolutions. Indeed, the International Court of Justice had stressed that great caution was required before assigning any normative value to such resolutions. Their limited value and the caution required in evaluating them had been recognized by the Commission itself in its work on identification of customary international law.

104. The second criterion, mentioned in subparagraph (b), namely that a principle underlay general rules of conventional or customary international law, contained even more inherent flaws than those regarding possible recourse to treaties. Firstly, it was too vague and could lead to the reading of ideas into treaties that were not actually contained therein, supporting the argument that customary law dictated more than what accepted State practice did. Those implications risked undermining the framework of treaty law and customary rules and inviting subjective interpretations that jeopardized overall legal stability and predictability.

105. Secondly, customary rules did not necessarily apply universally. That was particularly true in situations where there was a persistent objector to a certain rule. The persistent objector was a well-established

concept in international law and had been recognized by the Commission in the context of its work on the topics "Identification of customary international law" and "Peremptory norms of general international law (*jus cogens*)". Subparagraph (b) could be interpreted as suggesting that a general principle might be deduced from customary rules, potentially circumventing the persistent objector rule in an unacceptable manner. That issue raised the important question, which the Commission should explore, of whether general principles of international law applied to States that had expressly rejected them.

106. The third criterion, mentioned in subparagraph (c), namely that a principle was inherent in the basic features and fundamental requirements of the international legal system, was extremely vague and subjective. It also lacked a basis in State practice accepted as law and risked undermining the well-established framework of the sources of international law set out in Article 38, paragraph 1, of the Statute of the International Court of Justice. Israel therefore urged the Commission to give careful consideration to the question of whether the so-called second category of general principles should be pursued and how it might be justified and identified.

107. On draft conclusion 8, paragraph 2, Israel believed that only final or otherwise definitive decisions of higher courts should be taken into account in determining whether the judicial system of a State had recognized the existence and content of a given general principle of law.

108. Turning to the topic "Succession of States in respect of State responsibility", she said that the Commission was at its best when, in line with the accepted approaches to international law, it took up topics on which there was a well-developed body of State practice and jurisprudence that required refinement or clarification. It followed, therefore, that the Commission should choose topics of general international law that were of interest and utility to States and did not give rise to strong objections.

109. Her delegation had reservations about the approach followed by the Special Rapporteur in connection with the current topic, in particular in his fourth report (A/CN.4/743), where he stated that "the requirement of general practice as an element of identification of customary international law cannot be applied too strictly". Israel urged the Commission to uphold the accepted methodology for the determination of rules of customary international law, which had recently been embodied in the Commission's conclusions on that topic. Israel was also concerned about the lack of clarity regarding the scope of the project. It urged the Special Rapporteur to refrain from taking positions on related, but distinct, areas of law, such as the law of State responsibility. Israel did not see draft articles as appropriate for serving as the basis for a future convention and believed that draft guidelines might be more appropriate.

110. The choice of topics for the Commission to take up was a responsibility shared by both the Commission and States. It was therefore important for as many States as possible to make their positions known, including on the Commission's work more generally, in order to provide guidance to the Commission and ensure that the outcome of its work would be of service to States.

111. **Mr. Stellakatos Loverdos** (Greece), referring to the topic "Succession of States in respect of State responsibility", said that it was difficult to strike a balance between the principle that it was the predecessor State, if it continued to exist, that retained the obligation to provide reparation for its illegal act, and the legal and material reality arising from the succession, which in limited cases called for a transfer of the obligation to the successor State, at least in part or in certain forms of it.

112. Addressing the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), he said that given that draft articles 16, 17, 18 and 19 aimed to provide normative guidance, it would be appropriate to include in them a cross-reference to and a consequent rephrasing of paragraph 2 of draft article 9, which had been provisionally adopted by the Commission and dealt with the issue of transfer of responsibility to the successor State in a rather laconic manner.

