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Chair: Ms. Sverrisdóttir (Vice-Chair) . . . . . (Iceland)

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22-24706 (E)

In the absence of Mr. Afonso (Mozambique), Ms. Sverrisdóttir (Iceland), Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 77: Report of the International Law Commission on the work of its seventy-third session (*continued*) (A/77/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VII and VIII of the report of the International Law Commission on the work of its seventy-third session (A/77/10)

2. **Ms. Melikbekyan** (Russian Federation), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation reiterated its doubts regarding the utility of work on the topic, in view of the paucity and inconsistency of relevant State practice and the varied and contradictory interpretations reflected in doctrine. There was no observable trend towards the formation of rules of international law on the question.

3. With regard to the topic "General principles of law", her delegation reiterated its support for the Commission's view on the need to adhere to the meaning of those principles as set out in the Statute of the International Court of Justice. It also wished to refer to its comments made at previous sessions, where it had drawn attention to the lack of consistent terminology, to the citing, as examples of the existence of some general principles of law, of decisions of international criminal courts, and to the methodology for the identification of general principles of law formed within the international legal system.

4. With regard to the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, draft conclusion 6 (Determination of transposition to the international legal system) stated that a principle common to the various legal systems of the world might be transposed to the international legal system in so far as it was compatible with that system. Once again, that formulation merely referred to a potential, and not an actual transposition. It also diminished the role of States and was not in accordance with Article 38 of the Statute of the International Court of Justice. There was no reason why the principle that the will of States was at the origin of any rule of international law should not apply to general principles of law. It should be made clear in the commentary to draft conclusion 2 (Recognition) that recognition concerned actual transposition, and not the possibility thereof. It was also necessary to ensure that draft conclusions 2 and 6 were consistent with Article 38.

5. Concerning draft conclusion 11 (Relationship between general principles of law and treaties and customary international law), she said that, like a number of other delegations, the Russian Federation had expressed doubts about whether general principles of law were a separate source of international law. It disagreed with the categorical statement in paragraph 1 that "general principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law". It was true that no formal hierarchy had been established between sources of international law, but, as confirmed in doctrine and in the 1920 *travaux préparatoires* of the Advisory Committee of Jurists of the Permanent Court of International Justice, and also as noted by a number of members of the Commission, a formal hierarchy between sources did in fact exist, based on the logic of Article 38.

6. Her delegation had doubts about the Commission's logic that general principles of law might exist in parallel with a rule in a treaty or customary international law, set out in paragraph 2. According to that logic, States and courts could use different methods for the identification of one and the same rule: if they were unable to prove the existence of a rule of customary law, they could try to prove the existence of a general principle of law. That approach did not seem right.

7. In her delegation's view, the solution would be to recognize general principles of law as a transposable source: when a general principle of law became a rule in a treaty or customary international law, it would be absorbed by said treaty or customary international law and cease to exist. That was supported in doctrine. The Russian Federation also suggested that the possibility of considering general principles of law to be a means for the identification of a rule of customary law should not be ruled out. The Commission should reconsider those questions, including in the context of the recognition of general principles of law as an independent basis for the rights and obligations of States in international law, as set out in paragraph 2 (b) of draft conclusion 10 (Functions of general principles of law).

8. Her delegation took note of the substantial revision of draft conclusion 7 (Identification of general principles of law formed within the international legal system). In its current form, the text failed to differentiate between the categories of general principles of law formed within the international legal system. Many questions had also been raised about the vague wording whereby general principles of law formed within the international legal system had to be "inherent in the basic features and fundamental requirements of the international legal system".

Following that approach, the recognition of a general principle of law would be deduced from the abstract characteristics of the international legal system. That was an unfounded, arbitrary approach to the identification of general principles of law. A definition of general principles of law could not refer to natural law as recognized by the international community as being inherent in the international legal system. Moreover, it was unclear how those principles would differ from principles formed within the framework of customary international law.

9. The Commission should not rush its consideration of the topic and should carefully examine the comments of States.

10. **Ms. Suwannasri** (Thailand) said, with regard to the topic "Succession of States in respect of State responsibility", that in her delegation's view, evidence of relevant State practice had yet to be sufficiently established. It would be useful to specify which of the draft guidelines on succession of States adopted by the Commission were based on State practice and which reflected progressive development of international law.

11. On the topic "General principles of law", her delegation stressed the importance of general principles of law as a source of international law, as indicated in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice and its function in avoiding situations of *non liquet*. However, there was a need to establish the criteria for their identification. At the same time, those criteria should not be overly broad and should show clearly that there was a distinction between general principles of law and existing rules of customary international law. That distinction was important in the context of the draft conclusions on general principles of law provisionally adopted by the Commission.

12. In that connection, draft conclusion 7 (Identification of general principles of law formed within the international legal system) merited further consideration in the Commission's subsequent reports. On draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world), her delegation emphasized the need to have a comparative analysis of national legal systems that was inclusive, with due respect for the different legal families across various regions of the world, as well as their unique characteristics. That would ensure that the principle in question was representative and widely recognized.

13. **Ms. Aagten** (Netherlands), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation had taken note of the debate in the Commission regarding the appropriate outcome of the project and the decision to change its form to draft guidelines rather than draft articles. The Netherlands reiterated its view that an outcome in the form of draft articles, principles or guidelines was not suitable for the topic and therefore did not support it. The Commission should reconsider the usefulness and necessity of continuing its work on the topic before taking any further steps, including the appointment of a new Special Rapporteur.

14. Turning to the topic "General principles of law" and the draft conclusions on general principles of law provisionally adopted by the Commission, she said that her delegation was pleased with draft conclusion 3 (Categories of general principles of law), which showed that there was a category of general principles of law formed within the international legal system, despite the continuing doubts expressed in that regard.

15. The Netherlands appreciated in particular the Special Rapporteur's acknowledgement of the need to distinguish the methodology for identifying general principles of law formed within the international legal system from the methodology for identifying other sources of international law, in order to determine whether general principles of law constituted a source of international law in and of themselves.