113. With regard to draft article 16 (Restitution), his delegation supported the Special Rapporteur's proposal in paragraph 2 that restitution might be requested from the successor State in cases where only the latter was in a position to make such restitution. As for compensation and the transfer of the obligation to the successor State, it was obvious that compensation from the predecessor State which had committed the wrongful act was not impossible, given that a State was always in a position to provide that form of reparation. It should therefore be clarified whether the obligation was transferred, in certain limited circumstances, to the successor State, as implied in paragraph 57 of the Special Rapporteur's fourth report (A/CN.4/743), or whether both the predecessor State and the successor State had an obligation to provide compensation in such a case.

114. Those limited circumstances were described in paragraphs 57 and 63 of the Special Rapporteur's report as cases where there was a "clear direct link" either between the consequences of a wrongful act and the

territory or the population of the successor State, or where the perpetrator of a wrongful act was an organ of the predecessor State which later became an organ of the successor State and the latter continued to benefit from the consequences of the act.

115. In such cases, the successor State might be required to provide compensation based on the concept of unjust enrichment and also because its continued enjoyment of the benefits of the wrongful act without any expression of willingness to provide reparation to the injured State or its nationals might be considered to be a situation similar to one in which a State "acknowledges and adopts the conduct in question as its own" and hence bore responsibility for it, as set out in article 11 of the 2001 articles on responsibility of States for internationally wrongful acts. In any case, more guidance should be provided in the commentary regarding the criterion of benefit, including in relation to instances of illegal nationalization by the central authorities of the predecessor State of foreign property now located on the territory of the successor State.

116. With regard to the transfer to a successor State of the right to claim restitution, draft article 16, paragraph 4, referred to cases where the injury caused by the wrongful act continued to affect the territory or persons of the successor State. Greece believed that the wording should also cover instances of removal of movable, cultural or other State property from the territory which had come under the jurisdiction of the successor State. For that reason, a scenario whereby the successor State was entitled to restitution if it bore the injurious consequences of the wrongful act, already envisaged in draft article 17, paragraph 4, dealing with compensation, should be added to draft article 16, paragraph 4.

117. A provision concerning the cessation of a wrongful act of the successor State having a continuing character in relation to a wrongful act of the predecessor State should be included in the draft articles, given that draft article 7, which dealt with such acts, referred only to the consequences of the behaviour of the successor State, and not to the obligation to cease such an act.

118. His delegation welcomed the inclusion of draft article 7 bis (Composite acts), which was modelled on article 15 of the articles on State responsibility. Draft article 7 bis, paragraph 2, dealt with an internationally wrongful composite act that occurred after an action or omission by the successor State. A similar provision should be inserted into the draft articles dealing with an internationally wrongful composite act occurring as a result of a series of acts or omissions by the predecessor State before the date of State succession but lasting thereafter through acts or omissions of the successor State.

119. The current study of the topic "General principles of law" was a useful addition to the Commission's previous work on the sources of international law. His delegation was mindful of the complexities of the topic and concurred with the Special Rapporteur that it needed careful and extensive treatment, and that the success of the final outcome would depend on whether the Commission was able to strike the right balance to ensure that general principles of law were not used as a shortcut for identifying norms of international law where it was not possible to identify any applicable rules of treaty or customary law.

120. Turning more specifically to the categories of general principles of law set out in the Special Rapporteur's second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said that his delegation considered general principles deriving from national legal systems to constitute *lex lata*, and supported on the whole the proposed methodology for their identification, based on a two-step analysis. At the same time, it would welcome further clarification on the requirement of their compatibility with the fundamental principles of international law, in particular on whether the principles identified in paragraph 83 of the report were exhaustive. It would also welcome a more elaborate presentation and justification of the conditions that needed to exist to allow for the adequate application of a general principle of law in the international legal system.

121. His delegation still had doubts about the existence of general principles of law formed within the international legal system as an autonomous source of international law. It therefore called on the Commission to base its work on the topic primarily on relevant State practice and jurisprudence, while also carefully considering the *travaux préparatoires* of Article 38 of the Statute of the International Court of Justice.