16. Her delegation therefore looked forward to the revisions of the commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system). In its view, the two requirements included in the draft conclusion, namely that such principles existed in the international legal system and that they were recognized as intrinsic to the international legal system, served as a good basis but required further elaboration. The Netherlands would appreciate guidance on the defining features for general principles to be considered intrinsic.

17. Her delegation endorsed the view expressed in draft conclusion 11 (Relationship between general principles of law and treaties and customary international law) that a general principle of law might exist in parallel with a rule in a treaty or a customary rule of the same content. It would contribute to an understanding of general principles as a separate source of international law, in addition to those listed in Article 38 of the Statute of the International Court of Justice.

18. With regard to the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/753), her delegation shared the doubts expressed by many members of the Commission with respect to draft conclusions 13 (Gap-filling) and 14 (Specific functions of general principles of law). Listing the functions of

general principles of law seemed less relevant for the determination of a methodology for their identification. As to the specific functions included by the Special Rapporteur, draft conclusion 13 seemed to imply that the primary function of general principles of law was filling gaps. In her delegation's view, the other functions listed in draft conclusion 14 were equally relevant. It was not clear on what basis the functions outlined in draft conclusion 14 had been selected. Moreover, the functions ascribed to general principles also seemed to apply to the other sources of international law.

19. In the view of the Netherlands, general principles of law served as a reference framework that helped international courts and tribunals as well as States and other subjects of international law to interpret other rules of international law.

20. **Mr. Moon** Dong Kyu (Republic of Korea), speaking on the topic "Succession of States in respect of State responsibility", said that his delegation endorsed the Commission's decision to change the form of its work from draft articles to draft guidelines. While consistency with the Commission's previous work on State succession was important, his delegation took note of the relative paucity of State practice as well as the insufficiency and inconsistency of that practice on succession of States in respect of State responsibility. It agreed with those members of the Commission who believed that it would not be possible to produce a set of binding rules on the topic. The draft articles on succession of States in respect of State responsibility proposed by the Special Rapporteur were mixed in nature, some having a normative and prescriptive character, and others having a recommendatory or guiding character.

21. His delegation supported the approach taken by the Commission, with the examination of the situation according to the specific categories of succession of States. It also endorsed the distinction made between situations where two or more States merged to form one successor State but all the predecessor States ceased to exist and situations where one or more States were incorporated into another State. His delegation agreed with maintaining the distinction between situations where the predecessor State might cease to exist, as in cases of a merger, incorporation or dissolution, and situations where the predecessor State continued to exist, as in the case of a newly independent State and the separation of parts of a State, as dealt with together in draft guideline 12 (Cases of succession of States when the predecessor State continued to exist).

22. Turning to the topic "General principles of law" and referring to the draft conclusions on general principles of law provisionally adopted by the Commission, he said that draft conclusions 3 (Categories of general principles of law) and 7 (Identification of general principles of law formed within the international legal system) were still a cause for concern. Draft conclusion 3 referred not only to general principles of law derived from national legal systems, which were well accepted by States and scholars, but also to general principles of law that might be formed within the international legal system, a category that remained highly debatable.

23. Furthermore, in draft conclusion 7, a distinction was made between two sub-types of general principles of law that might be formed within the international legal system. In paragraph 1, the Commission indicated that for a general principle of law formed within the international legal system, it was necessary to ascertain whether the principle was "intrinsic to the international legal system", a phrase which remained unclear. Although, as explained in paragraph (2) of the commentary to the draft conclusion, the Commission considered that the existence of that type of general principle of law was justified for a number of reasons, his delegation could not find clear and convincing explanations and examples of such principles. It hoped that that could be clarified.

24. **Mr. Zvachula** (Federated States of Micronesia), referring to the topic "General principles of law", said that his delegation took note of the additional explanations provided in the Special Rapporteur's third report (A/CN.4/753) on the issue of transposition of principles common to the various legal systems of the world to the international legal system. The Commission's two-step approach for the ascertainment of such transposition was a sensible way of determining general principles derived from national legal systems. Existing differences between national legal systems and the international legal system required at least some form of reflection on the transferability of a principle common to national legal systems to the international level.

25. With regard to the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, Micronesia welcomed the changes made to draft conclusion 6 (Determination of transposition to the international legal system), which retained the two-step approach, while not being overly prescriptive. However, the goal of providing more diverse sources of legal systems and traditions recognized in the discussion of the methodology for the identification of general principles of law during the seventy-second session of the Commission should be better reflected in the context of draft conclusion 5 (Determination of the existence of

a principle common to the various legal systems of the world), for example by referring also to legal systems of Indigenous Peoples in the body of the draft conclusion and in the commentary thereto.

26. Micronesia appreciated the continuing efforts of the Special Rapporteur and the Commission in examining a potential second category of general principles of law, namely those formed within the international system, and it was generally open to such a category. It stood to reason that the international legal system, like all other legal systems, should be capable of generating its own general principles. Indeed, in his first two reports (A/CN.4/732) and (A/CN.4/741), the Special Rapporteur had presented practice demonstrating the existence of such principles, citing as examples the precautionary principle, the "polluter pays" principle, the principle of respect for human dignity and the principle of *uti possidetis juris*.

27. However, Micronesia remained concerned about the difficulty of distinguishing general principles of international law formed within the international legal system from customary rules of international law. The amendments made to draft conclusion 7 (Identification of general principles of law formed within the international legal system) did not fully address those concerns. In particular, the Commission should explain what was meant by the requirement of recognition of a principle as "intrinsic" to the international legal system, something that it did not do sufficiently in its commentary to the draft conclusion.

28. His delegation welcomed the clarification that there was no formal hierarchy between general principles of law and the other sources of international law listed in Article 38 of the Statute of the International Court of Justice. In its view, any hierarchy only resulted from the qualification of certain norms as peremptory (*jus cogens*). That qualification, however, was unrelated to any particular source of an international legal norm, be it a treaty, a custom or a general principle. Micronesia agreed that apart from the case of *jus cogens* norms, any conflict between a general principle of law and a rule in a treaty or customary international law could be adequately addressed by relying on the generally accepted techniques of interpretation and conflict resolution in international law.