122. **Mr. Roughton** (New Zealand) said that there was little State practice in some of the areas covered by the topic "Succession of States in respect of State responsibility". It would therefore be beneficial for the Commission to formulate commentaries to the proposed draft articles on the topic clarifying when they represented progressive development of international law rather than codification. It also supported the Special Rapporteur's view that the Commission should decide on the most appropriate outcome for the topic at a later stage.

123. In respect of the topic "General principles of law", his delegation noted with appreciation the Special

Rapporteur's general observations in his second report, including, importantly, that recognition was the essential condition for the existence of a general principle of law. It supported the chosen methodology for the identification of general principles of law derived from national legal systems: first, determining the existence of a principle common to the principal legal systems of the world and, second, ascertaining the transposition of that principle to the international legal system.

124. His delegation took note of the category of general principles of law formed within the international legal system, but considered that such principles and rules of customary international law must be clearly distinguished. It welcomed the Special Rapporteur's proposal to address the functions of general principles of law and their relationship with other sources of law in his third report.

125. **Ms. Flores Soto** (El Salvador) said, concerning the topic "Succession of States in respect of State responsibility", that her delegation supported the focus of the Special Rapporteur in his fourth report, including the need to clarify general questions on his approach. It agreed with the Special Rapporteur's view that his proposed draft articles were subsidiary in nature and that priority should be given to treaties and agreements between the States concerned. That view was in line with the relevant principles of the law of treaties, such as good faith and *pacta sunt servanda*.

126. As to the debate on the scarcity and diversity of State practice and, consequently, the nature of the rules reflected in the draft articles, her delegation firmly supported the Commission's work as part of the fulfilment of its function regarding the progressive development of international law. The fulfilment of that function would always give rise to difficulty and complexity, especially when dealing with topics such as the succession of States in respect of State responsibility. Nonetheless, it would be very useful if in the formulation of its commentaries to the draft articles the Commission could clarify which reflected State practice and which constituted progressive development.

127. Her delegation stressed the importance of maintaining consistency in the draft articles, in terminology and content, with the previous work of the Commission. The question of consistency was even more necessary in addressing the effects of State succession on forms of responsibility. In that context, El Salvador welcomed the cases contemplated by the Special Rapporteur involving the responsibility of the State for internationally wrongful acts.

128. On the topic "General principles of law", El Salvador underscored the need to preserve the autonomous nature of such principles, since they were not subsidiary sources in relation to custom or treaties, but an autonomous source, and as such should be reflected in and interrelated with customary or conventional rules of international law. Although that autonomous nature had been acknowledged in international jurisprudence, it did not mean that such principles should be considered as being in a hierarchical relationship with other sources, given the absence of hierarchy between sources of international law.

129. Her delegation agreed that the expression "civilized nations" contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was archaic and should be abandoned. For the purposes of progressive development and codification of international law, it would be more appropriate to refer to the "international community", understood in its broadest sense, which would include not only States but also all relevant actors that, together, recognized the value of a broad-based international legal order.

130. As to the determination of the existence of a principle common to the principal legal systems of the world, her delegation concurred that the comparative analysis must be wide and representative, including the greatest possible number of national legal systems. It was vital for States to provide input in that regard. El Salvador considered the term "legal families" inappropriate and preferred "legal systems of the world", without the adjective "principal", because it was important to focus on the idea of universality and to reflect and preserve the systemic nature of the rules of law.

131. On the inclusion of the practice of international organizations, in particular in cases where those organizations had been given the power to issue rules that were binding on their member States, her delegation supported the idea of considering their practice in order to ascertain whether the exercise of such power reflected the application of a general principle of law.

132. Her delegation appreciated the fact that the Special Rapporteur proposed to address the functions of general principles of law and their relationship with other sources of law in his third report.