29. His delegation supported the suggestion made by some members of the Commission to include a non-exhaustive list of general principles of law in the draft conclusions, similar to the list presented in the annex to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which could help to clarify the concept of general principles of law. In that context, consideration should be given to the "polluter pays" principle, the precautionary principle, the transboundary harm principle, the duty of the international community to cooperate to address major environmental harms and natural disasters, and the right to self-determination of Indigenous Peoples.

30. Micronesia once more encouraged an examination of whether general principles of law that were of a regional character or that were specific to some other type of grouping could exist, and whether such principles would be applicable beyond the region or grouping in question. The practices of the States and Indigenous Peoples of the Pacific region might be a useful subject of study in that regard.

31. **Ms. Stavridi** (Greece), referring to the topic "Succession of States in respect of State responsibility", said that her delegation agreed with the decision to exclude, from the final text of the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission, the provisions of draft articles 3 (Relevance of the agreements to succession of States in respect of responsibility) and 4 (Unilateral declaration by a successor State) which had been proposed by the Special Rapporteur in 2017.

32. Her delegation welcomed the clarification provided in paragraph (3) of the commentary to draft guideline 6 (No effect upon attribution) that while the term "attribution" came from the concept of attribution of conduct addressed in article 2, subparagraph (a), of the articles on responsibility of States for internationally wrongful acts, it did not refer to the term "attribution of conduct" as such. It also welcomed the reformulation of draft guideline 7 bis (Composite acts). However, the Commission should provide more clarity in respect of its assertion in paragraph (6) of its commentary that the continued application by a successor State of the relevant measures adopted by a predecessor State might also be an act attributable directly to the successor State in cases where the composite act had already been completed by the predecessor State.

33. Paragraph 2 of draft guideline 12 (Cases of succession of States when the predecessor State continues to exist) provided that, when an internationally wrongful act had been committed against a predecessor State that continued to exist, a successor State might, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act. In her delegation's view, in paragraph (6) of the commentary, which referred to cases of a connection between the injury to the

predecessor State before the date of succession and either the territory or the nationals that had become those of the successor State, the Commission should also provide, as an example of "particular circumstances", instances of illegal removal of cultural or other property from the territory which had come under the jurisdiction of the successor State.

34. Her delegation reiterated its interest in the topic "General principles of law", which complemented the Commission's previous work on the sources of international law and was of great importance not only from a theoretical but also from a practical point of view, given that the Commission's stated purpose was to clarify the nature, scope and method of identification of general principles of law as they had been used in international practice and jurisprudence, and thus to provide guidance for States, international organizations, international courts and tribunals, and scholars and practitioners.

35. Greece welcomed the Special Rapporteur's efforts to clarify certain issues already addressed in his previous reports that had given rise to concerns by States in the Committee. Regarding more specifically the issue of transposition of general principles of law derived from national legal systems, the openness to consider a simpler and more flexible alternative for draft conclusion 6 (Determination of transposition to the international legal system) of the draft conclusions on general principles of law provisionally adopted by the Drafting Committee was a positive development, insofar as the emphasis was now placed on the compatibility of those principles with the international legal system as a whole. It remained, however, to clarify how the process of transposition was meant to operate in practice.

36. Turning to the draft conclusions provisionally adopted by the Commission, and specifically the second category of general principles of law proposed by the Special Rapporteur, namely those formed within the international legal system, she said that Greece took note of the Special Rapporteur's declared intention not to engage in an exercise of progressive development on that matter and even less to attempt to create a new source of international law. It also took note of the explanation provided by the Commission in its commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system) that the draft conclusion had been adopted in the interest of obtaining further comments by States and that the commentary thereto was provisional and would be revisited at a later stage.

37. Indeed, in its current form, the commentary to draft conclusion 7 appeared to be an attempt to justify the existence of that second category of general principles of law, based on a broad interpretation of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice in the light of its *travaux préparatoires*, rather than a *de lege lata* statement of the criteria for the identification of such principles, substantiated by specific examples of State practice and case law. However, merely stating that the international legal system, like any other legal system, must be able to generate general principles of law that were intrinsic to it, and relying on the general formulation of Article 38, paragraph 1 (*c*) to conclude *a contrario* that the text of the draft conclusion did not exclude the existence of such principles, was not satisfactory from the point of view of legal certainty and consistency.

38. Greece supported the proposal of new draft conclusions to clarify the functions of general principles of law. Draft conclusions 13 (Gap filling) and 14 (Specific functions of general principles of law), proposed by the Special Rapporteur in his third report (A/CN.4/753), could therefore be merged to avoid the distinction between essential and specific functions, as the functions qualified as specific were not unique to general principles of law but were also of relevance for the other sources of international law.

39. *The meeting was suspended at 3.45 p.m. and resumed at 4.15 p.m.*

40. **Mr. Maeda** (Japan), addressing the topic "General principles of law", said that his delegation understood that the points discussed in the Commission in 2022 continued to be controversial. It expected further clarifications about the nature and function of general principles of law to be provided in the draft conclusions on the topic and the commentaries thereto. It would be helpful if the Commission could elaborate on the definitions of terms used in the draft conclusions, including a definition of the term "general principles of law".

41. **Mr. Montalvo Sosa** (Ecuador), speaking on the topic "General principles of law", said that the consolidated text of draft conclusions 1 to 11 of the draft conclusions on general principles of law provisionally adopted by the Drafting Committee appropriately covered the various aspects of the topic. Ecuador supported the methodology for the identification of general principles of law derived from national legal systems, set out in draft conclusion 4, the methodology for the determination of the existence of a principle common to the various legal systems of the world, set out in draft conclusion 5, and the methodology for the

determination of transposition to the international legal system, set out in draft conclusion 6. His delegation also endorsed draft conclusion 3, which identified two categories of general principles of law: principles derived from national legal systems, and principles that might be formed within the international legal system. Given the current state of development of international law, the latter category could conceivably constitute a legal system that had the capacity to generate its own general principles of law and not only to refer to those derived from other legal systems.