133. **Mr. Tichy** (Austria), referring to the topic "Succession of States in respect of State responsibility", said that his delegation noted with regret that the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743) had not been discussed in the

Drafting Committee and had only been considered during the general debate by the Commission.

134. Austria did not agree with the premise underlying the fourth report that there might be situations where the responsibility or the rights and obligations arising from responsibility might be transferred from a predecessor State to a successor State as *lex lata*. The proposition that parallels might be drawn with the transfer of State debts, one of the subjects of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, seemed inappropriate. Unlike for State debts, responsibility for wrongful acts was a highly personal liability that was not transferable. A far more apposite comparison would be with personal treaties that did not automatically pass to any successor State. A purported rule that responsibility passed from a predecessor State to a successor State would not be a welcome progressive development of the law.

135. Referring to the draft articles proposed by the Special Rapporteur in the report, he said, with respect to draft article 7 bis, that the purported rule that a successor State's responsibility extended beyond its own unlawful act or omission, as reflected in paragraph 1, appeared highly speculative and not in line with existing law. Austria was also not convinced that the asserted succession rule in paragraph 2 was supported by State practice.

136. Draft articles 16, 17, 18 and 19 continued to contain the ambiguous wording that, in some situations, States "may request" different forms of reparation from a successor State. If understood as permitting successor States to ask for reparation, which might be granted by the responsible States *ex gratia*, his delegation would not be opposed to it. However, it was likely to be understood as a rule of automatic succession to the responsibility of the predecessor State by the successor State. Such a rule had no basis in international law and should also not form part of *lex ferenda* either.

137. Where draft articles 16, 17, 18 and 19 restated the general rule that a State which continued to exist after State succession would remain responsible for its unlawful acts and thus have to afford reparation, Austria did not see any problems. However, it wondered to what extent it was necessary to restate a general rule of State responsibility that was already covered by the articles on responsibility of States for internationally wrongful acts. In that connection, it agreed with the views expressed by several members of the Commission, as set out in paragraph 142 of the Commission's report (A/76/10).

138. His delegation believed that matters concerning succession in respect of State responsibility, or more specifically, the legal consequences of internationally wrongful acts, were fundamentally different from issues relating to succession in respect of treaties, assets and debts. In the latter case, customary international law differentiated between types of treaties, assets and debts and provided for different succession rules. Austria did not believe that any rule claiming there to be an automatic transfer of rights and obligations to successor States where the predecessor State ceased to exist could be identified as *lex lata*, nor that it would be a good candidate for progressive development of the law.

139. Austria welcomed the suggestion by a number of members of the Commission, mentioned in paragraph 149 of the report, that the format of the outcome of the Commission's work on the topic be reconsidered. It deemed guidelines, principles or an analytical report more appropriate than draft articles.

140. With regard to the draft articles provisionally adopted so far by the Commission, Austria agreed with the rules formulated in draft article 7 concerning acts of a "continuing character", which affirmed the principles of the law on State responsibility that a State incurred responsibility only for its own acts or for those of third parties that it had acknowledged and adopted. The same applied to draft article 8, which restated the traditional rule of attribution of conduct of a successful insurrectional movement to a new State.

141. His delegation's position in regard to draft article 9 was less positive. While it did not disagree that the responsibility of a predecessor State continued for its own acts after part of its territory became part of another State, it was concerned about paragraph 2, according to which "[i]n particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury." Quite apart from the fact that the purported rule seemed to be based on the erroneous assumption of a transfer of responsibility between the predecessor State and the successor State, it was vague and imprecise and failed to indicate elements that might help ascertain such particular circumstances.

142. The examples given in paragraph (5) of the commentary to the draft article, such as when an expropriated factory was situated in the territory of a successor State or when a successor State would be unjustly enriched, demonstrated that the resulting "exceptional situation" was not at all a transfer of responsibility from the predecessor State to the successor State. Rather, it might be a justified consequence of the rule calling for the avoidance of unjust enrichment. The Special Rapporteur should study in more depth the potential of unjust enrichment and

similar doctrines, which might better explain why in specific circumstances international law might require successor States to remedy acts committed by predecessor States.