42. In draft conclusion 7 (Identification of general principles of law formed within the international legal system), it was established that, to determine the existence and content of a general principle of law that might be formed within the international legal system, it was necessary to ascertain that the community of nations had recognized the principle as intrinsic to the international legal system. It was his delegation's understanding that principles that were intrinsic to the international legal system were those which reflected or regulated the basic characteristics of, and were inherent to and essential for the functioning of the system.

43. His delegation shared the view that the Commission's focus on the methodology for the identification of general principles of law in the international legal system was similar to the methodology used in the case of general principles of law derived from national legal systems, which included an inductive and a deductive analysis. A principle formed within the international legal system must be recognized by the community of nations as a norm of general application, having an independent status from a particular treaty regime or customary rules, which meant that it was a general legal principle that could operate independently in international law.

44. With regard to the cases of practice referred to in the Special Rapporteur's reports to prove the existence of general principles of law formed within the international legal system, his delegation agreed with the analysis that the principles which applied at the time that the decisions had been taken could not have been considered to be treaty or customary rules or general principles derived from national legal systems.

45. On draft conclusion 7 (Identification of general principles of law formed within the international legal system), paragraph 2, it was appropriate to leave open the possible existence of other general principles of law formed within the international legal system that were not necessarily considered intrinsic to it.

46. Draft conclusions 8 (Decisions of courts and tribunals) and 9 (Teachings) were important, since they reflected practice and were consistent with Article 38, paragraph 1, of the Statute of the International Court of Justice.

47. His delegation supported draft conclusion 10 (Functions of general principles of law). Paragraph 1 reflected practice: general principles of law were mainly, but not solely, resorted to when other rules of international law did not resolve a particular issue. Although general principles of law fulfilled functions similar to those of other sources of international law, it was rightly stated in draft conclusion 10 that those principles contributed to the coherence of the international legal system, and that they might serve to interpret and complement other rules of international law.

48. With regard to draft conclusion 11 (Relationship between general principles of law and treaties and customary international law), his delegation agreed with the stipulation in paragraph 1 that general principles of law, as a source of international law, were not in a hierarchical relationship with treaties and customary international law. Another relevant clarification, in paragraph 2, was that a general principle of law might exist in parallel with a rule of the same or similar content in a treaty or customary international law. Paragraph 3 was also very useful, since it provided that any conflict between a general principle of law and a rule in a treaty or customary international law was to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law, namely *lex specialis*, *lex posterior* and *lex superior*.

49. **Mr. Bouchedoub** (Algeria), addressing the topic "Succession of States in respect of State responsibility", said that while his delegation supported the general rule that responsibility was not in principle transferred to a successor State if the predecessor State continued to exist, that rule would not gain widespread acceptance or interest from Member States. The very limited support for treaties relating to succession was an indication that the elaboration of draft articles might not be the most effective way for the Commission to influence future practice on the topic. Moreover, the scarcity of relevant State practice made the Commission's work on the topic particularly challenging. Indeed, experience showed that States tended to resolve issues concerning responsibility through negotiation, which suggested that there was little need for predetermined rules on the matter. His delegation would continue to support the Commission's activities with a view to the codification and progressive development of international law, particularly in areas that were of interest to Member States and met their needs.

50. Referring to the topic “General principles of law”, he said that when considering the issue of transposition into international law of a general principle of law derived from national legal systems, the Commission should continue undertaking a wide comparative analysis encompassing national legal sources, including legislation and the decisions of national courts, taking into account the particularities of each legal system and identifying legal principles common to them. It was necessary to cover the principal legal systems of the world, in order to ensure that a principle had effectively been generally recognized by the international community. In order for a principle grounded in domestic law to be deemed a general principle of law, it must first be ascertained that the principle was common to the principal legal systems of the world and that it had been transposed to the international legal system, a rather difficult task. Ultimately, it was for States themselves to recognize general principles of law.

51. His delegation had reservations regarding the category of general principles of law formed within the international legal system. It was clear from the *travaux préparatoires* of the Statute of the International Court of Justice that only general principles of law developed in domestic law were included in Article 38, paragraph 1 (*c*), of the Statute. The general principles described under the category of principles formed within the international legal system were in fact rules of conventional or customary law. It would be preferable to avoid considering such principles in order to prevent confusion between general principles of law, as envisaged in Article 38, paragraph 1 (*c*), and other sources of international law.

52. Regarding the functions of general principles of law and their relationship with other sources of international law, his delegation believed that such principles played a subsidiary or supplementary role in the interpretation of other rules of international law, and that they formed one of the three main sources of international law. They were an autonomous source of international law, giving rise to rights and obligations, as the list of sources in the Statute was not hierarchical.

53. His delegation hoped that the Special Rapporteur would continue working to define such terms as “general rules of international law”, “general principles of international law” and “fundamental principles of international law”, and that a distinction would be made between principles as a source of law and principles as a subsidiary category of customary or conventional law. It supported the proposal that the Commission could provide at the end of its work a broadly representative bibliography of the main studies that had been cited, something that would help to ensure the credibility and transparency of the Commission’s work.

54. **Ms. Arumpac-Marte** (Philippines), speaking on the topic “General principles of law”, said that as general principles of law were a direct source of rights and obligations, clarification of that source of international law was of high importance for the Philippines, which had jurisprudence in that regard. Her delegation therefore welcomed the Special Rapporteur’s characterization, in his third report (A/CN.4/753), of general principles of law as an independent basis for rights and obligations, as a means to interpret and complement other rules of international law, and as a means to ensure the coherence of the international legal system. It shared the view that the point of departure for the Commission’s work was Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, but that the Commission was not limited to the Statute in its consideration of the topic. The analysis of the jurisprudence of arbitral tribunals or international criminal tribunals in a report addressing general principles of law was therefore not irrelevant.