143. Turning to the topic "General principles of law" and the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said, with regard to draft conclusion 2, that Austria shared the view that the expression "civilized nations" found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was anachronistic and should be replaced by a different formulation. It preferred "international community" instead of "community of nations", since the notion of "nation" was unclear, disputed and politically sensitive. The words "international community" would have the further advantage of including other subjects of international law, such as international organizations, that might also develop legal systems similar to national legal systems that applied internally and might sometimes even apply them to their member States and their citizens. Austria supported the position not to exclude the legal practice of international organizations, as acknowledged in paragraph (5) of the commentary to the draft conclusion.

144. On draft conclusion 4, Austria agreed with the proposed methodology for identifying general principles of law derived from national legal systems. With regard to draft conclusion 6 (Ascertainment of transposition to the international legal system), his delegation agreed that the two requirements of the analysis, namely compatibility with fundamental principles of international law, and existence of conditions for adequate application in the international legal system, might be difficult to assess in specific cases. Nevertheless, his delegation concurred with the Special Rapporteur that they were useful requirements which should be specifically laid down in the draft conclusion and analysed in more detail in the commentary thereto. In that context, it might be advisable to consider adding the phrase "compatible with fundamental rules and principles of international law", which would make it clear that that also included *jus cogens*. His delegation also encouraged the Commission to give further consideration to the process of "transposition".

145. Concerning draft conclusion 7, Austria did not reject the notion of general principles of law formed within the international legal system. However, it was doubtful whether such principles could be identified as easily as the draft text seemed to suggest. Austria would hesitate to ascertain general principles of law on the basis of wide recognition in treaties or other instruments, underlying general rules of conventional or customary international law, or a principle inherent in the basic features and fundamental requirements of the international legal system. There could also be some confusion as to the difference between "fundamental principles of international law", as stated in draft conclusion 6, and "general principles of law formed within the international legal system", as stated in draft conclusion 7. An analysis of that question in the commentary would be useful.

146. **Mr. Arrocha Olabuenaga** (Mexico) said that the topic "Succession of States in respect of State responsibility" was not merely academic, but had tangible practical implications. The draft articles proposed by the Special Rapporteur 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. Those rules would benefit not just States that committed internationally wrongful acts but also States that were injured by such acts and were entitled to reparation. The draft articles reflected established principles of international law, including those concerning forms of reparation, the obligation of cessation and assurances and guarantees of non-repetition. Thus, they were consistent with the Commission's previous work, such as the articles on responsibility of States for internationally wrongful acts.

147. As acknowledged by the Commission in the past, it was important not to give legal advantages to States that violated international law. Indeed, the Commission stated in article 5 of the draft articles it had provisionally adopted so far, that the cases of succession covered by the text were those that occurred "in conformity with international law". Therefore, the Commission should continue to examine questions relating to responsibility and reparation by States whose succession processes had not occurred in conformity with international law or the principles of the Charter of the United Nations.

148. On the topic "General principles of law", his delegation noted the progress made by the Commission and welcomed the inclusion in the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1) of a draft conclusion highlighting the importance of a wide and representative comparative analysis that included different legal families and regions of the world for the determination of the existence of a general principle of law. In his delegation's view, the methodology for ascertaining whether a general principle existed should not be limited to the observation of international

practice. National practice and jurisprudence, along with teachings, might be illustrative in determining the existence of general principles of law. Mexico was therefore pleased that the Special Rapporteur's reports reflected a broad survey of relevant State practice, jurisprudence and teachings.

149. Attention should also be given to the delimitation and focus of the work. The development of international law was based to a large extent on the understanding of what was considered a general principle of law, the clearest example of which was the inclusion of general principles of law among the sources of law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice.

150. Mexico therefore agreed with the delimitation of the topic since the beginning of its consideration by the Commission. That focus highlighted the importance of the topic, and its practical dimension would be enhanced in future reports when the Commission would consider the functions of general principles of law in international law and their relationship with other sources of law. Mexico was confident that the study, which would complement the Commission's work on other principal sources of international law, would serve to clarify the legal nature of general principles as a source of international law, their scope, their interrelationship with national and international legal systems, and the methodology for their identification.

151. **Mr. Devillaine Gomez** (Chile) said with regard to the topic "General principles of law" that the Special Rapporteur had, in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), noted that there was general agreement that the starting point for the Commission's work on the topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, analysed in the light of State practice and jurisprudence. There had also been general agreement within the Commission and the Committee that the expression "civilized nations" found in the Article was anachronistic and should be avoided. In that connection, his delegation supported the unanimous proposal to remove those words and endorsed the Special Rapporteur's suggestion to replace them with "community of nations", as found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

152. Referring to the draft conclusions proposed by the Special Rapporteur in his report, he said, with regard to draft conclusion 4 (Identification of general principles of law derived from national legal systems) that his delegation agreed with the two-step analysis for determining the existence and content of a general principle of law that would be recognized in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. However, the Special Rapporteur should clarify what the criteria were for meeting the requirement for the determination of the existence of a principle common to the principal legal systems of the world, since he had stated in the Commission's report (A/76/10) that "focus should be placed on basic notions that those systems might have in common". The comparative analysis he proposed in paragraph 200 of the report should be conducted bearing in mind the meaning and scope of those basic notions.

153. On draft conclusion 5, his delegation agreed that the comparative analysis must be "wide and representative" and should cover the largest possible number of national legal systems. Chile shared the doubts voiced about the concept of "legal families" used in paragraph 2 to describe the scope of the comparative analysis. It agreed that national legal systems within a legal family might or might not share a principle, and that the comparative analysis should then be conducted in a more secure manner by examining the interrelationship between national systems. Chile hoped that the Commission would examine the concept of legal families in greater depth in order to understand its utility and thus better clarify its scope.

154. His delegation concurred with the view of several members of the Commission and the Special Rapporteur himself on the importance and necessity of draft conclusion 6 (Ascertainment of transposition to the international legal system), since it concerned the compatibility of a principle common to the principal legal systems of the world with the very foundations of the international legal system and the existence of conditions for its adequate application. In any event, the application of that element of transposition might give rise to conflicts when time came to analyse its compatibility with other concepts in the same text, since the meaning and scope of those concepts had not been determined in order to have a better understanding of how the transposition would take place. His delegation supported the suggestion that further consideration be given to the exact nature of the subjects to whom a given principle would apply as an element to take into account in the process of transposition.

155. With regard to draft conclusion 7 (Identification of general principles of law formed within the international legal system), his delegation shared the concerns raised by some members of the Commission about the lack of sufficient or conclusive practice to reach conclusions regarding that category of general principles of law. It also shared the concerns regarding the difficulty of distinguishing those principles from customary

international law and the apparent risk that the criteria for identifying general principles in that category would not be sufficiently strict, which could render them too easy to invoke. While welcoming the incorporation of that category of principles, his delegation hoped that the Special Rapporteur could continue to develop the methodology for identification so as to better distinguish between general principles of law formed within the international legal system and principles of customary international law.

156. His delegation agreed on the need to make it clear that the general principles of law to which Article 38 of the Statute of the International Court of Justice referred constituted an autonomous and independent source from treaties and custom, in the manner in which they were constituted or formed. Although there were important relationships between all formal sources, in that, for example, treaties and custom could be sources for concluding that a general principle of law consistent with Article 38 existed, they were not necessarily the means through which a general principle of law was created.

157. Lastly, his delegation agreed with draft conclusions 8 and 9, to the extent that they assigned a subsidiary role to teachings and decisions of courts and tribunals. Both were sources from which elements of relevance for determining the existence and content of general principles of law could be derived.

The meeting rose at 1.05 p.m.