55. With regard to the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, her delegation supported the suggestion to simplify draft conclusion 6 (Determination of transposition to the international legal system). It agreed that the recognition of a principle should take place both *in foro domestico* and within the international legal system, and that for the latter, recognition in the context of transposition was implicit. It noted the need for further development of the question of transposition.

56. The Philippines reiterated its view that further study of draft conclusion 7 (Identification of general principles of law formed within the international legal system) might be more prudent. Although the Special Rapporteur indicated that there was sufficient practice and doctrine to substantiate a draft conclusion on that second category, her delegation looked forward to the formulation of a clear and precise methodology for the identification of such general principles, to ensure that they were not confused with other sources of international law, including customary law.

57. With regard to the draft conclusions proposed by the Special Rapporteur in his third report, the Philippines had reservations about draft conclusion 10 (Absence of hierarchy between the sources of international law). There was an informal hierarchy in practice, as the Special Rapporteur himself had noted in his report. Her delegation would be interested in information on whether State practice supported affording general principles the same status as a treaty

or a rule of customary international law, and it would welcome further elaboration on the dynamic between draft conclusions 10, 11 (Parallel existence), 12 (*Lex specialis* principle) and 13 (Gap-filling).

58. The main issue before the Commission was to establish clear criteria to determine that a principle *in foro domestico* was transposed to the international legal system. Her delegation did not see that a non-exhaustive list of general principles was a necessary annex. However, there might be value in including in the commentaries several general principles chosen on the basis of the criteria indicated.

59. **Ms. Ozgul Bilman** (Türkiye), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation wished to reiterate the positions set out in its previous statements and that the absence of a comment or observation on the reports of the Special Rapporteur should not be construed as agreement with the content of the reports and the references thereto. In his reports, the Special Rapporteur made reference to the articles on responsibility of States for internationally wrongful acts, which were still considered open to discussion, specifically concerning whether and to what extent they reflected customary international law. Her delegation did not agree with the conclusion in paragraph 14 of the Special Rapporteur's fifth report (A/CN.4/751) that draft articles 16 to 19 of his proposed draft articles on succession of States in respect of State responsibility reflected existing international law.

60. Her delegation had doubts as to whether it was possible to differentiate between the political and legal aspects of the topic, which were largely intertwined. The scarcity of available State practice and the prevalence of significant differences over the existing ones might even raise doubts about the need for "guidelines" on the topic.

61. Turning to the topic "General principles of law", she said that her delegation wished to reiterate its previous statements. In his third report (A/CN.4/753), the Special Rapporteur had indicated that ascertaining the recognition of the transposition of a general principle of law from domestic legal systems would be implicit and that "implicit recognition is to be found in the framework of rules and principles of international law accepted by States, framework within which a general principle of law is to apply and fill possible lacunae". He had also suggested in his second report (A/CN.4/741) that it appeared from the practice of States and the jurisprudence of international courts and tribunals that, in some cases, international instruments, in particular treaties, could be considered as evidence confirming that a principle had been transposed to the international legal system.

62. Further elaboration was needed to clarify the proposition that recognition of transposition would be implicit and did not require an express or formal act. That would be all the more relevant for the suggestion that general principles of law might serve as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules, and that they might also have a "gap-filling" function. Since it had been proposed that, ultimately, international instruments, in particular treaties, were to be considered as evidence confirming the transposition, her delegation wondered what the evidence of transposition would be when general principles of law assumed the function of filling gaps that might exist in conventional and customary international law. It also sought clarification of the terms "international instruments" and "rules and principles of international law accepted by States".

63. **Mr. Gueye** (Senegal), referring to the topic "Peremptory norms of general international law (*jus cogens*)", said that as *jus cogens* norms were meant to defend the interests and values of the international community and not the interests of States considered individually, his delegation took note of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading.

64. Turning to the topic "Protection of the environment in relation to armed conflicts", he said that protection of the environment was important in all circumstances, given contemporary challenges. His delegation took note of the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on second reading and supported the temporal approach adopted, and recognized the value of preventive measures, including in the context of peace operations.

65. Concerning "Other decisions and conclusions of the Commission", his delegation welcomed the new topics identified by the Commission for inclusion in the programme of work of its seventy-fourth session, including the topic of prevention and repression of acts of piracy and armed robbery at sea, considering the situation in the Gulf of Aden and the Gulf of Guinea.

66. As for the topic "Sea-level rise in relation to international law", his delegation encouraged the Study Group on sea-level rise in relation to international law to continue its studies on statehood and the protection of persons affected by sea-level rise. Senegal was well aware that sea-level rise was a global albeit non-uniform phenomenon, particularly in the light of the challenges

posed by climate change. The interests and views of vulnerable States, in particular small island developing States, must therefore be taken into consideration, without prejudice to the concerns of the international community as a whole.

67. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that his country, a fierce combatant against impunity, attached vital importance to the question of immunity of State officials from foreign criminal jurisdiction. It therefore took note of and welcomed the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, in particular draft article 3, whereby Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* to the extent that they were acting on behalf of the State.

68. Despite the differences in opinion among Member States, Senegal continued to support the establishment of an international legal framework for effectively preventing and repressing the most serious crimes. It therefore called once again upon all States to join the mutual legal assistance initiative which it was leading along with Argentina, Belgium, the Netherlands and Mongolia, on the adoption of a multilateral treaty on mutual legal assistance and extradition for the national prosecution of the most serious international crimes. His delegation would continue to follow with interest the work of the Commission on the topic of succession of States in respect of State responsibility.

69. On the topic "General principles of law", Senegal reaffirmed the importance of widespread and representative acceptance of such principles, in the spirit of draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world) of the draft conclusions on general principles of law, which had been provisionally adopted by the Commission, and welcomed the provisional adoption by the Drafting Committee of draft conclusions 3, 6, 7, 8, 9, 10 and 11.

70. Senegal reaffirmed its conviction that the work of the Commission must continue to be based on the diversity of doctrinal approaches and legal cultures expressed in various languages. In that connection, the Commission must represent, now more than ever, a fertile crucible reflecting the geographic diversity and representativeness of the major legal systems of the world. His delegation therefore called for stronger cooperation between the Commission and relevant African bodies in order to benefit from the specificities of African legal systems and customary law.

71. **Ms. Silva Walker** (Cuba) said that her delegation was satisfied with the form of draft conclusions with commentaries as the outcome of the work on the topic "General principles of law". It was pleased that the members of the Commission had been able to agree on matters such as the consideration of the legal nature of general principles of law as a source of international law, and that they had taken into account principles common to national legal systems.

72. Addressing the topic "Succession of States in respect of State responsibility", she said that the responsibility of States for internationally wrongful acts in respect of State succession should be assessed in the light of the draft articles on succession of States in respect of State responsibility which the Commission had adopted at its seventy-third session in the form of draft guidelines. It was difficult to establish a position on succession of States in respect of State responsibility owing to the dearth of relevant State practice and decisions of national and international courts.

73. Cuba agreed with the idea that an underlying general guideline applicable to State succession could be established to the effect that State responsibility did not automatically transfer to a successor State, except in specific circumstances. It advocated the maintenance of consistency between the Commission's work on the current topic and its previous work, in particular its articles on responsibility of States for internationally wrongful acts, in terms of both terminology and substance. The question of responsibility should be examined in the light of each specific type of succession. Lastly, her delegation welcomed the form of draft guidelines adopted by the Special Rapporteur and the Commission on the current topic.

74. **Mr. Turay** (Sierra Leone), addressing the topic "Succession of States in respect of State responsibility", said that after considering the fifth report of the Special Rapporteur (A/CN.4/751), which primarily addressed the problems relating to a plurality of injured successor States or of responsible successor States, the Commission had decided that its work on the topic would take the form of draft guidelines, rather than draft articles. That decision appeared to have been in response to concerns expressed by States. The deliberations in the Commission in which it had considered the difference between the two forms of outcomes remained helpful, although greater clarity by the Commission on the effect of the nomenclature relating to the outcomes was needed.

75. His delegation noted that the Working Group on methods of work had indicated that the Commission understood, at least for the purposes of the current topic,

that draft guidelines were intended to provide normative guidance to States, while draft articles were framed as directions to States, often suitable for incorporation in a treaty. It noted accordingly that, in the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Drafting Committee, the words "shall be" had been replaced by "is" in draft guideline 8, reflecting the descriptive nature of the provision. Likewise, in paragraph 2 of draft guideline 9, the imperative verb "shall" had been replaced by "should", as was the case in draft guidelines 10 and 11 of the draft guidelines provisionally adopted by the Commission, thus reframing the provisions as guidelines for States.

76. Sierra Leone regretted that, for reasons that remained unclear and might well be due to its internal working methods, the Commission had failed to complete a first reading of the text on the interesting if sometimes complex topic of succession of States in respect of State responsibility. Nevertheless, Sierra Leone welcomed the transparency with which the work that had been completed to date had been reported in chapter VII of the Commission's report (A/77/10). Among other things, consolidating the text and commentaries in a single chapter with helpful footnotes had made it easier for delegations to understand the status of the work done over the previous few years on the topic.

77. As a general matter, partly for reasons of legal certainty and predictability, it remained vital that the guidelines proffered by the Commission stay consistent with the general regime of responsibility of States for internationally wrongful acts as reflected in the now-widely used work of the Commission completed in 2001. The draft guidelines should also remain non-binding and subsidiary to any agreements concluded by the States concerned. Pending its study of the Commission's work to date on the current topic, Sierra Leone reserved its position and looked forward to commenting, at a later stage, on the substance of the Commission's provisionally adopted draft guidelines.

78. In deciding the fate of the topic at its next session, the Commission would have the various options it had debated at its seventy-third session, including appointing a new Special Rapporteur to assist with the successful completion of its work, discontinuing its work on an instrument, and convening a Working Group with the aim of producing a report on the topic that would be annexed to its report. The latter approach, which had been followed for the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)", seemed to be the middle-ground and reasonable approach, which his delegation was persuaded to support. Nonetheless, it was notable that the current members of the Commission were divided on those options. While the views on the Commission could change as its composition changed, his delegation hoped that the Commission would take an institutional approach. It therefore urged the Commission to be transparent and inclusive and to carefully study the implications of its decision on the future of the topic, bearing in mind the practical utility of the final outcome for States.

79. Turning to the topic "General principles of law", he said that members of the Commission and States had expressed divergent views about draft conclusion 7 (Identification of general principles of law formed within the international legal system) of the draft conclusions on general principles of law provisionally adopted by the Commission. Although the Commission had not included a summary of the debate on the draft conclusion in its report (A/77/10), it had noted in the report that Part Two of the Special Rapporteur's third report (A/CN.4/753) "summarized the differing views expressed in relation to the second category of general principles of law reflected in draft conclusion 7, [...], and clarified certain matters regarding the methodology for their identification".

80. Given the coverage of the issue in the Special Rapporteur's report and pending a full report on the debate in the Commission, his delegation was comforted by the Special Rapporteur's reiteration, as presented in the Commission's report, "that there was sufficient practice and doctrine to substantiate a draft conclusion on the second category, while acknowledging that caution was required, especially in view of concerns raised that this category should not be confused with customary international law". Like many members of the Commission and the Special Rapporteur, Sierra Leone supported the existence of a second category of general principles of law formed within the international legal system. His delegation acknowledged that there remained a challenge in formulating a clear and precise methodology for the identification of general principles of that category, and thus noted the balance struck between rigour and flexibility in the identification of said general principles.

81. While his delegation would have appreciated further consideration of some issues raised by some members of the Commission in the plenary debate in relation to the current topic, such as the principle of equity, it understood that the Special Rapporteur intended to complete the first reading on the topic the following year with the submission of the relevant commentaries to all the provisionally adopted guidelines. It hoped that the Commission would consider elaborating further on some

of the draft conclusions which it had provisionally adopted, and would provide detailed comments on the overall substance of the Commission's work on the topic following the first reading of the draft conclusions. Lastly, his delegation repeated its call for a return to in-person meetings and the usual working methods of the Commission with uninterrupted interpretation in future sessions.

82. **Mr. Papac** (Croatia), speaking on the topic "Succession of States in respect of State responsibility", said that Croatia took note of the Commission's decision to instruct the Drafting Committee to prepare draft guidelines on the basis of the draft articles which the Commission had provisionally adopted. In further consideration of the topic, the Commission should pay attention, inter alia, to situations in which part or parts of a predecessor State that would become the successor State could bear responsibility for internationally wrongful acts committed not only towards or against third States, but also towards or against other successor States of the former common State.

83. Referring to the topic "General principles of law", he said that a cautious approach was advisable when discussing issues related to the contentious category of general principles of law formed within the international legal system, bearing in mind that the general approach of international legal scholars was that general principles of law could not be directly formed within the international legal system. His delegation therefore shared the general assessment that controversies over general principles formed within the international legal system were still unresolved and that additional efforts must be made to further examine, elaborate and clarify the remaining issues relating to that particular category. In that regard, there should be a clear distinction between general principles and other sources of international law, especially in relation to customary law.

84. Regarding the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, the current formulations of draft conclusions 6 (Determination of transposition to the international legal system) and 7 (Identification of general principles of law formed within the international legal system) remained unclear and required further consideration. To that end, it was important to clearly determine the elements necessary for the recognition of general principles formed within the international legal system. Additional efforts could also be made to merge and combine draft conclusion 2 (Recognition) and draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world), since they addressed the same issue, albeit using different wording.

85. His delegation also wished to draw attention to the examples of general principles of law derived from national legal systems, mentioned in footnote 1202 of the Commission's report (A/77/10), including the principle of *uti possidetis juris*. Additional clarifications were also needed in relation to the transposition of general principles of law derived from national legal systems to the international legal system, since crucial questions in that regard remained unanswered, which could be taken to mean that there were no differences between general principles of law and customary law. Some answers could be obtained by further exploring the functions of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, where judicial decisions and the teachings of the most highly qualified publicists of the various nations were identified as subsidiary means for the determination of rules of law.

86. With regard to the issue of hierarchy between the three sources of international law, since general principles of law were *lex generalis*, they tended to be applied rarely, in comparison to treaties and customary international law, which were *lex specialis*. It was therefore the view of his delegation that there was no hierarchy between general principles of law; rather, there was a principle of speciality, which should apply when dealing with two rules from the same source.

87. Lastly, the considerable increase in the caseload of the International Court of Justice in recent years and the geographical variety of States appearing before it demonstrated the increasing confidence that States had in the independence, impartiality and integrity of the Court and the high legal standards it held. The independence and impartiality of adjudication mechanisms were therefore crucial general principles of law and a basic prerequisite for their existence and functioning, and must therefore be preserved and complied with in all circumstances and at all costs.

88. **Ms. Russell** (New Zealand), speaking on the topic "General principles of law", said that her delegation noted with appreciation the Special Rapporteur's observation in reference to the transposition of general principles of law derived from national legal systems, as explained in the Commission's report (A/77/10), that recognition of the applicability of such principles in the international legal system was an essential condition. Her 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.

89. A complete version of her delegation's written statement would be made available for publication on the website of the Committee.

90. **Mr. Nyanid** (Cameroon), referring to the topic "Succession of States in respect of State responsibility" and the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission, said that the debate that had taken place within the Commission regarding draft guideline 6 (No effect upon attribution) of the was worthwhile, because it provided that a succession of States had no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession. In the view of his delegation, the draft guideline was absolutely necessary. While in general it set out the basic principle codified in article 1 of the articles on responsibility of States for internationally wrongful acts, the position taken by the Commission on the draft guideline could be more nuanced with respect to a successor State succeeding to a treaty. Indeed, when a State became a party to a treaty through succession, there was an automatic transmission of international responsibility arising from a violation of the treaty committed by the predecessor State before the date of succession. In other words, there was automatic succession to international responsibility solely because the successor State was now a party to a treaty of which one of the provisions had been violated by the predecessor State. In that case, responsibility was transmitted at the same time as the treaty.

91. It was logical for succession to a treaty by a State to also involve succession by said State to the international responsibility arising from the violation of said treaty. That was undeniably the case in situations of automatic succession to a treaty, the idea being to maintain treaty relations in respect of a given territory and to ensure legal certainty in international relations. The need for continuity in legal relations, which was at the very centre of automatic succession, militated in favour of a transfer to a successor State of the consequences of the international responsibility arising from any treaty violation. That was the position reflected in the judgments of the International Court of Justice in the *Gabčíkovo-Nagymaros* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* cases, among others.

92. His delegation welcomed draft guideline 7 (Acts having a continuing character), provisionally adopted by the Drafting Committee, and draft guideline 7 bis (Composite acts), which followed the structure of articles 14 and 15 of the articles on responsibility of States for internationally wrongful acts. It welcomed the focus on the question of when the breach by a composite act occurred in various succession contexts, which reflected the type of situation referred to by the International Court of Justice in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, and in its judgment in *United States Diplomatic and Consular Staff in Tehran*. His delegation would suggest, however, that a distinction be drawn between a "continuing act" and an "instantaneous act with continuing effects", as established by the Italian Government in the *Phosphates in Morocco* case and by the European Commission of Human Rights in the *de Courcy v. United Kingdom* case.

93. To be able to conclude that there had been a violation of an international obligation due to an act of a State, the provision that was supposedly violated would first have to be in force vis-à-vis that State at the time of the conduct in question, consistent with the maxim *nullum crimen sine lege*. Time had an impact on the evolution of rules of international law, as indicated by the maxim *tempus regit actum*. The question of the interaction between the evolution of the law and the violation of an international obligation must be resolved with that fundamental principle in mind.

94. His delegation welcomed the efforts made by the Commission in draft guidelines 10 (Uniting of States) and 10 bis (Incorporation of a State into another State), in which it drew a balance between the "clean slate" doctrine and the "automatic succession" position. His delegation supported the flexible approach of those draft guidelines, which strongly suggested that States should negotiate and also gave them the freedom to choose the terms of any agreement they concluded. His delegation also welcomed the spirit and letter of draft guideline 11 (Dissolution of a State) and paragraph 3 of draft guideline 12 (Cases of succession of States when the predecessor State continues to exist), in which the Commission also suggested negotiation in case of dissolution of a State. By showing such openness to negotiation, the Commission was aligning itself with the positions adopted by the Permanent Court of International Justice in the case concerning *Railway Traffic between Lithuania and Poland*, the International Court of Justice in *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, and the Arbitral Tribunal for the Agreement on German External Debts in the case of *Greece v. the Federal Republic of Germany*.

95. His delegation also commended the Commission for its efforts to seek legal certainty by protecting the rights of the injured State in case of State succession where the predecessor State continued to exist. It therefore supported the phrase "continues to be entitled to invoke", used in paragraph 1 of draft guideline 12, which showed that the position of the predecessor State was not affected by State succession. His delegation also supported the phrase "if the injury to it has not been made good", to take into account the link that existed between the injury and the predecessor State's right to invoke the responsibility.

96. Cameroon would have wanted the Commission to address the question of diplomatic protection in its draft guideline 15 (Diplomatic protection), something that was complex under normal circumstances but even more complex in cases of State succession. Although the Commission noted in its commentary to the draft guideline that the omission of specific rules on diplomatic protection did not mean that the rule relating to the nationality of claims and other rules of diplomatic protection could not apply in situations of the succession of States, it would have been desirable for it to address that question, because State succession which led to a change of nationality of the persons inhabiting a territory or parts of the territory of a predecessor State which became the territory of a successor State made the question of the identification of effective nationality in case of multiple nationalities even more complex.

97. Turning to the topic "General principles of law", he said that those principles must be recognized by States in order to exist. His delegation had reservations about the suggestion to establish a non-exhaustive list of such principles, which would undoubtedly be incomplete and would divert attention from the key aspects of the question. His delegation acknowledged that there were two types of general principles of international law: those derived from national legal systems, and those formed within the international legal system, which were different from the fundamental principles of international law contained in Article 2 of the Charter of the United Nations. The rationalization of the methods used to discover those principles boiled down to determining how the judge deduced those principles and how they were adapted to the requirements and particularities of international law. Those considerations were all the more necessary as international judges very rarely used the expression "general principles of law".

98. Referring to draft conclusion 4 (Identification of general principles of law derived from national legal systems) of the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, he said that it was inappropriate for a hierarchy to be established between legal systems. Beyond the well-known tandem of civil law and common law systems, there were other legal systems that represented a combination of the two or that were completely different. In certain cases, legal systems emerged from environments and cultures that must be taken into consideration, as was the case of Africa, with its rich and secular customary law which was used to resolve conflicts that could not be resolved using the rules and procedures of so-called modern law.

99. His delegation therefore suggested that the Special Rapporteur explore other avenues, and encouraged him to continue his study with a view to determining the existence of a category of general principles of law derived from national legal systems, including traditional systems. Such general principles were particularly important for young States that were still trying to build their legal systems; it would help them in a practical and significant way to avoid situations of *non liquet*.

100. **Ms. Sayej** (Observer for the State of Palestine) said that the topic "General principles of law" was of importance to the State of Palestine. The development and consolidation of treaties and conventions and other sources of international law were based on a common understanding of general principles of law and applied across human societies. General principles of law were expressions of both national legal systems and international rules and principles. They were a core of legal ideas and the essence of all legal systems which represented the common denominator in the community of nations and ensured the evolutionary character of international law. They were not limited to a "gap-filling" function but were intrinsic to the international legal system; they did not supplant customary law but complemented it.

101. Her delegation welcomed the Commission's reaffirmation, in its report (A/77/10), that general principles of law were a source of international law, and agreed with the inclusion of the category of general principles of law formed within the international legal system in the draft conclusions on general principles of law provisionally adopted by the Commission. While general principles were indications of national legal policies and principles, they were augmented by international recognition.

102. Her delegation appreciated the Commission's notation in its commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system) that the methodology it would use to identify such general

principles would be to carry out an inductive analysis of relevant treaties, customary rules and other international instruments such as General Assembly and Security Council resolutions and declarations at international conferences. Her delegation wished to emphasize the universal power of the General Assembly and the enforcement power of the Security Council and their indispensability to the formation and formulation of general principles of law. The draft conclusions on general principles of law presented a good basis for future work on the topic and the State of Palestine looked forward to contributing to them.

103. **Mr. Tladi** (Chair of the International Law Commission), speaking via video link, said that despite the differences in opinion as to what a "good quality" product of the Commission was, it was only through open and honest dialogue and communication that the international community could arrive at a common understanding of what such a product should be. During the current debate on the work of the Commission, he had been encouraged and even inspired by the diversity of views expressed. He was particularly pleased that, for the most part, even in cases of very strong differences and disagreements, views had been expressed in a respectful and collegial manner, which boded well for future interactions between the Committee and the Commission.

104. One major concern that the Commission had always expressed was the lack of written comments and observations from developing States, which in effect had pushed the Commission into reflecting largely the view of one segment of the "international community". In an attempt to address that situation, the Commission always endeavoured, at least on second reading, to also take into account the oral statements delivered during the debates in the Committee, although it was well aware that oral statements could not be a substitute for written comments and observations, which were more carefully considered, reasoned and justified. His personal approach to international law had been to try to lower the privileged position of some and to raise the underprivileged position of others, in the pursuit of a more equal and just world order. On behalf of the Commission, he wished to thank the Codification Division for its valuable contribution to the work of the Commission and that of the Committee.

The meeting rose at 5.45 p.m.